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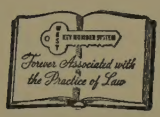


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CALIFORNIA REPORTER

335 PACIFIC REPORTER
SECOND SERIES

51 Cal.2d 586

Mary Frances GONZI, a Minor, etc., Petitioner,

v.

SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Respondent;

Daily News Company, Ltd. (a Corporation), et al., Real Parties in Interest.

S. F. 20016.

Supreme Court of California.
In Bank.
Feb. 17, 1959.

Proceeding on petition for a writ of mandate to compel a Superior Court to grant petitioner's application to have a reporter present during a court-ordered physical examination of petitioner by a doctor employed by real parties in interest who were defendants in a personal injury action commenced by petitioner against them in the Superior Court. The Supreme Court, Carter, J., held that where court ordered an examination of petitioner by doctors of real parties in interest, orderly procedure in the administration of justice required that permission be granted at request of either party, for a reporter's presence at the examination, although petitioner was not entitled to a court order directing the physical examination to be conducted in the presence of a "certified court reporter" inasmuch as orderly procedure in administration of justice required only that such examination be conducted in the presence of a reporter if the report thereof was requested by either party.

Writ issued in accordance with opinion.

1. Damages ⇐206(7)
Mandamus ⇐32

Where court ordered examination of plaintiff in personal injury action by defendant's doctors, orderly procedure in the administration of justice required that permission be granted at request of either party, for a reporter's presence at the examination, although plaintiff was not entitled to a court order directing physical examination to be conducted in the presence of a "certified court reporter" inasmuch as orderly procedure in administration of justice required only that such examination be conducted in the presence of a reporter if the report thereof was requested by either party, and mandamus would be issued directing a superior court to permit plaintiff to have a reporter present when she submitted to physical examination ordered by the court.

2. Damages ⇐206(7)

Statute providing that a party subjected to a physical examination at instance of an opposing party may demand from the party causing the examination to be made a copy of a detailed written report of the examining physician, does not constitute a sufficient substitute for a transcript of the proceedings made by a reporter, and notwithstanding such statute, the party submitting to the examination is entitled to have the examination conducted in the presence of a reporter. West's Ann.Code Civ.Proc. § 2032 and subd. (b).

Delany, Fishgold & Freitas and Matthew M. Fishgold, San Francisco, for petitioner.

No appearance for respondent.

Barfield & Barfield, Charles V. Barfield, Jr., and Herbert Chamberlin, San Francisco, for real parties in interest.

CARTER, Justice.

Mary Frances Gonzi, a minor, through her guardian ad litem, Melchio Gonzi, petitions for a writ of mandate to compel the Superior Court of the City and County of San Francisco to grant petitioner's application to have a reporter present during a court-ordered physical examination by a doctor employed by the real parties in interest, Daily News Company, et cetera, a corporation, and Fred J. Fleckin.

The petition for mandate, after alleging the appointment of the guardian ad litem, alleges that petitioner has a cause of action against the real parties in interest in that

she sustained injuries as a result of the negligent operation and control of a certain vehicle "on a public street in the City and County of San Francisco: That heretofore, to-wit, on or about the 27th day of August, 1957 said guardian ad litem above named caused to be filed in the Superior Court of the State of California, in and for the City and County of San Francisco, a Complaint for Damages against the real parties in interest above named and that said real parties in interest caused an answer to be filed on or about the 27th day of September, 1957; that said answer was filed on behalf of said real parties in interest by the law firm of Barfield and Barfield, 111 Sutter Street, San Francisco, California; that said answer denied most of the material allegations of petitioner's Complaint; that by said complaint and answer, the nature and extent of said minor petitioner's injuries as alleged in her complaint were placed in issue." It is further alleged that the attorneys for the real parties in interest moved the defendant Superior Court for an order requiring petitioner to submit to a physical examination by Dr. Knox Finley; that petitioner in her complaint had alleged that she had suffered the following injuries: "* * * Fractures of the skull, cerebral contusions about the body, head and limbs, severe nervous shock, and other injuries * * *" and that as a result of the negligence of the real parties in interest, petitioner had suffered damages in the sum of $100,000. Petitioner's attorney filed an affidavit in opposition to the motion and requested that if the examining physician intended to "ask questions of said minor, that plaintiff and her attorney be permitted, by the order of said court, to have a Court Reporter present, as well as affiant as one of her attorneys. * * *" The trial court made its written order in which it held: "Upon the motion of plaintiff's attorney, it is further ordered that said physical examination shall be conducted in the presence of plaintiff's attorney.

"The motion of plaintiff's attorney to have said physical examination conducted in the presence of a certified Court Reporter is denied."

Petitioner contends that the portion of the order denying her application to have a court reporter present is prejudicially erroneous and "beyond the Court's jurisdiction"; that she has no other adequate remedy at law "because if the petitioner were to comply with the trial court's order an appeal from the final judgment would be moot on this question."

[1] In Sharff v. Superior Court, 44 Cal. 2d 508, 509, 510, 282 P.2d 896, 897, where the respondent court had made an order directing the plaintiff to submit to an oral and physical examination "'concerning [her] alleged injuries, which said examination shall be performed in the absence of said plaintiff's attorney * * and that further proceedings by plaintiff in the above entitled action be stayed until said plaintiff * * * submits to said examination'" we held that mandamus "will issue, where there is not a plain, speedy and adequate remedy in the ordinary course of law, to compel performance of an act which the law specifically enjoins or to compel the admission of a party to the use and enjoyment of a right to which he is entitled and from which he is unlawfully precluded. Code Civ.Proc. §§ 1085, 1086. The order in the present case is not appealable, and plaintiff does not have any plain, speedy and adequate remedy in the ordinary course of law. The writ is, therefore, available to test whether the court by its order has imposed an unlawful condition upon plaintiff's right to proceed to trial." We held that since the court could order a plaintiff in a personal injury action to undergo a physical examination by the defendant's doctor (Johnston v. Southern Pac. Co., 150 Cal. 535, 89 P. 348) the plaintiff should be permitted "to have the assistance and protection of an attorney during the examination." We said in the Sharff case that "Whenever a doctor selected by the defendant conducts a physi-

cal examination of the plaintiff, there is a possibility that improper questions may be asked, and a lay person should not be expected to evaluate the propriety of every question at his peril." The same reasoning is applicable in the case at bar. If an injured plaintiff is not permitted to have a reporter present at the court-ordered examination by defendant's doctors there is no disinterested person present to report, or later testify to, what occurred during the examination. If the defense-employed doctor is called upon to testify at the trial on the issue of plaintiff's injuries his version of the questions and answers elicited at the examination might differ materially from plaintiff's counsel's version of the same questions and answers. It appears to us that orderly procedure in the administration of justice requires that permission be granted at the request of either party for a reporter's presence in such a situation as is here presented. We are of the opinion, however, that petitioner is not entitled to a court order directing that her physical examination be conducted in the presence of a "certified court reporter" inasmuch as the orderly procedure in the administration of justice requires only that such an examination be conducted in the presence of a reporter if a report thereof is requested by either party.

[2] The real parties in interest argue that this matter is now controlled by statute since the enactment of section 2032 of the Code of Civil Procedure in 1957 (which became effective on January 1, 1958) and which provides in subsection (b) that a party subjected to such an examination may demand from the party causing the examination to be made a copy of a detailed written report of the examining physician. In view of what has been heretofore said we are of the opinion that such a report would not be a sufficient substitute for a transcript of the proceedings made by a reporter.

Let a peremptory writ of mandate issue directing respondent court to permit petitioner to have a reporter present when she submits to a physical examination by the doctor employed by the real parties in interest.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



51 Cal.2d 602

PEOPLE of the State of California, Respondent,

v.

Frank CARSWELL, Appellant.

Cr. 6347.

Supreme Court of California,
In Bank.
Feb. 17, 1959.

Rehearing Denied March 18, 1959.

Prosecution for second-degree burglary. The Superior Court, Alameda County, Marvin Sherwin, J., entered judgment of conviction and defendant appealed. The Supreme Court, Spence, J., held that where police officers were informed by a reliable person that defendant was seen carrying objects which could have been recently stolen guns and went to defendant's house at time they reasonably expected that he would be home and a knock produced no answer and they were let in by painter who had key, entry was justified in order to make an arrest, and where incriminating evidence was in plain sight seizure of same after procuring search warrant based on knowledge acquired in first entry, was proper.

Affirmed.

Opinion, 328 P.2d 842, vacated.

1. Criminal Law ⇐543(2)

Showing of fact that witness in previous trial was absent from State constituted sufficient foundation for introduction

of transcript of his prior testimony, and prosecution was not required to show that it had exercised due diligence to insure his presence at the second trial. West's Ann. Pen.Code, § 686, subd. 3.

2. Criminal Law ⇐543(2)

Under statute permitting introduction of transcript of testimony of witness at a prior trial on the ground that either witness is out of the jurisdiction or cannot with due diligence be found within the State, where evidence is sufficient to show that witness is absent from the State due diligence requirement is inapplicable. West's Ann.Pen.Code, § 686, subd. 3.

3. Criminal Law ⇐1043(3)

Where defendant claimed on appeal from judgment of conviction after second trial that transcript of witness' testimony from first trial should have been excluded since there was no evidence of authenticity of transcript, but at second trial defendant had made only a general objection to this testimony and argument was directed solely to question of whether sufficient foundation had been laid for introduction of transcript, objection about alleged lack of authenticity of transcript came too late. West's Ann.Pen.Code, § 686, subd. 3.

4. Criminal Law ⇐1172(2)

In prosecution for second-degree burglary, instruction respecting necessity of corroboration of an accomplice's testimony, while subject to criticism, because of abundant evidence other than testimony of accomplice connecting defendant with commission of offense, was not prejudicial.

5. Criminal Law ⇐394.5(4)
Searches and Seizures ⇐3(2)

Where stolen articles were seized pursuant to search warrant obtained after police officers had entered defendant's premises without a warrant and saw the articles, since warrant was obtained as a direct result of officers' previous observations in room, it was valid only if their first entry was lawful and burden of establishing its legality was on prosecution.

6. Searches and Seizures ⇐3(2)

Where police officers investigating burglary of guns were told by a reliable informant that defendant had been seen carrying objects which might have been the guns and police officers went to defendant's home at time they reasonably believed defendant would be there, and upon obtaining no answer to their knocks they were let in by a painter who had the key, and upon entry into home officers observed stolen guns which were in plain sight, entry was justified in order to make an arrest and search warrant subsequently obtained as result of police officers' first visit to premises was valid. West's Ann. Pen.Code, §§ 836, subd. 3, 844.

7. Criminal Law ⇐1192

Where at prior trial of defendant it was held that prosecution had not justified entry of police officers upon which subsequent search warrant was based, but on second trial prosecution presented additional evidence directed toward showing that entry was lawful for purpose of making an arrest, holding as to illegality of seizure in first trial did not become law of case, since evidence presented at the two trials was not substantially the same. West's Ann.Pen.Code, § 844; West's Ann. Code Civ.Proc. § 2061, subd. 4.

8. Criminal Law ⇐781(4), 1172(2)

In prosecution for second-degree burglary, instruction to the effect that jury should view with caution testimony of any witness which purports to relate to an oral statement of defendant, while open to objection, was not prejudicial since review of record disclosed there was no reasonable probability that a result more favorable to defendant would have been reached if properly limited instruction had been given in place of the challenged one. West's Ann.Pen.Code, § 844; West's Ann. Code Civ.Proc. § 2061, subd. 4.

9. Criminal Law ⇐1172(1)

Where review of record leads court to conclusion that there is no reasonable probability that a result more favorable to defendant would have been reached if

a properly limited instruction had been given in place of the challenged one, alleged error does not warrant a reversal.

10. Burglary ⇐41(1)

Evidence sustained conviction of second-degree burglary.

James M. Dennis, O. A. Goth and Goth & Dennis, Redwood City, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant appeals from a judgment of conviction of second degree burglary and from an order denying his motion for a new trial. He challenges the admission of certain evidence, the instructions to the jury, and the sufficiency of the evidence to support the verdict.

The judgment appealed from was entered on defendant's second trial. The facts concerning the commission of the offense are fully set forth in the opinion on the first appeal. 149 Cal.App.2d 395, 308 P.2d 852. The evidence introduced on both trials showed that a number of rifles and shotguns had been stolen from an Oakland hardware store. Over defendant's objection on the second trial, the court permitted the prosecution to read into evidence the testimony given on the first trial by one Holmes to the effect that the defendant, together with Holmes and two other men, had planned and perpetrated the burglary. Defendant first contends that the admission of Holmes' prior testimony constituted error.

Penal Code, section 686, subdivision 3, provides that a defendant is entitled "to produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that * * * the testimony on behalf of the people or the defendant of a witness deceased, insane, *out of jurisdiction,* or who can not, with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted." (Emphasis added.)

Before the first trial Holmes had pleaded guilty to the burglary. A deputy probation officer testified that Holmes had been assigned to him for supervision and that his probation had been revoked. In order to facilitate his rehabilitation, the officer had on July 11 obtained a court order restoring Holmes to probation on condition that he return to his home in Philadelphia. He testified that he had asked Holmes to write him upon his arrival there, and that he had received a letter postmarked July 22. Since the trial began on July 24, it may reasonably be inferred from this evidence that Holmes was out of the state at the time of the trial.

[1, 2] Defendant argues that the mere showing of Holmes' absence from the state did not constitute a sufficient foundation for the introduction of his prior testimony, as the prosecution did not show that it had exercised due diligence to insure his presence at the second trial. The statute (Pen.Code, § 686, subd. 3) permits the introduction of such testimony where it is shown either that the witness is "out of jurisdiction" or that he cannot, "with due diligence, be found within the state." See People v. Noone, 132 Cal. App. 89, 94–95, 22 P.2d 284. In the latter situation, due diligence to find the witness is required; the cases on which defendant relies hold nothing more. People v. Kuranoff, 100 Cal.App.2d 673, 677, 224 P.2d 402; People v. McDonald, 66 Cal. App.2d 504, 509, 152 P.2d 448. Where the evidence is sufficient to show that the witness is absent from the state, the due diligence requirement is inapplicable. See People v. Barker, 144 Cal. 705, 706–707, 78 P. 266; People v. Martin, 127 Cal.App. 2d 777, 784, 274 P.2d 509. To hold, as defendant argues, that there must also be a showing of due diligence to keep the witness within the state, would be contrary

to the plain terms of section 686 and would work an unreasonable hardship on the party seeking to introduce such testimony.

[3] Defendant also argues that Holmes' testimony at the first trial should have been excluded because there was no evidence of the authenticity of the transcript. But at the trial he made only a general objection to this testimony, and his argument was there directed solely to the foundational requirement of section 686. The present objection therefore comes too late. See People v. Fowzer, 127 Cal.App.2d 742, 746–747, 274 P.2d 471; People v. Renek, 105 Cal.App.2d 277, 283, 233 P.2d 43; People v. Tolmachoff, 58 Cal. App.2d 815, 826, 138 P.2d 61.

[4] Defendant next challenges the giving of the following instruction concerning the corroboration of an accomplice's testimony: "In determining whether or not the testimony of an accomplice has been corroborated as required by law, you must, for the purpose only of your consideration of that question, assume to be removed from the case *such testimony, if any, of the accomplice which tends to connect the defendant with the commission of the offense charged and shown by the evidence to have been committed by someone;* and you then must examine all the other evidence with the view of determining if there be any evidence tending to connect the defendant with the commission of the offense. If such other evidence does do that, then the testimony of the accomplice is corroborated; if it does not, then there is no corroboration, although the accomplice may be corroborated in regard to any number of facts sworn to by him." (Emphasis added.)

While a similar instruction was criticized on defendant's previous appeal, the court found it unnecessary to determine whether there was prejudicial error. People v. Carswell, supra, 149 Cal.App.2d 395, 403–404, 308 P.2d 852. In view of the abundant evidence other than the testimony of the accomplice connecting defendant with the commission of the offense, we are convinced that no prejudicial error was committed.

[5] Defendant contends that the trial court should have excluded the testimony relating to the seizure of nine of the stolen guns found in his room. At both trials it appeared that police officers, acting without a search warrant, entered defendant's room after the burglary and saw the guns. On the basis of their observations, they obtained a search warrant pursuant to which the guns were later seized. Because the warrant was obtained as a direct result of the officers' previous observations in defendant's room, it was valid only if their first entry was lawful. The burden of establishing its legality was on the prosecution. People v. Roberts, 47 Cal.2d 374, 377, 303 P.2d 721; see People v. Carswell, supra, 149 Cal.App.2d 395, 397, 308 P.2d 852. We are satisfied that this burden was amply sustained.

[6] Police officers testified that they went to the hardware store after the burglary, and that they talked to a Mrs. Ornduff, a resident of an hotel next door. Mrs. Ornduff, a reliable informant, told the officers that she had seen defendant and two other men carrying long packages wrapped in sheets out of the hotel on Sunday evening. Defendant's home address was ascertained, and on Monday evening five officers went to his home to arrest him. They were admitted by a painter, who showed them to defendant's room. They knocked and announced that they were police officers but received no reply. On request, the painter then produced a key and admitted them. Defendant was absent. On the bed lay a gun, the serial number of which corresponded with that of one reported missing from the hardware store. Eight more guns were seen in the closet when the officers looked for defendant there.

It is clear that grounds existed for defendant's arrest. A felony had in fact been committed, and Mrs. Ornduff's information gave reasonable cause to believe

that defendant had committed it. Pen. Code, § 836, subd. 3. The entry was justified by section 844 of the Penal Code, which provides that to make an arrest a peace officer, after demanding admittance and explaining the purpose for which admittance is desired, may break open the door of a house in which he has reasonable grounds to believe the person to be arrested to be. The officers testified that they called at defendant's home about six o'clock in the evening, when they thought he was likely to be home from work. That evidence is sufficient to support a finding that they had reasonable grounds to believe him to be present. Its weight is not diminished because the officers received no response to their knocking. They testified that persons seeking to avoid arrest commonly fail to reply.

Since the first entry into defendant's room was lawful, there was no reason for excluding the incriminating evidence. The officers testified that they entered solely to arrest defendant and that they did not search for evidence. They were not required to blind themselves to what was in plain sight, and their lawfully obtained knowledge could be used as the basis for procuring a search warrant. People v. Roberts, supra, 47 Cal.2d 374, 303 P.2d 721; see People v. Martin, 45 Cal.2d 755, 761–763, 290 P.2d 855.

[7] Defendant contends, however, that the law of the case establishes the illegality of the seizure. While it was held on defendant's prior appeal that the prosecution had not justified the entry at the first trial (People v. Carswell, supra, 149 Cal.App.2d 395, 397–402, 308 P.2d 852), the doctrine of law of the case would apply only if the evidence introduced at the second trial had been substantially the same. 4 Cal.Jur.2d, Appeal and Error, § 703, p. 608; see Erlin v. National Union Fire Ins. Co., 7 Cal.2d 547, 548–549, 61 P.2d 756; Weightman v. Hadley, 138 Cal. App.2d 831, 835–836, 841, 292 P.2d 909; Rutledge v. Rutledge, 134 Cal.App.2d 689, 694, 286 P.2d 429. On the first trial, the prosecution attempted to justify the entry by showing that the painter voluntarily admitted the officers to defendant's room. On the second trial, the prosecution presented additional evidence directed toward showing the entry lawful for the purpose of making an arrest. Pen.Code, § 844. The law of the case therefore does not require us to hold that the seizure of the guns was unlawful. Davis v. Edmonds, 218 Cal. 355, 23 P.2d 289, cited by defendant, is inapplicable because the same evidence was there offered at both trials.

[8, 9] Defendant next complains that the jury was not instructed to view "the evidence of the oral admissions of [defendant] with caution." Code Civ.Proc. § 2061, subd. 4. The record does not show that defendant requested such an instruction, but the court nevertheless should have given it. People v. Deloney, 41 Cal. 2d 832, 840, 264 P.2d 532; People v. Bemis, 33 Cal.2d 395, 398, 202 P.2d 82; People v. Cornett, 33 Cal.2d 33, 39–40, 198 P.2d 877. Instead the court instructed the jury to "view with caution the testimony of any witness which purports to relate an oral *statement* of the defendant." (Emphasis added.) Defendant has not cited nor has independent research disclosed any case holding it error to give such an instruction; however, the refusal to instruct in somewhat similar terms has been upheld. People v. Leddy, 95 Cal.App. 659, 679, 273 P. 110.

In this case, police officers testified to statements made by defendant to them after his arrest. Defendant testified to a different version of the conversation. He argues that the instruction here given required his own testimony to be viewed with caution, as well as that of the prosecution witnesses. While the instruction is open to objection, a review of the record leads us to the conclusion that there is no reasonable probability that a result more favorable to defendant would have been reached if a properly limited instruction had been given in the place of the challenged instruction. The alleged error does not therefore warrant a reversal. People

v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243.

[10] In view of our conclusion that the testimony of Holmes was properly admitted, and that such testimony was amply corroborated, we find no merit in defendant's final contention that the evidence was insufficient to support the judgment of conviction.

The judgment and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and McCOMB, JJ.



51 Cal.2d 569

The PEOPLE of the State of California, Respondent,

v.

Joseph CASTALDIA, Appellant.

Cr. 6351.

Supreme Court of California, In Bank.

Feb. 10, 1959.

Prosecution for unlawfully accepting a bet on a horse race. The Superior Court, Los Angeles County, Joseph M. Maltby, J., after jury's verdict entered judgment of conviction and denied defendant's motion for new trial, and defendant appealed. The Supreme Court, McComb, J., held that where case was a close one, misconduct of jurors in giving false answers to questions put to them on voir dire examination as to whether they would be prejudiced by the nature of a bookmaking case or by the fact that some events had taken place in a bar, resulted in a miscarriage of justice.

Judgment and order denying motion for new trial reversed.

Opinion, 328 P.2d 1016, vacated.

1. Criminal Law ⇐956(8)

Affidavits of jurors may be used to set aside a verdict where the bias or disqualification of a juror was concealed by false answers on voir dire examination.

2. Criminal Law ⇐956(8)

In prosecution for unlawfully accepting a bet on a horse race, wherein two jurors, on voir dire examination, stated there was nothing in the nature of a bookmaking case to cause them to hesitate to sit as jurors and that if some of the evidence took place in a bar it would not prejudice them, affidavit of a third juror disclosing that a juror stated during deliberation that there was not enough evidence to convict defendant but that she could not turn him loose and that another juror stated that he had lost his house to a bookmaker, was admissible on motion for new trial. West's Ann.Pen. Code, § 337a, subd. 6.

3. Criminal Law ⇐956(13)

Where two jurors, on voir dire examination, stated that there was nothing in the nature of a bookmaking case to cause them to hesitate to sit as jurors, and that if some of the evidence took place in a bar it would not prejudice them in any manner, and affidavit of a third juror disclosed that such answers were false, misconduct of jurors entitled defendant to new trial. West's Ann.Pen.Code, §§ 337a, subd. 6, 1181.

4. Criminal Law ⇐1186(4)

Where prosecution for unlawfully accepting a bet on a horse race was close, misconduct of jurors in giving false answers to questions put to them on voir dire examination, as to whether they would be prejudiced by the nature of bookmaking case or by fact that some events had taken place in a bar, resulted in miscarriage of justice within Constitution providing that no judgment shall be set aside unless error complained of resulted in miscarriage of justice. West's Ann.Pen.Code, §§ 337a, subd. 6, 1181; West's Ann.Const. art. 6, § 4½.

David A. Fall and Kenneth W. Gale, San Pedro, for appellant.

Edmund G. Brown, Atty. Gen., and Carl Boronkay, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant appeals, after a jury trial, from (1) a judgment finding him guilty of accepting a bet on a horse race, contrary to the provisions of section 337a, subdivision 6, of the Penal Code, and (2) an order denying his motion for a new trial.

Facts: During the voir dire examination of the jury, juror Angela R. Kennedy, in response to questions of defendant's counsel, stated that there was nothing in nature of a bookmaking case to cause her to hesitate to sit as a juror; that if some of the evidence took place in a bar it would not prejudice her in any manner; that she would not suffer herself to be biased against defendant; that she would consider the case solely on the evidence; and that she felt she could keep a free and open mind until all the evidence was in.

During the voir dire examination of juror James Russell, he stated that the fact that the case might involve gambling or that some of the events might have taken place in a barroom would not prejudice him and that he would answer the questions asked Mrs. Kennedy the same way she had.

A verdict finding defendant guilty was returned on May 22, 1957. He made a motion for a new trial, and in support of his motion for a new trial filed three affidavits.

One was by his counsel, reciting that on July 8, 1957, Angela R. Kennedy, one of the jurors who heard the case and returned the verdict, had related the following facts to him: During her service as a juror on the case, she commuted from her home to court and returned by bus. In returning to her home from court she transferred at Sixth Street and Harbor Boulevard in San Pedro. After transferring at that point at the close of the first day of the trial and while waiting for the bus to depart, she had a conversation with the bus driver, named Joe, with whom she had been acquainted for more than ten years. During the conversation she told him she was a juror in a bookmaking case, the defendant was Joseph Castaldia, the case arose out of bets allegedly made in January 1957 at the Bamboo Hut and Bank Cafe in San Pedro, and she was going to stop at those establishments some time and find out what kind they were. The driver told her there were a great many bookmakers at almost any establishment in the area and that during January 1957 the police had arrested a number of bookmakers there. She told affiant she did not remember the exact number of bookmakers the driver told her had been arrested, but she believed it was either 14 or 17.

A second affidavit, by Joseph Gualeni, was offered, wherein he stated the following facts: He was a bus driver and had been acquainted with Angela R. Kennedy for 15 years. During May 1957 he had a conversation with her in his bus while it was waiting to commence a scheduled run. She asked him if he knew the exact location of the Bamboo Hut. He told her he was uncertain of its exact location, but he believed it was on Sixth Street in San Pedro just west of the Bank Cafe. She told him that the "bookie" involved in the case in which she was sitting as a juror was some one from San Pedro who was picked up in that area, that the case involved the Bamboo Hut, and that she was going to take a look at it some time. Near the end of the conversation, Mrs. Kennedy stated "that she had no respect for bookmakers and that she wished they would throw the book at all of them and put all of them away * * * that the defendant in the case, on which she was then presently sitting, as a juror, didn't have a chance that the jury on which she was then sitting was going to throw the book at him on the following morning." On occasions and dates prior to the above conversation, when the subject of gambling was mentioned on the bus, she stated in his presence that she disliked gambling and persons who gambled.

In the third affidavit, the affiant, Charles W. Eddy, one of the jurors in the case, stated the following facts: After the case was argued and given to the jury and during the discussions and balloting, juror Angela R. Kennedy had stated that there was not enough evidence to convict the defendant but she just could not turn him loose; that she was thoroughly familiar with the area in which the Bank Cafe was situated; that at every shoeshine stand, cigar stand or newsstand, one could buy a scratch sheet and place a bet anywhere. After about the third ballot, James Russell, foreman of the jury, stated that he could explain bookmaking to the other jurors. Mr. Russell stated that he knew a great deal about bookmaking for he had in fact lost his house to a bookmaker, and he thereafter spent approximately fifteen minutes explaining to the other jurors the use of a scratch sheet, the manner of making bets, and various means of gambling.

There was no contradiction of the foregoing facts.

Affidavits by defendant and his counsel disclosed that neither of them knew the facts stated in the other affidavits until after the rendition of the verdict.

[1,2] *Questions*: First. *Was the affidavit of juror Charles W. Eddy properly received in evidence to show that jurors Kennedy and Russell had given false answers to questions on their voir dire examination?*

Yes. It is the general rule in California that affidavits of jurors may not be used to impeach a verdict. (Kollert v. Cundiff, 50 Cal.2d 768, 772 [3], 329 P.2d 897.) However, an exception to this general rule is: Affidavits of jurors may be used to set aside a verdict where the bias or disqualification of a juror was concealed by false answers on voir dire examination. (Kollert v. Cundiff, supra, 50 Cal.2d at page 773 [4a], 329 P.2d at page 900; Williams v. Bridges, 140 Cal.App. 537, 540 [3], 35 P.2d 407; cf. People v. Galloway, 202 Cal. 81, 92[3] et seq., 259 P. 332.)

The facts in the present case bring the affidavit within the exception to the general rule, since jurors Kennedy and Russell gave false answers to the questions asked them on their voir dire examination. The affidavit was therefore admissible on the motion for a new trial.

[3] Second. *Were jurors Kennedy and Russell guilty of misconduct which entitled defendant to a new trial?*

Yes. Section 1181 of the Penal Code provides, in part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:

* * * * * *

"2. When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property;

"3. When the jury has * * * been guilty of any misconduct by which a fair and due consideration of the case has been prevented;

"4. When the verdict has been decided * * * by any means other than a fair expression of opinion on the part of all the jurors."

The conduct of the two jurors in giving false answers to questions asked them during their selection for jury service constituted misconduct on their part sufficient to warrant the granting of a motion for a new trial. (Gackstetter v. Market Street Ry. Co., 10 Cal.App.2d 713, 723, 52 P.2d 998; People v. Galloway, supra, 202 Cal. at page 93, 259 P. at page 336; cf. Sherwin v. Southern Pacific Co., 168 Cal. 722, 726, 145 P. 92.)

[4] Third. *Did the misconduct of the jurors result in a miscarriage of justice?*

Yes. An examination of the record discloses that the case was a close one. Officer Trotsky was the only witness who testified for the People. He gave evidence of overhearing a conversation between defendant and an unidentified person while he was standing some twelve feet from the speakers. He had consumed at least five beers

that afternoon and said defendant was wearing a hat. He did not arrest defendant until some time later, and he made no effort at any time to ascertain the identity of the unknown person. On the other hand, defendant denied having had the conversation related by Officer Trotsky and also denied wearing a hat at the time of the alleged conversation.

On consideration of the entire record, we cannot say that in the absence of the misconduct complained of a different verdict would have been improbable. Therefore, the misconduct constitutes a miscarriage of justice within the meaning of article VI, section 4½, of the California Constitution. (People v. Newson, 37 Cal.2d 34, 45 [6], 230 P.2d 618.)

The judgment and order denying the motion for a new trial are reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



51 Cal.2d 574

S. H. RIDDLE et al., Respondents,

v.

Richard D. LEUSCHNER et al., Appellants.

Sac. 6745.

Supreme Court of California.

Feb. 11, 1959.

Rehearing Denied March 11, 1959.

Action by creditor of one corporation against that corporation, a second corporation and shareholders, officers and directors of both corporations for amount due. The Superior Court, Stanislaus County, David F. Bush, J., rendered judgment for creditor and defendants appealed. The Supreme Court, Gibson, C. J., held that where one corporation's assets were intermingled with those of a second to suit convenience of parties who controlled both corporations and to assist them in evading payment of their obligations, and manipulations of affairs of corporations were designed to foster controlling parties' own purposes to disadvantage of first corporation and its creditors, separate entity of first corporation would be disregarded with respect to creditor of first corporation, but that man, who was managing employee of both corporations but who did not hold a single share of stock of either corporation, could not be held liable.

Judgment reversed as to managing employee and affirmed as to other defendants.

Schauer and Shenk, JJ., dissented.

Opinion, 322 P.2d 538, vacated.

1. Corporations ⇐1.6(3)

Where man was president of one corporation and assistant treasurer of other and was active in management of business of both corporations, but he held none of stock of either, had no right to share in any profits and received a monthly salary, man was "managing employee" of corporations, corporations could not be regarded as alter ego of man and he was not liable to creditor of one corporation.

See publication Words and Phrases, for other judicial constructions and definitions of "Managing Employee".

2. Corporations ⇐1.7(2)

In action by creditor of one corporation against that corporation, a second corporation and shareholders, officers and directors of both corporations for amount due, evidence established that woman who was stockholder of debtor corporation and man who was stockholder of both corporations operated corporations as their alter egos and that as to them there was such unity of interest and ownership that separate personalities of corporations and individuals no longer existed.

3. Corporations ⇐1.6(3)

Fact that woman had one share of corporation's stock was sufficient to permit holding her personally liable to creditors of that corporation where alter ego doctrine was otherwise applicable.

4. Corporations ⇐1.6(3)

Where woman with another controlled and dominated one corporation and such corporation transferred most of its assets to another corporation, lack of ownership of stock in second corporation by woman did not prevent her from being responsible for debts of corporation in which she held stock.

5. Corporations ⇐1.7(2)

In action by creditor of one corporation against that corporation, a second corporation and shareholders, officers and directors of both corporations for amount due, evidence sustained findings that two corporations were controlled, dominated, managed, and operated by two members of family, and that there was no separateness between them and corporations.

6. Corporations ⇐1.6(3)

Fact that two relatives controlled and dominated two corporations did not preclude holding each of relatives personally liable for obligations of the businesses.

7. Corporations ⇐1.6(3)

Two or more shareholders of a corporation may be liable to creditors as principals or partners under the alter ego principle.

8. Corporations ⇐1.6(3)

Where one corporation's assets were intermingled with those of a second to suit convenience of parties who controlled both corporations and to assist them in evading payment of their obligations, and manipulations of affairs of corporations were designed to foster controlling parties' own purposes to disadvantage of first corporation and its creditors, separate entity of first corporation would be disregarded with respect to creditor of first corporation.

9. Parties ⇐96(4)

Where defendants did not object to joinder of creditors as parties plaintiff, and their counsel stated to trial court that any creditors had a right to come in, defendants waived any objection to joinder of creditors as parties plaintiff by court order.

Robert D. Carter, Modesto, for appellants.

Mellis & Stockton and Cleveland J. Stockton, Modesto, for respondents.

GIBSON, Chief Justice.

S. H. Riddle commenced this action for declaratory and other relief against Yosemite Creek Company, Kadota Creek Company, and most of the shareholders, officers and directors of the two companies, both of which were California corporations. He was a creditor of Yosemite and sought to hold the other defendants for the amount due from Yosemite, alleging that each of the corporations was the alter ego of the individual defendants. Subsequently the trial court permitted the joinder as plaintiffs of a number of other creditors of Yosemite who sought similar relief.

During the course of the suit the action was dismissed as to all individual defendants except Richard D. Leuschner, Sr., Elizabeth F. Leuschner, his wife, and Richard D. Leuschner, Jr., his son. Judgment was rendered against the two corporations and the Leuschners jointly and severally, and they appealed. The appeal was dismissed as to the two corporations, and the matter is now before us with respect only to the Leuschners.[1]

The corporations were organized by the Leuschner family in 1949. Mrs. Leuschner was issued 510 shares of Yosemite's stock, and in 1951 she transferred half of them to Leuschner, Jr., her stepson, and the other half to Elizabeth Leuschner Baker, her stepdaughter. Mrs. Leuschner acquired another share, and during the period when plaintiffs' claims arose in 1952 and 1953 the stock ownership of that corporation was as

1. The appeal was dismissed by the District Court of Appeal as to the corporations apparently on the ground that their corporate powers had been suspended pursuant to section 23301 of the Revenue and Taxation Code. The corporations did not petition this court for a hearing.

follows: Mrs. Leuschner, one share; Leuschner, Jr., 268 shares; Elizabeth Baker, 257 shares; and various employees, eight shares. Leuschner, Jr., and Mrs. Baker each owned one-third of the shares of Kadota, and the other third was owned by Jeannette and Homer Andre, the daughter and son-in-law of Mrs. Leuschner. Leuschner, Sr., held no shares in either corporation.

In 1952 and 1953 Leuschner, Sr., was the president of Yosemite and the assistant treasurer of Kadota, and he was active in the management of the business of both corporations. Leuschner, Jr., was the vice-president and treasurer of Yosemite and the president of Kadota. Salaries of $600 a month and $75 a week were paid to Leuschner, Sr., and his son, respectively, first by Yosemite and later by Kadota. Mrs. Leuschner was secretary of Yosemite, and the three of them were also directors of both corporations. The other officers and directors of the corporations were Elizabeth Baker and her husband, who, like Jeannette and Homer Andre, were not made defendants in this action. It thus appears that during the period important for this case the directors of the corporations were identical and that all of the stock of Kadota and practically all the shares of Yosemite were held by persons who were related by blood or marriage.

In the years from 1949 to 1953 each of the corporations held one shareholders' meeting. Neither of them held any regular meetings of their directors, but Yosemite's directors had four special meetings, and Kadota's had two. The two corporations occupied the same offices, used the same furniture and files, and retained the same bookkeeper and attorneys during considerable portions of the time between 1949 and 1954.

The three Leuschners entered into a large number of personal transactions with the corporations. On one occasion in 1949, while Mrs. Leuschner was secretary and a director of Yosemite, she borrowed about $12,000 from the corporation. At various times the Leuschners loaned their personal funds to the corporations. At least nine notes calling for 8% interest and totaling $11,700 were given to Leuschner, Jr., by Yosemite, and 12 notes at the same interest totaling $33,575 were given to him by Kadota. Mrs. Leuschner made a number of loans to Yosemite, and she took at least six notes totaling $10,000 at 8% from Kadota. Leuschner, Sr., also made similar loans. There was no specific, formal approval by directors or stockholders of these loans.

On a number of occasions Leuschner, Jr., and Mrs. Leuschner purchased equipment in their own names and rented it to the corporations. When a seller was about to repossess from Kadota a year-old machine sold to Kadota for $1,800, Leuschner, Jr., paid the balance due of about $200, obtained title and thereafter leased the machine to Kadota. Similarly he purchased from a third party a fork lift truck, which he rented to Yosemite for $300 a month, and he purchased another machine, which was being used by Yosemite, and leased it to the corporation at a monthly rental of $200. Mrs. Leuschner purchased machinery from both corporations and leased some of it to Kadota. She also participated with Leuschner, Jr., in acquiring title to certain equipment by a complicated transaction whereby they furnished money to enable Yosemite to pay off a chattel mortgage on a machine which was then traded to a third party for the equipment to which she and her stepson obtained title. The result of the transaction, apparently, was that Yosemite lost title to the mortgaged machine and got nothing in return.

In many cases the documents which evidence the transactions were executed by a member of the family both in his individual capacity and as one of the officers of the corporation who signed on its behalf. For example, between May 1953 and June 1954, Leuschner, Jr., as president of Kadota, with his father as assistant secretary, executed several bills of sale of various items of machinery and equipment to himself as an individual. The minutes do not show any prior authorization or approval of any of

the personal transactions by the directors or stockholders of either corporation, although there was a general resolution adopted by the stockholders of Yosemite approving all the acts of the officers and directors during the years 1950, 1951 and 1952, and there were two similar resolutions by the directors ratifying the acts of Yosemite during the years 1949, 1950 and 1951. There does not appear to have been any similar resolution by the directors of Kadota, but there is a resolution by its stockholders approving all acts of the corporation from the date of incorporation to January 1953.

Yosemite was in the business of processing fruits and vegetables. The enterprise was commenced in 1949 and was fairly extensive, each year grossing over $2,000,000 and paying almost $900,000 to growers for their produce. Kadota leased and operated farms in 1949 and 1950, but it ceased operations in the latter year and remained dormant until early in 1953. At that time Yosemite was involved in litigation with the Reconstruction Finance Corporation and the Smith Processing Company, neither of which are plaintiffs herein, and its operations were severely hampered by attachments of its bank accounts and by seizures of some of its assets. According to Leuschner, Sr., Yosemite had outstanding contracts committing it to purchase close to a million dollars of produce from growers and to sell processed foods to various companies, but because of the attachments and seizures it was unable to operate.

On January 2, 1953, Yosemite transferred some machinery to Kadota and assigned to it a contract with a food company for the packing of spinach, and Kadota agreed to perform the contract. The remainder of Yosemite's equipment and machinery was assigned to Kadota on April 10, 1953. There was testimony by Leuschner, Sr., and his son that there was a written agreement by which Kadota undertook to perform Yosemite's contracts, but no copy of the asserted agreement could be found. According to Leuschner, Sr., Kadota supplied labor and materials, processed the produce, sold it, collected for the sales, and transferred "the difference in funds on account" to Yosemite, which paid the money to its growers and field men. A large number of checks payable to Yosemite were endorsed in favor of Kadota and deposited to the latter's account without passing through Yosemite's bank account. Yosemite continued to contract with growers for the purchase of produce during 1953. It did not pay the growers in full, and, because of this failure, its processing license from the Department of Agriculture was revoked in January of 1954. Apparently Kadota ceased operations sometime in 1954.

Yosemite's financial statement showed that the corporation had an excess of "current liabilities" over assets of $45,461.14 as of June 30, 1952, and of $156,114.78 on June 30, 1953. Kadota's "current liabilities" exceeded its assets by $17,116.34 on April 30, 1953, and by $62,890.42 on June 30, of that year.

The court found and concluded that Yosemite was indebted to plaintiffs under contracts entered into in 1952 and 1953, that Yosemite and Kadota were at all times completely controlled, dominated, managed and operated by the three Leuschners, that the corporations were such in name only and were mere fictions employed by the Leuschners, that the assets of Yosemite were intermingled with the assets of Kadota to suit the convenience of the Leuschners and to assist them in evading payment of their obligations, that after such intermingling the two corporations were not separate entities but were a single entity operating as Kadota, that there was no individuality or separateness insofar as the corporations and the Leuschners are concerned, and that each of the corporations was the alter ego of the Leuschners.

In Automotriz Del Golfo De California S. A. De C V. v. Resnick, 47 Cal.2d 792, 796, 306 P.2d 1, 3, we stated that the two requirements for disregard of corporate entity are "(1) that there be such unity of

interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow."

[1] The evidence is not sufficient to bring Leuschner, Sr., within the first of these requirements. It is undisputed that he held none of the stock, and there is no evidence that he had any interest as an owner in the business operated by either of the two corporations or that he had a right to share in any profits they might make. Instead, he received a monthly salary. Under all the circumstances, he is to be regarded as having been a managing employee of the two companies, and his control over their affairs must be treated as that which would be exercised by a managing agent rather than that of a shareholder or owner. It follows that there was not such unity of "interest and ownership" between Leuschner, Sr., and the corporations that the separate personalities of the corporations and the individual no longer existed, within the meaning of the rule set forth above. Cf. Shea v. Leonis, 14 Cal.2d 666, 670, 92 P.2d 332 (demurrer sustained as to count failing to allege defendant had any beneficial interest in stock).

[2] The situation is different with respect to Leuschner, Jr., and Mrs. Leuschner, who were stockholders, and the evidence is sufficient to show that, with the help of Leuschner, Sr., they operated the corporations as their alter egos and that as to these two persons there was such unity of interest and ownership that the separate personalities of the corporations and the individuals no longer existed. As we have seen, Leuschner, Jr., owned over half of the outstanding shares of Yosemite and a third of the shares of Kadota during 1952 and 1953, and Mrs. Leuschner then had one share of Yosemite stock. All the remaining stock of the two corporations was owned by persons who were related to the Leuschners by blood or marriage, with the exception of eight shares of Yosemite stock owned by various employees.

[3, 4] The fact that Mrs. Leuschner had one share of Yosemite stock is sufficient to permit holding her personally liable to creditors of that corporation provided that the alter ego doctrine is otherwise applicable. Stark v. Coker, 20 Cal.2d 839, 846–849, 129 P.2d 390 one share held by wife, 139 shares held by her husband, and 11 held by a person who did not participate in the corporation's business. The lack of ownership of Kadota's stock by Mrs. Leuschner will not, of course, prevent her from being responsible for the debts of Yosemite.

[5] The findings that the two corporations were controlled, dominated, managed, and operated by the Leuschners and that there was no separateness between them and the corporations are supported by the evidence set forth above insofar as concerns Leuschner, Jr., and the relationship between Mrs. Leuschner and Yosemite. We need not repeat that evidence in detail but may state generally that it supports inferences that these two defendants, with the aid of Leuschner, Sr., transferred most of the assets of Yosemite to Kadota, that they failed to follow normal corporate procedures with respect to holding meetings and keeping records, and that, although they were officers and directors, they entered into personal transactions with the corporations, to the disadvantage of the corporations, without prior approval of the other directors and stockholders.

[6, 7] The fact that both Leuschner, Jr., and Mrs. Leuschner controlled and dominated the corporations does not preclude holding each of them personally liable for the obligations of the business, since it is settled that two or more shareholders of a corporation may be liable as principals or partners under the alter ego principle. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 520–523, 203 P.2d 522; Hiehle v. Torrance Millworks, Inc., 126 Cal.App.2d 624,

628–630, 272 P.2d 780; see Continental Securities & Investment Co. v. Rawson, 208 Cal. 228, 238–239, 280 P. 954; Hotaling v. Hotaling, 193 Cal. 368, 381, 224 P. 455, 56 A.L.R. 734.

[8] The evidence and findings are likewise sufficient to justify the conclusion that an inequitable result will follow if the acts complained of are treated as those of the corporations alone. The trial court found, as we have seen, that Yosemite's assets were intermingled with those of Kadota to suit the convenience of the Leuschners and to assist them in evading payment of their obligations and that after the intermingling the two corporations were a single entity operating as Kadota. It may reasonably be inferred that the Leuschners, without regard to the interests of Yosemite or its creditors, and at a time when Yosemite was insolvent, transferred its assets to Kadota so that they could remain in the food processing business, and that their manipulations of the affairs of the corporations were designed to foster their own purposes and operated to the disadvantage of Yosemite and its creditors. Such conduct is inequitable within the rule of the cases which permit the disregard of the separate entity of a corporation. Cf. Stark v. Coker, 20 Cal.2d 839, 846 et seq., 129 P.2d 390; Minifie v. Rowley, 187 Cal. 481, 488, 202 P. 673.

[9] It is claimed that this action was brought as a class suit and that the requirements of such a suit have not been met. However, there is no occasion for us to determine this question because the record shows that all creditors who were awarded damages by the judgment were joined as parties plaintiff by court order. It does not appear that the Leuschners objected to the joinder, and, in fact, their counsel stated to the trial court that any creditors had a right to come in. Accordingly, any objection to the procedure was waived.

The judgment is reversed as to Richard D. Leuschner, Sr., and is affirmed as to Richard D. Leuschner, Jr., and Mrs. Leuschner.

TRAYNOR, SPENCE and McCOMB, JJ., concur.

CARTER, J., did not participate herein.

Opinion by SCHAUER, Justice (dissenting).

It appears to me that the evidence in the present case falls short of establishing the requirement that fraud, injustice, or an inequitable result will follow unless the corporate entity is disregarded. (See Automotriz Del Golfo De California S. A. De C. V. v. Resnick (1957), 47 Cal.2d 792, 796[5], 306 P.2d 1, and cases there cited; Minifie v. Rowley (1921), 187 Cal. 481, 487 [5], 202 P. 673.)

Certainly the evidence referred to in the majority opinion relates a number of facts which must be regarded as established. Principally the evidence establishes that two corporations were organized by members of the Leuschner family, that the stockholders of those corporations did control them, that there was a downward turn in the market for canned goods and that one or both of the corporations lost money, and that the Leuschners or some of them advanced more money to those corporations as loans in an effort to keep them solvent, both for the benefit of the creditors and themselves; these loans were in addition to that which had been paid in for the stock. Wherein does such evidence even tend to prove "fraud, injustice or an inequitable result"?

Surely we may also recognize that undoubtedly the corporations were organized so that they would constitute a shield between the individual stockholders and the creditors, i. e., so that liability of the stockholders to be incurred in the dealings of the corporations would be limited to the amount of their presumptively original investment in the corporations. Is such

purpose not always a material, if not controlling, factor in leading the incorporators to select the corporate form of enterprise?

Manifestly from the above recounted facts no reason whatsoever is shown for the drastic remedy of disregarding the corporate entity. As appears from the various provisions of law relating to corporations and as is even mentioned in other parts of the law, such as section 923 of the Labor Code,[1] it has been the policy of government to foster and encourage the corporate form of enterprise for the express purpose of limiting the liability of the stockholders to the funds invested in the enterprise. This objective of encouraging thrifty persons to become entrepreneurs by limiting their possible losses to the amounts originally invested is the most important element of the corporate concept. It is because of the safety factor that investors become willing to pool their capital for larger enterprises. Even in partnerships express provision is made for the classification of partners as general and special and thereby limiting liability beyond the investment to general partners only. (See Corp. Code, § 15507, et seq.)

It is also a thoroughly established principle of law that the perpetration of fraud, or similar acts leading to injustice and inequity, is not to be lightly presumed and, indeed, that any of such acts must be established by clear and convincing proof. Fraud is closely akin to a charge of criminal conduct and the character of the proof to establish fraud should at least approximate that which is essential to prove guilt of crime. (Hedden v. Waldeck (1937), 9 Cal.2d 631, 636–637[1–3], 72 P.2d 114.) I appreciate, of course, that it is in the trial court that the question is initially determined as to whether the evidence constitutes clear and convincing proof of the fact to be established, but that does not mean that the reviewing court shall not scrutinize the record to determine whether the facts which the evidence is sufficient to establish are of themselves of such a character as can, as a matter of law, constitute clear and convincing proof of fraud.

In the light of the foregoing, all of which is merely fundamental to the concept of corporate operation, and the basis for the extraordinary remedy of striking down the corporate entity, it seems to me that the evidence recounted in the opinion of the Chief Justice, as was said at the beginning, "falls short of establishing the requirement that fraud, injustice, or an inequitable result will follow unless the corporate entity is disregarded." Rather, I believe, the advancement as loans to the companies by members of the Leuschner family of various sums of money aggregating probably $100,000, and on any view of the evidence a substantial sum, with the result that the plaintiff creditors received on an average about 80 per cent of the contract price for produce they delivered, shows a concerted effort by members of the family to save the solvency of the companies for the benefit of the creditors and themselves. They had a perfect right, of course, to seek to protect themselves when going beyond the call of legal duty to try to save the corporate enterprise. The regrettable situation that, because of a declining canning market and a breach of contract by one of the buyers from the defendant companies, the corporations were unable to pay plaintiffs in full does not in the circumstances warrant a holding that fraud, inequity, or injustice will follow as a result of acts of the Leuschners unless further monies are supplied by them.

In any event, it additionally appears that the defendant Elizabeth F. Leuschner was actually a housewife by occupation who had little knowledge of the affairs of the corporations and no independent direction or control of their business activities, and who only did the bidding of her husband, Richard D. Leuschner, Sr., in the way of exe-

1. Lab.Code, § 923: "Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. * * *"

cuting documents as requested by him.[2] Moreover, during the period when plaintiffs' claims arose in 1952 and 1953, Mrs. Leuschner's sole ownership or property interest in the two defendant corporations consisted of one share of Yosemite's stock, and no shares whatsoever of the stock of Kadota. As shown in the opinion prepared by Chief Justice Gibson, various employes of Yosemite also owned eight shares of that corporation's stock. I can perceive no reasonable or fair basis for holding Mrs. Leuschner, a housewife, responsible for the activities and obligations of Yosemite, which she herself did not direct or control and in which she owned only one share of stock, while not holding the stock-owning employes. Consequently, it seems to me, an affirmance of the judgment against her in itself serves to promote injustice and inequity, rather than the contrary.

I would reverse the judgment as to all of the individual defendants.

SHENK, J., concurs.

Rehearing denied; SHENK and SCHAUER, JJ., dissenting.

2. The record shows the following:

"Q. [Of Mrs. Leuschner] What is your occupation? A. Housewife.

"Q. Do you have any other occupation other than that of housewife? A. No. * * *

"Q. Do you have any knowledge of the corporation by the name of Yosemite Creek Company? A. I knew there was one, yes. * * *

"Q. * * * were you one of the incorporators of Yosemite Creek Company? A. According to that, I am, or was.

"Q. Yes, and were you also one of the directors * * * in 1949? A. I don't remember. It should be of record. * * *

"Q. In what business was the Yosemite Creek Company engaged? A. In the canning business.

"Q. Did you do any processing, selling? A. *I don't know* anything about that part of it. * * *

"Q. Where was the plant located in 1949, Mrs. Leuschner? A. At Kadota out on Yosemite Highway.

"Q. Was the plant and office later moved to Modesto? * * * A. Yes, I think it was.

"Q. *Do you know* about *when* it was moved? A. *No, I do not.* * * *

"Q. * * * did you, as an individual, ever enter into any business transaction, business deal, or arrangements of any kind with Yosemite Creek Company? A. Well, all I did was given money * * * I loaned money to Yosemite Creek Company * * * and I was supposed to get it back. * * * I don't remember the years, but * * * there are records of that. * * * I don't know how much [money] * * *." (Italics added.)

Mr. Leuschner, Sr., testified as follows:

"Q. During this period of time, Mr. Leuschner in 1953, * * * did you have occasion to actually discuss the business operations and the operation of the Yosmite Creek Company and the Kadota Creek affairs with her [Mrs. Leuschner] to a point where she would know * * * the nature and extent of the business, the activities? A. No.

"Q. In other words, she didn't know, is that right? A. I ran the business."

51 Cal.2d 590

PEOPLE of the State of California, Respondent,

v.

Raymond L. CARTIER, Appellant.

Crim. 6273.

Supreme Court of California, In Bank.

Feb. 17, 1959.

Prosecution for murder. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment of conviction and defendant appealed. The Supreme Court, McComb, J., held that in prosecution for murder, trial court prejudicially erred in refusing to permit defendant to hear recordings of his conversations with police officers subsequent to his arrest, which conversations he claimed he did not remember, where such conversations contained evidence that would have been of material benefit to defendant and his counsel in preparation of his defense in that they contained impeachment of testimony of one of the principal witnesses for the state, on an im-

portant issue, and contained evidence as to defendant's lack of consciousness of guilt.

Judgment reversed.

1. Criminal Law ⇐627½

In a criminal case, an accused is entitled to hear recordings of his conversations with police officers where he has forgotten what he said at the time he was examined and alleges that the recordings are necessary to refresh his recollection.

2. Criminal Law ⇐627½, 1166(1)

In prosecution for murder, trial court prejudicially erred in refusing to permit defendant to hear recordings of his conversations with police officers subsequent to his arrest, which conversations he claimed he did not remember, where such conversations contained evidence that would have been of material benefit to defendant and his counsel in preparation of his defense in that they contained impeachment of testimony of one of the principal witnesses for the state on an important issue, and contained evidence as to defendant's lack of consciousness of guilt.

3. Constitutional Law ⇐268
Criminal Law ⇐627½

Where defendant in murder prosecution moved for inspection of transcript of recordings made by the police during interviews with defendant, trial court erred in not marking the transcripts for identification during the trial and such procedure was violative of defendant's right to due process of law since it permitted the judge to base his ruling upon evidence prepared by the prosecution, but denied defendant and his counsel the right to inspect and know what such evidence was.

4. Constitutional Law ⇐266

It is a denial of due process of law and fundamental fairness for a court to determine issues upon the basis of evidence available to it and the prosecution but not also available to the defendant and his counsel since it is analogous to denying to the accused his right to cross-examine or confront witnesses produced against him, and in fact is more akin to a procedure whereby a defendant and his counsel would be prevented from even seeing the witnesses or hearing their testimony or examining physical evidence.

5. Constitutional Law ⇐266, 268

Where trial court failed to mark for identification during trial transcripts of recordings of conversations between defendant and police officers, which conversations defendant sought to have introduced into evidence, and denied defendant's motion to inspect the transcripts of the recordings, such procedure denied to defendant the right to confront adverse witnesses, the right to be present at all stages of the proceedings, the right to be represented by effective counsel, the right to cross-examine, and the right to be heard on the meaning of the evidence and the inferences to be drawn therefrom, rights guaranteed by the due process clauses of the state and federal constitutions. U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, § 13.

6. Criminal Law ⇐486

In a criminal prosecution, although it is questionable whether results of an examination made while a person is subject to "truth drugs" are admissible in evidence if the statements are offered for the purpose of proving the truth of the matter asserted, use of such drugs does not preclude a psychiatrist from giving his expert analysis of a defendant's answers to questions while under the influence of drugs for the purpose of determining whether, in the opinion of the psychiatrist, defendant was sane or insane at the time of commission of the alleged offense.

7. Criminal Law ⇐486

In murder prosecution, testimony consisting of an expert opinion of a psychiatrist that defendant was insane at time of commission of alleged offense, even though based in part on statements made to the psychiatrist by defendant while under the influence of sodium pentathol, was admissible, since the statements made under the influence of the drug were not offered for the purpose of proving the truth of the matter asserted, but to show a portion of the basis

for the opinion of the psychiatrist as to defendant's mental condition at the time of the commission of the alleged offense.

Robert K. Barber, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., James Don Keller, District Atty., and F. E. Gallagher, Deputy Dist. Atty., San Diego, for respondent.

McCOMB, Justice.

This is an automatic appeal from a judgment of guilty of murder in the first degree after trial before a jury. The jury fixed the punishment at death and found defendant to have been sane on the date of the commission of the offense.

Viewed in the light most favorable to the People, the record discloses the following facts:

In November 1957 defendant, 29 years of age, resided with his wife, Geneva Cartier, in a single-story duplex dwelling in San Diego. Defendant and his wife had been married a few months before.

On November 11, 1957, defendant left work at approximately 3:45 p. m. and by prearrangement met his wife. They went to a bar, had a drink and made plans for Mrs. Cartier to leave her job about 7 o'clock that evening. Mrs. Cartier was then driven to her place of employment, and defendant drove home, where he changed his clothes and cut a rug in half, as requested by his wife. While at home, defendant drank one "mixed drink" and half of a second. When he had drunk about half of the second one, he added some wine to it. This drink he also consumed.

About 5:30 defendant left home and drove to a bar, where he had a few beers. At approximately 7 p. m. he met his wife at her place of employment. They immediately went to a nearby bar for a drink, but before doing so each of them drank from a bottle which defendant had brought with him. After having one drink at the bar, they left and proceeded to another bar. Between the two bars they drank the rest of the contents of the bottle which defendant had. At this time defendant felt exceedingly happy and gave his wife the keys to their automobile. At the second bar they had two drinks, played shuffleboard, and left about 8:15 to go to another bar, the Java Club.

They arrived at the Java Club between 9 and 10 p. m. They took seats at the end of the bar and invited a waitress to have a drink with them. She accepted the offer and sat with them at the bar for approximately 45 minutes. Defendant left his wife and the waitress and went to the rest room. During his absence a sailor came into the bar with a ring which he was trying to pledge. The waitress and defendant's wife called the sailor over to show them the ring, struck a match to see it better, and in the process held the sailor's hand. Defendant was standing behind his wife while she and the waitress were looking at the ring on the sailor's finger, and defendant became very angry and violent because they were talking with the sailor. He told the sailor that if he did not take his hands off his (defendant's) wife, he would "knock his block off." Defendant's wife then tried to humor defendant back into a happy state. Thereafter defendant got into an argument with the bartender about the latter's refusal to cash a check for him. He then went to the rest room again, and upon his return suggested that he and his wife go home, and the two walked out of the bar with their arms around each other.

Mr. Martinez, who lived with his wife and child in the other dwellling unit in the duplex occupied by the Cartiers, stated that on the evening in question he had gone to bed about 7 or 7:30 and was later awakened by the sound of violent quarreling coming from the Cartier residence. The quarreling lasted for about 15 minutes, during which time he heard a "scuffling" noise "like furniture being moved," and then he heard defendant's wife say, "Please, please, don't!" Thereafter he heard three or four thuds on the wall or floor, after which everything became silent and he went back to sleep.

Mr. Martinez was awakened later by a neighbor's calling "Fire!". Thereupon he arose, dressed, and went outside to the front of the Cartiers' part of the duplex. There he saw defendant standing on his front porch with the front door closed behind him. Defendant was facing away from the front door and was motionless. Mr. Martinez asked defendant if Mrs. Cartier was inside, and defendant replied: "I think so. I don't know." Mr. Martinez then tried to open the front door. Finding it locked, he forced it open by kicking it. He then entered the house and found it filled with smoke and the heat quite intense. He then came out of the house and walked around to the back porch of the house, but found too much smoke there to enter. He returned to the front of the house and stood with defendant beside a car. Defendant suddenly ran into the Martinez side of the duplex. Mr. Martinez followed him and found defendant in the kitchen trying to knock down the kitchen wall with a chair. The kitchen wall was opposite the bedroom in the Cartier side of the duplex. When asked what he was doing, defendant replied that his wife was in there and that he loved her.

It was about 11:30 p. m. when the neighbor had noticed the fire. Shortly thereafter members of the fire department arrived and extinguished the fire, and the body of defendant's wife was found on the floor of the bedroom. It was lying face upward, with the head near the foot of the bed, and was covered with considerable debris, which appeared to have been bedclothes and a foam rubber mattress. Also discovered near the body were a butcher knife, a French chef's knife, and several pieces of heavy glass similar to a heavy glass ash tray. In a corner of the bedroom was found a meat cleaver. A paring knife was found on the floor beneath the shoulders of the body.

An autopsy disclosed that the body was charred over nearly the entire skin surface. Both bones of the lower right arm were fractured at a point approximately one inch below the wrist joint, and the bone fragments protruded through the flesh. A large wound extended from the collar bone on the left downward and across the midline to and including the vagina. The wound was jagged and extended through the skin, underlying fat and muscle tissue. The cartilages of the second through the tenth ribs on the left side had been separated, and the heart had been severed from the major vessels connecting to it and removed from the body. The vagina had likewise been cut out from the surrounding tissue. On the head there was a depressed fracture, oval in shape, approximately one and a half centimeters in diameter, at a point a little above the ear. An examination of the tracheobronchial tree revealed no evidence of smoke inhalation. In the opinion of the autopsy surgeon, the death of defendant's wife was caused by the cutting out of her heart.

Two experts testified that they had inspected the Cartier home after the fire, that the area of greatest burning was located in the bedroom area at a point near the foot of the bed, where the body was found; and that the fire started at that point near the floor below the level of the bottom of the bed. They further testified that the fire was of deliberate incendiary origin.

These are the questions necessary for us to determine:

First. *Did the trial court err in refusing to permit defendant to hear recordings of his conversations with the police officers subsequent to his arrest, which conversations he claimed he did not remember?*

[1] *Yes.* In a criminal case an accused is entitled to hear recordings of his conversations with police officers where he has forgotten what he said at the time he was examined and alleges that the recordings are necessary to refresh his recollection. (Vance v. Superior Court, 51 Cal.2d 92, 330 P.2d 773; Powell v. Superior Court, 48 Cal. 2d 704, 705 et seq., 312 P.2d 698; People v. Riser, 47 Cal.2d 566, 587 [29], 305 P.2d 1.)

In the present case, after defendant was arrested by the San Diego police, he was interrogated by Sgt. DeVore and various other public officials in a room in the jail.

The conversations were recorded by means of a hidden microphone and lasted for a period of an hour and 45 minutes. Later the same day, November 12, 1957, defendant was further interrogated by Sgt. DeVore and other police officers. This later conversation was recorded in the same manner as the first conversation and lasted for about 20 minutes. Defendant was also interrogated by Dr. Meyers on the same day.

During the trial defendant moved for an order to permit him to inspect the transcriptions of these conversations. After a considerable colloquy the trial judge granted the prosecution 48 hours in which to prepare counter-affidavits and announced that before ruling on the motion he would require that defendant waive his constitutional right not to testify and also require that defendant be examined under oath outside the presence of the jury on the validity of the allegation in his affidavit that he was unable to recall the contents of the various recorded conversations.*

* The following proceedings were had at the bench out of the presence of the jury:

"Mr. Gallagher [for the prosecution]: The thought came to me that in view of counsel's motion which is pending for the production of transcripts that I might inform the court at this time I do have transcripts of three tape recordings; one is an interview conducted on November 12th at approximately 3:10 a. m.; another one an interview on the 12th during the afternoon hours; and the third is an interview on the 12th in the afternoon conducted by Doctor Meyers. The first two interviews were conducted by the present witness, Sergeant DeVore. I have those transcripts here and I would suggest, or perhaps offer, if the Court deems it advisable, that I put these transcripts in the possession of the Court at this time, since it is a matter of the sound discretion of the Court to ascertain if the witness needs to refresh his recollection from the transcripts passing on the motion. So I would give these three transcripts, or make them available to the Court now, should the Court desire in any way to refer to them or to examine them and consider them in the light of the present testimony which is going to be admissions made by the defendant during the initial interview at 2:10—or 3:10 a. m. on the 12th. If the Court would feel that to be a proper thing to do at this time.

"The Court: Is that the Riser Case?

"Mr. Gallagher: I think the Riser case would have a bearing on it, but as I recall on that case there are certain words in that case which might have a bearing on this situation and I think to keep the Court fully advised, and in view of that case to be able to exercise sound discretion in this matter.

"The Court: I tell you, you can leave them up here and we will not mark them for identification. If I think counsel should have them, if there is anything in there that would be beneficial to him, I will consider turning them over. If there is nothing in there I will have them marked for identification at the conclusion of the trial so that the upper court, if it should be necessary to take it up there, may see what is in those transcripts and those recordings as to whether or not there has been an abuse of discretion.

"Mr. Gallagher: I think that is perfectly agreeable with me. My only purpose is to make sure that this trial is conducted fairly and that the defense has all they are entitled to and do everything possible to make things available, and that a proper showing be made by the defendant under the case.

"The Court: I have seen so many of these recordings and the officers usually follow questions and answers given practically word for word, but in the transcriptions and in the recordings there is usually some prior record of the defendant that is brought out which they eliminate and which, of course, doesn't get before the jury, if a copy of the transcription is given to defense counsel, but so many times these defendants sit down there and make voluntary statements which are self-serving declarations, and defense counsel says, 'Well, now, officer, didn't he also tell you so and so; didn't he tell you so and so?' And by just asking the question they get the whole thing in the record. You have got to permit the person to ask the question, these self-serving declarations and these other things that creep in there, 'Weren't you arrested once for that?', and that should be kept out. If the officer gives an accurate recitation of the questions and answers that are pertinent I don't see why it is necessary for the defendant to have the transcripts turned over to him, or the recording. That is my view of it.

"Mr. Gallagher: I might add in this case, too, in line with your Honor's words, that there are things in the tran-

Defendant filed a written motion for the inspection of the foregoing recordings, together with affidavits of himself and his counsel. Defendant's affidavit alleged that

script which relate and are prejudicial to the defendant.

"The Court: In this one?

"Mr. Gallagher: Yes. His conduct in being AWOL from the Navy and such things as that, and I have instructed the officer in the interests of fairness that certain matters which I considered would be prejudicial which are not factual and related to this case, that he not relate and volunteer, so that the jury would not be prejudiced by anything the defendant said which is on the basis of speculation or admissions against his interest, but which do not—are not probative of the issues involved here. I am asking the officer to relate admissions made which are factual, based upon the defendant's movements, the factual things pertaining to issues that are properly before the jury.

"The Court: I think if I marked them for identification at this time—I don't know—I looked it up once before, I think if I marked them for identification, I think all counsel in the case, when you mark something for identification, are entitled to see it. So instead of making them for identification, if you will leave them with me I will have them marked for identification at the conclusion of the trial. What is your idea, Mr. Fulkerson?

"Mr. Fulkerson [for the defense]: At this time my idea is this, that a witness's verbal recitation is subject, of course, first to the instruction that his oral admissions or confessions are to be viewed with caution; secondly, although to this date no court has held that accurate reproductions of the exact conversation are the best evidence, if those are available they should be introduced in place of secondary evidence.

"The Court: What do you mean, you want to introduce the recording?

"Mr. Fulkerson: I feel this way, that for proper cross-examination of this witness the exact phraseology which was used in these conversations, if available, is extremely important in order that the correct light, not a witness's interpretation of a conversation, be made, and for that purpose I feel it is an added reason why the defendant should have this recorded memory, if we may call it such, available to him, not only to assist him in putting forth his defense, but to assist in correctly presenting to the jury exactly the facts as they occurred during this conversation. In other words, science has reached the point now that although the Court has not said it is the best evidence the Court at this time should say that the recording is the best evidence because it can accurately represent the entire conversation. Now if there are portions of the conversation which would be objectionable here for the People or for the defendant, we cannot violate the basic hearsay rule—

"The Court: I don't know. The Courts now are violating everything. They go into legislative session, they create things there is no authority for, and so forth. In this Powell case that came down, I forget, I think Justice Schauer wrote the opinion, and he said * * * and he had dissented in the other case, a civil suit, in which the statute authorized the inspection, but in this criminal case it said at the common law the defendant wasn't entitled to a copy of the statement, and so forth, if he didn't sign it, and there is no provision for it in the statute, but we are going to give it to him. If I read those cases, the Riser case and the Powell case, that last criminal case that came down that Schauer wrote, I think it is a matter of discretion and I am going to exercise my discretion in this thing when I see the transcription.

"Mr. Fulkerson: For purposes of the record at this time might I object to an oral recitation of this witness's recollection of the conversation based on the fact that it isn't the best evidence of the conversation?

"The Court: Well, that is a novel theory.

"Mr. Fulkerson: I think some day we are going to have it.

"The Court: From time immemorial they have sat here and recited that thing, even when they had recordings and shorthand notes, and so forth. If it is going to be the best evidence and you are going to take that thing literally, to get the full effect and significance of everything, according to your theory, you would have to bring the whole transcription, objectionable or not, in order to get the significance, the sequence and the full effect of it. I am sure you wouldn't want to stipulate to anything like that. So I will receive these at this time and if I think you are entitled to see them when I exercise my discretion I will let you have them during the trial, and if I don't think so I will mark them for identification at the conclusion of the trial and if the Supreme Court or Appellate Court wants to see what is in them they can order them sent up to them."

he had been interrogated by police officers and by Dr. Meyers at various times on November 12, 1957; that he believed certain of those conversations had been recorded and transcribed; that one of the conversations lasted in excess of 45 minutes; that each of the others lasted in excess of one hour; that he was unable to recall or relate to his attorney the things contained in the statements; that such recordings were necessary to refresh his recollection; and that no copies had been furnished to him.

The affidavit of defendant's counsel alleged that he had reason to believe that the prosecution would "use these conversations at the forthcoming trial" and that "the statements, conversations and documents are necessary to the defense of Raymond Cartier; i. e., to refresh his recollection of prior recorded conversation."

After considering the counter-affidavits filed by the prosecution, the trial court denied defendant's motion.

[2] In view of the rule set forth above, the trial court erred in its ruling. That this ruling was prejudicial to defendant appears from the fact that the transcription contained impeachment of the testimony of Sgt. DeVore, one of the principal prosecuting witnesses, on an important phase of the case. He testified on direct examination, and reaffirmed on cross-examination, that during his interview with defendant the latter, in response to a direct question as to who drove home, stated, "My wife drove home." This testimony was valuable to the prosecution and had the effect of establishing the prosecution's theory that defendant's lack of memory of any events from the time he was at the Java Club until he was taken into custody was a mere convenience or fabrication and that it had been contradicted by defendant himself. A reading of the transcript of Sgt. DeVore's two interviews with defendant, however, reveals that Sgt. DeVore's testimony was inaccurate in this respect. The following colloquy took place between them: "Q. Do you recall going home at all? A. No. Q. Do you recall your wife driving home? A. No."

Previously, defendant had told the interrogator that he had given his car keys to his wife earlier in the evening because she wanted to drive. In the recorded conversations it appears that Sgt. DeVore asked defendant a couple of questions which assumed that defendant's wife had driven home, but defendant's responses did not show any recollection by him that he remembered his wife's having driven home.

In the second recorded interview defendant was asked who drove home, but his response contained no remembrance on his part.

The recorded interviews contained other evidence that would have been of material benefit to defendant and his counsel in preparation of his defense. It showed a lack of consciousness of guilt on the part of defendant, which fact would have been material to the jury in determining the weight to be given Sgt. DeVore's testimony. It appears that although the interviews took place only a couple of hours after defendant's arrest, defendant had been sleeping in his cell until called to the interrogation room; and that up to that point in the interrogation defendant had not been too alert and bright. It also appears that when the interrogator asked defendant if he would then like to see his wife, defendant answered, "Yes."

The facts that defendant was asleep in his cell and desired to see his wife are inconsistent with a consciousness of guilt on the part of defendant for the mutilated condition of the victim and would tend to substantiate his defense of a "blackout" or intoxication sufficient to render him incapable of forming the intent necessary to constitute premeditation. These matters were known to the prosecution and the trial judge but were not known to defendant or his counsel. Obviously, under these circumstances the error was prejudicial, and defendant was improperly deprived of his right to inspect relevant and material evidence in the hands of the prosecution.

Second. *Did the trial court err in not marking for identification during the trial*

the transcripts of the recordings which defendant sought to have introduced into evidence?

[3] *Yes.* At the time the trial court denied the motion to inspect the transcripts of the recordings, he had before him the affidavits and counter-affidavits and the testimony of Sgt. DeVore. He had also been provided by the prosecution with transcripts of the recorded conversations. These transcripts were not made available to defendant and for that reason were physically received by the judge with the announcement that he would not mark them for identification until the case was closed, because otherwise defendant would have a right to see them.

This procedure was novel. It permitted the trial judge to pass upon defendant's motion on the basis of evidence and documents not available to defendant or his counsel and had the effect of substituting the judge for defendant's counsel, in so far as defendant was to be represented by counsel, in arguing the admissibility or effect of the documents with respect to his motion.

They were before the judge as a basis for the judge's rulings but were never available to defendant.

Such a procedure was violative of defendant's right to due process of law. It permitted the judge to base his ruling upon evidence prepared by the prosecution, but denied to defendant and his counsel the right to inspect and know what such evidence was.

It is evident that in passing upon defendant's motion to inspect the transcriptions of the recordings the trial court was called upon to determine issues of fact or mixed issues of fact and law, that is, that the recordings contained no matters of impeachment, nothing that would assist the jury in the ascertainment of the true facts with fairness to defendant and the People alike, and nothing that would assist defendant in refreshing his memory as to what had been said.

[4] It is a denial of due process of law and fundamental fairness for a court to determine such issues upon the basis of evidence available to it and the prosecution but not also available to the defendant and his counsel. It is analogous to denying to the accused his right to cross-examine or confront witnesses produced against him. In fact, it is more akin to a procedure whereby a defendant and his counsel would be prevented from even seeing the witnesses or hearing their testimony or examining physical evidence.

[5] The procedure here adopted denied to defendant the following rights guaranteed by the due process clauses of the federal and state Constitutions: (1) The right to confront adverse witnesses, (2) the right to be present at all stages of the proceedings, (3) the right to be represented by effective counsel, (4) the right to cross-examine, and (5) the right to be heard on the meaning of the evidence and the inferences to be drawn therefrom. See U.S. Const. amend. XIV; Cal.Const. art. I, § 13.

The procedure followed in the instant case constituted a departure from recognized rules and procedure designed to insure the accused a fair trial. The error obviously was prejudicial and could have resulted in a miscarriage of justice.

Third. *Did the trial court err in sustaining an objection to defendant's offer of proof with respect to Dr. Lindemulder's opinion as to defendant's sanity at the time of the commission of the alleged crime, which examination was made while defendant was under the influence of sodium pentathol?*

Yes. Defendant offered to prove that Dr. Lindemulder would testify that he first examined defendant at the San Diego jail and formed the opinion, based upon this physical examination, that defendant was sane and that if defendant "blacked out" prior to the time of the alleged crime the blackout was probably caused from excessive use of alcohol; that he examined defendant a second time pursuant to court

permission at a clinic in San Diego, on which occasion he placed defendant under the influence of sodium pentathol; that after defendant was placed under the influence of this drug the doctor held a conversation with him concerning events which occurred on November 11, 1957; that based on this conversation it was the doctor's opinion that defendant was insane on November 11, 1957, and was incapable of appreciating the nature and quality of his acts at that time; that the use of sodium pentathol is an accepted medical procedure; that in the doctor's opinion the examination under consideration was a successful one; and that the doctor would identify a tape recording as being that of the conversation in question, would lay the foundation of the recording as the basis for his opinion, and would further qualify it in regard to authenticity for presentation before the jury.

The trial judge sustained the district attorney's objection to the offer of proof, stating that if the doctor was called he could not use the information obtained from defendant under truth serum as a basis for forming his opinion.

[6] In People v. Jones, 42 Cal.2d 219, 225 [12] et seq., 266 P.2d 38, this court held that although it is questionable whether results of an examination made while a person is subject to "truth drugs" are admissible in evidence if the statements are offered for the purpose of proving the truth of the matter asserted, the use of such drugs does not preclude a psychiatrist from giving his expert analysis of defendant's answers to questions while under the influence of drugs for the purpose of determining whether, in the opinion of the psychiatrist, defendant was sane or insane at the time of the commission of the alleged offenses. (See People v. Jones, supra, 42 Cal.2d at pages 222, 225 [11] et seq., 266 P.2d at pages 41, 42.) It is, of course, a question for the trier of fact to determine from all the evidence, including the testimony of the doctor, whether defendant was sane or insane during the period in question.

[7] In the present case the testimony offered was the expert opinion of the psychiatrist that defendant was insane at the time of the commission of the alleged offense. The statements made to the psychiatrist by defendant while under the influence of the drug were not offered for the purpose of proving the truth of the matter asserted therein. Hence, under the foregoing rule, it was error for the trial judge to exclude the proffered evidence.

In view of our conclusions, it is unnecessary to discuss other errors urged by defendant.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



168 Cal.App.2d 71

George A. MARSHALL, Jr., Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR The COUNTY OF CONTRA COSTA, Respondent.

Civ. 18492.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1959.

Husband brought prohibition proceeding against the Superior Court of the County of Contra Costa to restrain that court from exercising jurisdiction in action brought in that court by wife for custody of the children. The District Court of Appeal, Dooling, J., held that where husband brought action for divorce in the Superior Court of Marin County and, by appropriate allegations, put in issue the right to custody of the children, and the Superior Court of Marin County made an order granting husband temporary custody of the children,

and thereafter the wife brought a divorce suit in Nevada, and husband appeared therein through counsel, and wife obtained a divorce decree, which made no reference to the children, and subsequently the wife brought suit in the Superior Court of Contra Costa County for custody of the children, the Marin County Superior Court continued to have exclusive jurisdiction of the custody of the children, so long as action was pending therein, and the Superior Court of Contra Costa County had no jurisdiction.

Writ of prohibition ordered to be issued.

1. Courts ⇐475(1)

Court, which first acquires jurisdiction over custody of children, has such jurisdiction to exclusion of any other court.

2. Courts ⇐475(15)

Where husband brought divorce action in Superior Court in Marin County, California and, by appropriate allegations, put in issue right to custody of children, and court made order granting temporary custody of children to husband, and thereafter wife brought divorce action in Nevada, and husband appeared through counsel, and wife obtained divorce decree making no reference to the children, and subsequently wife brought action in Superior Court in Contra Costa County, California to obtain custody of the children, fact that husband voluntarily submitted to Nevada court and fact that such court entered a divorce decree did not divest the Marin County Superior Court of further jurisdiction and did not authorize wife to maintain action in Contra Costa County Superior Court for custody of the children. West's Ann.Civ.Code, § 199.

3. Appearance ⇐18

Where Superior Court of Marin County first acquired jurisdiction over custody of children as result of divorce action in that court by husband, husband's general appearance in subsequent suit by wife in Superior Court of Contra Costa County did not confer jurisdiction over the subject matter on Superior Court of Contra Costa County, since distinction between a general and special appearance is only important on question of jurisdiction over the person and has no relevancy to question of jurisdiction of subject matter of action.

4. Courts ⇐475(15)

Where husband brought divorce action in Superior Court in Marin County, California and, by appropriate allegations, put in issue right to custody of children, and court made order granting temporary custody of children to husband, and thereafter wife brought divorce action in Nevada, and husband appeared through counsel, and wife obtained divorce decree making no reference to the children, and subsequently wife brought action in Superior Court in Contra Costa County, California to obtain custody of the children, Superior Court of Marin County continued to have exclusive jurisdiction of children's custody so long as the action was pending therein, and therefore Superior Court of Contra Costa County had no jurisdiction of wife's custody action.

Gardiner, Riede, Elliott & Bagley, San Rafael, for petitioner.

James Martin MacInnis, Joseph F. X. Murphy, San Francisco, for real party in interest.

DOOLING, Justice.

Petitioner seeks a writ of prohibition to restrain the respondent court from exercising jurisdiction over the custody of his children. Petitioner commenced an action for divorce against his then wife in Marin County, California, and by appropriate allegations put in issue the right to custody of their children. In that action the court made an order by which plaintiff, petitioner herein, was granted temporary custody of the children subject to visitation rights of the defendant. This order has never been modified or revoked and is still in effect.

Thereafter the wife, real party in interest herein, secured a divorce from petitioner in Clark County, Nevada, in an action in which petitioner appeared through counsel. That divorce decree made no reference to the children of the parties.

In August 1958 petitioner's divorced wife took the children from petitioner for a visit to her home in Contra Costa County and thereupon filed the action in the Contra Costa County Superior Court for their custody. Petitioner objected to the jurisdiction of the Contra Costa County Court on the ground that the Superior Court of Marin County had exclusive jurisdiction. The court overruled this objection and after a hearing made its order purporting to award custody pendente lite to the mother.

[1] The court which first acquires jurisdiction over the custody of children has such jurisdiction to the exclusion of any other court. Greene v. Superior Court, 37 Cal.2d 307, 231 P.2d 821.

[2] The real party in interest argues, however, that the voluntary submission of petitioner to the Nevada divorce court and the entry of that court's decree divested the Marin County Superior Court of further jurisdiction. We may concede that the entry of the Nevada decree constitutes a bar to the further prosecution of petitioner's action for divorce in Marin County but that does not affect the action insofar as the custody of the children is concerned. The Nevada Court by its decree did not exercise or attempt to exercise jurisdiction over the children or their custody. An action for custody may be maintained by a parent without seeking a divorce (Civil Code, § 199) and indeed that is exactly what the real party in interest is now seeking to do in the Contra Costa Court. The two causes, for divorce and custody, are severable and we fail to see how the fact that a portion of the relief sought in the Marin County action is now barred by the Nevada decree can operate as a bar to a severable portion of the relief sought in the Marin County action upon which the Nevada Court made no adjudication. Title Guarantee & Trust Co. v. Monson, 11 Cal.2d 621, 631–633, 81 P.2d 944.

[3] Petitioner's general appearance in the Contra Costa County proceeding did not confer jurisdiction over the subject matter. The distinction between a general and special appearance is only important on the question of jurisdiction over the person and has no relevancy to the question of jurisdiction of the subject matter of the action. Sampsell v. Superior Court, 32 Cal.2d 763, 773, 197 P.2d 739; 5 Cal.Jur. 2d, Appearance, §§ 39, 40, p. 42.

[4] The finding of the Contra Costa Court that the participation of the parties in the Nevada action superseded the effect of any proceedings in the Marin County Court and that the parties regarded such action as *de facto* dismissed and abandoned is based upon the erroneous legal assumption that by submitting the question of divorce to the Nevada Court they must in some way have impliedly submitted the severable question of child custody as well. If the real party in interest had any legal ground for seeking the dismissal of the Marin County action she would have to assert that right in the Marin County Court. So long as that action is pending the Marin County Court continues to have exclusive jurisdiction of the children's custody. In re Guardianship of Vierra, 115 Cal.App.2d 869, 253 P.2d 55.

It is ordered that the writ of prohibition issue as prayed.

KAUFMAN, P. J., and DRAPER, J., concur.

PACIFIC EMPLOYERS INSURANCE CO., Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California and Tom L. Stroer, Respondents.*

No. 23500.

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1959.

Rehearing Granted April 8, 1959.

Proceeding to review an award of Industrial Accident Commission of maximum temporary partial disability benefits. The District Court of Appeal, Patrosso, J. pro tem., held, inter alia, that the award was erroneous for failure to make findings as to "probable earnings" of "the proportionate loss of physical ability or earning power caused by the injury" as required by statute, and commission's finding that injury caused temporary partial disability during which time "work of a type which the applicant could perform was not available to him, did no more than declare that employee was partially disabled and since he was unable to obtain employment of a type which the applicant could perform was not available to him" was not sufficient.

Award annulled and cause remanded.

1. Workmen's Compensation ⇐1733, 1755

An award by Industrial Accident Commission of maximum temporary partial disability benefits to compensation claimant was erroneous for failure to make findings as to "probable earnings" or "the proportionate loss of physical ability or earning power caused by the injury" as required by statute, and commission's finding that injury caused temporary partial disability during which time "work of a type which the applicant could perform was not available to him" was not sufficient. West's Ann.Labor Code, §§ 4654, 4657.

2. Workmen's Compensation ⇐1733

Where evidence was not such as to necessarily require a finding that employee's disability was of a type which rendered him unable to compete in the open market for some generally available line of work under the "odd lot" doctrine, but the evidence as readily lent itself to interpretation that employee's failure to obtain finish carpenter work was caused in part by his disability and in part by economic conditions, Industrial Accident Commission should have made appropriate findings of fact as to whether claimant was an "odd lot", and if not, as to what earnings were reasonably to be anticipated by claimant in his then state of disability, taking into consideration the factors enumerated in statute. West's Ann.Labor Code, §§ 4654, 4657.

3. Workmen's Compensation ⇐1733

An award by Industrial Accident Commission of maximum temporary partial disability benefits which failed to make findings as to "probable earnings" or "the proportionate loss of physical ability or earning power caused by the injury" could not be upheld on ground that there was "no point * * * to either find that applicant, as a temporarily partially disabled person, was an odd lot on the labor market or to find that for all practical purposes he was totally disabled during the period in question", since if employee was partially disabled he could not have been totally disabled and award could not be sustained on such hypothesis in absence of a finding that he was totally rather than partially disabled, and fact that employee was unable to perform work of a rough carpenter although he was ready, willing and able to accept employment as a finish carpenter did not serve to establish that he fell into the "odd lot" category.

Clopton & Penny and Robert C. Wreisner, Los Angeles, for petitioner.

Everett A. Corten, San Francisco, and Edward A. Sarkisian, Los Angeles, for respondent Commission.

Levy, Russell, DeRoy & Geffner, Los Angeles, for respondent Stroer.

* Opinion vacated 340 P.2d 622.

PATROSSO, Justice pro tem.

By this proceeding petitioner seeks review and annulment of an award by the respondent commission of maximum temporary partial disability benefits to the respondent Tom L. Stroer, hereinafter referred to as "employee."

On July 29, 1957, the employee, a carpenter, sustained an admitted industrial injury to his back. Petitioner, the employer's insurance carrier, accepted liability and voluntarily furnished medical care and paid compensation until February 17, 1958. There is no present question as to such care and compensation.

Under date of February 18, 1958, Dr. Manning, the treating physician on behalf of the petitioner, reported that the employee had been "temporarily totally disabled until 2–17–58" but had been "advised that he should return to work as of 2–17–58." Thereupon petitioner stopped temporary disability indemnity and the employee filed the application herein on which hearing was held on July 23, 1958.

At said hearing the employee testified *inter alia* that he had been unable to do other than "finish carpenter" work which is lighter than regular or "rough" carpenter work; that he had registered on February 18, 1958, at his union hiring hall for finish carpenter work and had reported to the hall practically every day and that he would have accepted any type of finish carpenter work had it been available but none had been available; that he had no work until July 7, 1958, when he took on a job of remodelling a barn into a house which job did not involve any framing and part of the work was finish work.

The referee's finding and award provided that the employee's injury "caused temporary partial disability, beginning February 17, 1958, to and including July 6, 1958, during which time work of a type which the applicant could perform was not available to him, entitling him to $40 per week during said time, based on maximum earnings."

[1] Petitioner does not complain of the finding that during the period in question the employee was temporarily partially disabled. Petitioner, however, contends that the commission did not make findings as required by Labor Code, § 4657, as to the "probable earnings" or "the proportionate loss of physical ability or earning power caused by the injury." This contention is well founded and must be sustained.

Labor Code, section 4657, reads as follows: "In case of temporary partial disability the weekly loss in wages shall consist of the difference between the average weekly earnings of the injured employee and the weekly amount which the injured employee will probably be able to earn during the disability, to be determined in view of the nature and extent of the injury. In computing such probable earnings, due regard shall be given to the ability of the injured employee to compete in an open labor market. If evidence of exact loss of earnings is lacking, such weekly loss in wages may be computed from the proportionate loss of physical ability or earning power caused by the injury."

Section 4654 of the Labor Code which is correlated with section 4657 reads: "If the injury causes temporary partial disability, the disability payment is 65 per cent of the weekly loss in wages during the period of such disability."

Speaking of the foregoing sections the court in California Compensation Ins. Co. v. Industrial Acc. Comm., 1954, 128 Cal. App.2d 797, 811–812, 276 P.2d 148, 155, 277 P.2d 442, wherein the factual situation was strikingly similar to that here, said: "These sections taken together establish the standard by which a weekly wage loss attributable to a temporary partial disability may be fixed. Where the employee so disabled has, in fact, established himself in an occupation paying less than he regularly earned before, his weekly wage loss can be quite readily ascertained. However, where such employee, although able and available for work has at the time of the hearing been unable to secure employment,

section 4657 comes into play by providing the yardstick by which his weekly wage loss is to be measured.

"* * * The requirement of the statute before us is that an employer pay compensation to an injured employee during his temporary partial disability in an amount representing the difference between his earnings before injury and what he 'will probably be able to earn during the disability,' giving 'due regard * * * to the ability of the injured employee to compete in an open labor market.'

"It is the duty and function of the commission to weigh the evidence and make findings of fact. Labor Code, § 115. The difference between the earnings of the employee before an injury and his probable ability to earn thereafter because of the nature of his injury is primarily a question of fact upon which findings must be made. Tarascio v. S. C. Poriss Co., 116 Conn. 707, 164 A. 206, 207. It is a matter to be established by proof, and cannot be arbitrarily fixed. (Citations.) Loss of wages due to an inability to secure work which has its origin merely in general business conditions or the slackness of the demand for labor furnishes no basis for an award of workmen's compensation. (Citations.) Though the workmen's compensation act is to be liberally construed to extend its benefits for the protection of those coming within its provisions, it is not intended to provide unemployment insurance benefits. (Citations.) To sustain an award such as has been made herein, the evidence must show and the commission must find that the employee's probable inability to earn any amount whatsoever is traceable to the injury, whether it be through an inability to perform work or an inability to procure work. Reilley v. Carroll, 110 Conn. 282, 147 A. 818."

The finding here that "[s]aid injury caused temporary partial disability between February 17, 1958, to and including July 6, 1958, during which time *work of a type which the applicant could perform was not available to him*" does no more than to declare that the employee was partially disabled and since he was unable to obtain employment of the type which he could perform therefore he is entitled to the same amount of temporary disability indemnity as if he had been totally disabled. (Italics ours.) Not only is there no attempt by this finding to determine "the difference between the average weekly earnings of the injured employee and the weekly amount which the injured employee will probably be able to earn during the disability, to be determined in view of the nature and extent of the injury" but, as is well said by the petitioner, the award fails to "give 'due regard * * * to the ability of the injured employee to compete in the open labor market' and makes no attempt to compute the weekly loss in wages based upon the proportionate loss of physical ability or earning power caused by the injury."

[2] Aside from the foregoing, as pointed out in California Compensation Ins. Co. v. Industrial Acc. Comm., supra, the evidence is not such as to necessarily require a finding that the employee's disability was of a type which rendered him unable to compete in the open market for some generally available line of work under the "odd lot" doctrine enunciated in Meyers v. Industrial Accident Comm., 39 Cal.App.2d 665, 103 P.2d 1025.[1] The evidence as readily lends itself to the interpretation that the employee's failure to obtain finish carpenter work was caused in part by his disability and in part by economic conditions. "Under these circumstances, the commis-

1. The "odd lot" doctrine is stated in the cited case as follows: " 'The authorities draw a distinction between cases in which it appears that the injured employee can do light work of a general nature and where he is only fitted to do "odd" jobs, or special work, not generally available. In the former, the burden is on the petitioner; the presumption being that his inability to obtain employment is due to the fluctuations in the labor market and not to the consequences of the accident. In the latter, the burden is on the employer to show that such special work is available to the petitioner.' "

sion should have made appropriate findings of fact as to whether [the employee] was an 'odd-lot,' and if not, as to what earnings were reasonably to be anticipated by [the employee] in his then state of disability, taking into consideration the factors enumerated in section 4657." California Comp. Ins. Co. v. Industrial Acc. Comm., supra, 128 Cal.App.2d 797, 813, 276 P.2d 148, 156.

[3] Nor is it any answer to say, as did the commission's Southern Panel in its report on order denying reconsideration, that "we see no point in granting defendant's Petition for Reconsideration to either find that applicant, as a temporarily partially disabled person, was an odd lot on the labor market or to find that for all practical purposes he was totally disabled during the period in question." If the employee was partially disabled, as it is admitted the commission properly found, it is apparent that he could not have been totally disabled and the award cannot be sustained upon this hypothesis in the absence of a finding that he was totally rather than partially disabled. And the fact that the employee was unable to perform the work of a rough carpenter although he was ready, willing and able to accept employment as a finish carpenter does not serve to establish, as the commission suggests, that he fell into the "odd lot" category. Assuming that finish carpentry work is work of a light nature it may not be said that it is not work "of a general nature," but rather, "special work not generally available." No authority has been called to our attention which suggests that if an employee is unable to perform his regular work due to a temporary partial disability he must in every case be classified as an "odd lot" on the labor market when he is unable to obtain work which he can perform. If this were so section 4657 would serve no purpose.

Inasmuch as the commission's award is unsupported by a finding that the employee's disability brought him within the "odd lot" category and there is no finding as to his probable earnings during his period of temporary partial disability, the award cannot stand.

The award is annulled, and the cause remanded to respondent commission for further proceedings in consonance with the views herein expressed.

SHINN, P. J., and VALLÉE, J., concur.



167 Cal.App.2d 799

George SAARI, Cross-Complainant and Appellant,

v.

Jane G. LEDDY, as Administratrix of the Last Will and Testament of John Thomas Leddy, also known as John T. Leddy, Deceased, Cross-Defendant and Respondent.

Civ. 9388.

District Court of Appeal, Third District, California.

Feb. 11, 1959.

Administratrix of deceased driver brought original action against driver for damages arising out of automobile collision, and driver filed answer and cross-complaint. Original complaint was dismissed before trial, and cause proceeded on cross-complaint. The Superior Court, Humboldt County, William G. Watson, Jr., J., granted administratrix' motion for nonsuit on ground that driver was guilty of contributory negligence as matter of law, and driver appealed. The District Court of Appeal, Peek, J., held that where it could reasonably be inferred that driver turned left into proper lane of approaching decedent to avoid decedent and was under stress and confusion caused by negligence of decedent, and collision occurred, question of driver's contributory negligence was for jury.

Reversed.

1. Negligence ⇐72

Doctrine of imminent peril does not apply to one who through his own negligence places himself in danger.

2. Automobiles ⇐245(89)

In action for personal injuries sustained in collision which occurred when plaintiff turned left, toward driveway and into lane of rapidly approaching automobile of decedent weaving to either side of highway, allegedly to escape collision with approaching decedent, question whether decedent had placed plaintiff in imminent peril and therefore plaintiff turned left was for jury.

3. Negligence ⇐72

Person placed in imminent peril without having sufficient time to consider all circumstances is required to act only as reasonably prudent person would have acted under similar circumstances and is not held accountable for failure to choose best or safest course.

4. Automobiles ⇐245(89)

In action for personal injuries sustained in collision which occurred when plaintiff turned left, toward driveway and into lane of rapidly approaching automobile of decedent weaving to either side of highway, allegedly to escape collision with approaching decedent, where it could reasonably be inferred that plaintiff was under stress and confusion caused by negligence of decedent, question of plaintiff's contributory negligence was for jury.

5. Appeal and Error ⇐103, 110

Orders denying motions for new trial and motion to amend complaint are nonappealable.

Hilger & Thomas, Eureka, and Philip Steiner, San Francisco, for appellant.

Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco, and Woodman, Leddy & Sautter, Eureka, for respondent.

PEEK, Justice.

This is an appeal by plaintiff from a judgment of nonsuit in an action for personal injuries arising out of an automobile accident. Suit was originally filed by the heirs of Leddy. Thereafter plaintiff filed an answer and cross-complaint. The original complaint was dismissed prior to trial, and the cause proceeded upon the cross-complaint. The motion for nonsuit by the heirs of Leddy was based solely upon the ground that the plaintiff was guilty of contributory negligence as a matter of law.

The facts show that plaintiff had stopped his car in order that his niece might transfer to another car which was parked across from him and headed in the opposite direction on what is known as the Old Arcata Road in Eureka. After his niece had alighted from his car and crossed the highway, plaintiff had proceeded north only a matter of a few feet when he observed Leddy's car approximately 200 yards away and headed towards him. He estimated Leedy's speed at that time as being from 80 to 90 miles per hour. There was other testimony of eye witnesses who estimated the speed to be from 70 to 90 miles an hour. One expert witness, Captain Bailey of the California Highway Patrol, in answer to hypothetical questions, estimated the speed to have been 74.2 miles per hour. Leddy's car was described as "weaving back and forth * * * bouncing back and forth * * * on either side of the highway," or as Mrs. Ritola, the driver of the car into which plaintiff's niece had transferred and who witnessed the accident, testified, "fishtailing or weaving and it was obviously out of control." When Leddy's car was approximately 150 feet distant, plaintiff started a left turn. He estimated that the point of impact was somewhat over the white line; however, an investigating officer estimated the point as being three feet. The Leddy car skidded some 48 feet before its left front end collided with the left front of the plaintiff's car. There was testimony that there were approximately four feet of skid marks left by plaintiff's car, although plaintiff denied any recollection of having applied his brakes prior to the accident. The Leddy car, after striking and pushing plaintiff's vehicle approximately 63 feet,

continued for some 50 feet and came to rest in a ditch. Leddy apparently was killed instantly. An autopsy performed on his body showed a blood alcohol level of 1.5 milligrams per cubic centimeter of blood, indicating that he was in fact intoxicated or at least on the borderline of intoxication. At the point where the collision occurred the Old Arcata Road was a two-lane highway, having a narrow shoulder of approximately one foot on plaintiff's right, some brush, and dropping off into a drainage ditch running parallel thereto. To plaintiff's left, that is across the highway, was a driveway. His testimony was that after seeing the Leddy car approaching he realized there was no escape to the right and sought to get across the highway and to the driveway on his left.

Upon such evidence the court concluded that plaintiff was guilty of contributory negligence as a matter of law in attempting to make a left turn across the highway in the path of the oncoming car. Plaintiff, on appeal, contends that the doctrine of imminent peril should apply, and hence the fact that he was over the center line of the highway at the time of the accident does not establish as a matter of law that he was guilty of contributory negligence. Hill v. Peres, 136 Cal.App. 144, 28 P.2d 944.

[1, 2] It is true, as defendant contends, that the doctrine of imminent peril is not available to one who, through his own negligence, places himself in a position of danger. Vedder v. Bireley, 92 Cal.App. 52, 60, 267 P. 724. However, from the evidence as summarized, one could reasonably infer that, faced with a sudden emergency, plaintiff's action in turning to the left in the opposite lane was an attempt to avoid the danger rather than a negligent act which placed him in danger. The fact that the Leddy car remained on its own side of the road for the last 100 yards it traveled prior to the impact would not preclude the jury from finding that the car was out of control and that plaintiff was in danger anywhere on the highway. Whether or not plaintiff was in a position of imminent peril was a question of fact for the jury. Kehlor v. Satterlee, 37 Cal.App.2d 116, 119, 98 P.2d 759.

[3] Where a person is suddenly placed in imminent peril without having sufficient time to consider all of the circumstances, he "* * * is required to act only as a reasonably prudent person would have acted under similar circumstances, and [he] will not be held accountable for not choosing the best or safest course. He may use such means of avoiding the danger as would appeal to a person of ordinary prudence in a like situation, without being held to a strict accountability as to whether the course chosen by him was the most judicious one." (6 Cal.Jur.2d, Automobiles, 653–54.) Or, as our courts have held: "'* * * he is excusable for omitting some precautions, or making an unwise choice, under this disturbing influence, although, if his mind had been clear, he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault.' And of such case it is said: 'Even if, in bewilderment, he runs directly into the very danger which he fears, he is not in fault. The confusion of mind caused by such negligence is part of the injury inflicted by the negligent person.'" Schneider v. Market Street Ry. Co., 134 Cal. 482, 490, 66 P. 734, 738.

[4] As noted in the cited case, if the jury could reasonably have drawn the inference (and we conclude it could) that when plaintiff turned left in front of the oncoming car, he omitted some precautions, made an unwise choice, or in bewilderment ran directly into the approaching danger of the Leddy car, and that such choice was made under the stress and confusion caused by the negligence of Leddy, then such circumstances would preclude a nonsuit, since he could not be held contributorily negligent as a matter of law.

The other questions raised by plaintiff, although meritorious, demand no discussion in view of our conclusion upon his primary contention.

[5] The purported appeals from the order denying motion for new trial and from

the order denying motion to amend the complaint are dismissed as they are non-appealable orders.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



168 Cal.App.2d 53

Lila Mae PFLEG, Plaintiff and Appellant,

v.

George PFLEG, Defendant and Respondent.

Civ. 17991.

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1959.

Proceedings on husband's motion for modification of alimony and child support provisions of divorce decree. The Superior Court, San Mateo County, A. R. Cotton, J., granted the relief sought, and the wife appealed. The District Court of Appeal, Peters, P. J., held that on a clerk's transcript appeal, reviewing court must conclusively presume that evidence was ample to sustain findings and that only questions presented are as to sufficiency of pleadings and whether findings support judgment.

Affirmed.

1. Appeal and Error ⇐907(3)

Where clerk's transcript, which was sole record, showed that witnesses had testified at trial and minute order of court recited that parties had testified, and that documentary evidence had been introduced, it would have to be conclusively presumed on appeal that hearing had been had, that witnesses, including both parties, had been called to testify, and that evidence, both oral and documentary, had been introduced. West's Ann.Rules on Appeal, rule 52.

2. Divorce ⇐245(3), 309

Modification of alimony and child support provisions of divorce decree must be supported by evidence of change in circumstances since prior order.

3. Appeal and Error ⇐907(3)

On a clerk's transcript appeal, reviewing court must conclusively presume that evidence was ample to sustain findings and that only questions presented are as to sufficiency of pleadings and whether findings support judgment. West's Ann.Rules on Appeal, rule 52.

Ernest O. Meyer, San Francisco, for appellant.

Lois B. Preston, San Francisco, for respondent.

PETERS, Presiding Justice.

The trial court, on motion of the husband, modified the amount of alimony-child support payments that the husband was required to pay under the terms of a divorce decree. The wife appeals.

The parties were married in 1944. They had two children. On February 5, 1954, the wife secured an interlocutory decree of divorce and an award of $238 per month as alimony and child support. In April of 1954 the husband moved to modify this award on the ground that there had been a change of circumstances since the original order in that his income had been reduced. The wife averred that her husband's income had in fact increased. On April 13, 1954, the trial court modified the decree by reducing the monthly payments from $238 per month to $200 per month.

The final decree of divorce was entered July 8, 1955, which incorporated the modified support order. In August of 1956 the husband again moved to modify. This time his supporting affidavit averred that he had remarried; that although his salary was $512 per month, much of it was temporary overtime, and that he was unable to pay $700 that he was in arrears in his payments. On October 2, 1956, the trial court denied the modification on the ground that no

change of circumstances had occurred since the last order.

On March 15, 1957, the husband again moved to modify, averring that his income had decreased to $92 per week and that he had certain obligations other than food, which he listed, totalling $549.29 per month. In addition he averred that he had to have dental work done that will cast $300, his automobile overhauled, which will cost $450, and that he has borrowed $600. The wife filed a counter-affidavit. On April 4, 1957, a hearing was had on this motion, and on April 8, 1957, the trial court modified the decree by reducing the total alimony and support money payable by the husband from $200 to $100 a month and ordered, in addition, that the husband pay his wife $10 a month on past arrearages totalling $490, until this sum was paid. The wife appeals. She has not furnished the court with a reporter's transcript, or other form of record of the hearing of April 4, 1957. The sole record is the clerk's transcript. This lack of a reporter's transcript the wife describes as "regrettable," but nevertheless seeks to argue that the reduced award is not justified by the evidence.

[1–3] This failure to produce a transcript or record of the hearing, so far as the point sought to be urged is concerned, is not only "regrettable," but is fatal. The case was not tried on conflicting affidavits. The clerk's transcript, as augmented, shows that a trial was held on April 4, 1957, at which witnesses testified. The minute order of the court for that day recites: "George Pfleg, Mary Pfleg and Lila Pfleg were sworn and testified as witnesses herein." The order of April 8, 1957, from which this appeal is taken, recites that on the day of the hearing both parties appeared in court with their attorneys, "and the testimony of plaintiff and defendant having been heard, and documentary evidence having been introduced" the matter was submitted for decision. In the face of this record appellant contends that she "was never permitted to take the stand." (Appellant's Opening Brief, p. 17.) This assertion is contrary to the recitals in the minute order and the modification order above quoted, the sole record before us. It is obvious that in this state of the record it must be conclusively presumed that a hearing was had on the motion, that witnesses, including both parties, were called to testify, and that evidence both oral and documentary was introduced.

The sole contention of appellant is that the trial court abused its discretion in modifying the support order, for the reason that there was no evidence of a change in circumstances since the prior order. Appellant is correct in asserting that a modification must be supported by such evidence. But, in the absence of a record of the hearing, we must conclusively presume, in support of the order, that such evidence was introduced, and that such evidence supports the order. The rule is properly stated in Kompf v. Morrison, 73 Cal.App.2d 284, 286, 166 P.2d 350, 352, in the following language: "It is elementary and fundamental that on a clerk's transcript appeal the appellate court must conclusively presume that the evidence is ample to sustain the findings, and that the only questions presented are as to the sufficiency of the pleadings and whether the findings support the judgment." See also McMahon v. Merrill, 112 Cal.App.2d 454, 246 P.2d 73.

The presumptions contained in Rule 52 of the Rules on Appeal are not applicable to such an appeal. This was clearly pointed out in White v. Jones, 136 Cal.App.2d 567, at page 571, 288 P.2d 913, at page 915, where the court, after carefully and correctly tracing the historical consequences of appealing on an incomplete record, or on a clerk's transcript, concluded: "Effective January 1, 1951, Rule 52 was amended by adding thereto the following sentence: 'On an appeal on the judgment roll alone, or on a partial or complete clerk's transcript, the *foregoing presumption* shall not apply unless the error claimed by appellant appears on the face of the record.' Under the rule as amended the presumptions in support of the judgment that were made prior to the adoption of the Rules on

Appeal apply except as expressly limited by rule 52, and it is not presumed, in the absence of the oral proceedings being made a part of the record on appeal pursuant to one of the methods provided for by the Rules, that the record on appeal contains all matter material to the determination of the appeal. Therefore we must presume that the trial court received evidence which would support its findings." See also Berker v. Barnes, 139 Cal.App.2d 294, 293 P.2d 821.

Under these well settled and elementary rules, it must be conclusively presumed, in the absence of some record showing the contrary, that the trial court's determination that the defendant was entitled to a modification because of changed circumstances is supported by substantial evidence.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



168 Cal.App.2d 84

Elsie Mertzmann ALGER, as Executrix of the Estate of Dean E. Alger, Deceased, Plaintiff and Respondent,

v.

Nida Ione ASTON, also known as Nida Aston Alger, Nida Aston, Nida I. Aston; Ava Bell Reese, Defendants.

Nida Ione Aston, Appellant.

Civ. 5800.

District Court of Appeal, Fourth District, California.

Feb. 17, 1959.

Action to quiet title in plaintiff to real property. The Superior Court of Riverside County, Hilton H. McCabe, J., entered judgment quieting title in plaintiff and defendant appealed. The District Court of Appeal, Mussell, Acting P. J., held that evidence was sufficient to sustain finding that defendant who was grantee of real property by virtue of conveyance from deceased had reconveyed property to deceased by deed later recorded by deceased's daughter, the plaintiff.

Affirmed.

1. Deeds ⇐207, 208(1)

In action to quiet title to real property, evidence was sufficient to sustain finding that defendant who was grantee of real property by virtue of conveyance from deceased had reconveyed the same to deceased before his death and delivered deed to deceased who in turn had delivered it to his daughter who recorded it.

2. Deeds ⇐181

If party conveyed land by deed which was delivered to grantee, even if grantee allegedly eradicated grantor's signature on conveyance, such act was not sufficient to revest title in grantor, since neither cancellation or destruction of deed nor redelivery to grantor operates to retransfer title even when accompanied by intention on part of grantor and grantee to revest title in grantor by such means.

3. Deeds ⇐194(3)

A grant deed duly executed is presumed to be delivered at its date and possession by grantee gives rise to inference that instrument was duly delivered.

Kegley & Read, Riverside, for appellant.

Max Z. Wisot, Long Beach, for respondent.

MUSSELL, Acting Presiding Justice.

This is an appeal from a judgment quieting title in plaintiff to real property in Indio, Riverside county. The complaint was filed October 11, 1954. Defendant Nida Ione Aston filed an answer denying that Dean E. Alger, deceased, was the owner of the property involved at the time of his death, and a cross-complaint in which she sought to quiet her title to said

property. Ava Bell Reese filed a disclaimer of interest in the quiet title action and it was dismissed as to all fictitious defendants.

On June 30, 1955, defendant Nida Aston filed a petition for determination of heirship in the matter of the estate of Dean E. Alger, deceased, being action number 15272 in the Superior Court of Riverside county. In this petition said defendant alleged that she was the surviving spouse of said decedent and one of his heirs at law. This matter and the quiet title action were consolidated for trial. Following the trial, a decree was entered in the proceedings to determine heirship and it was adjudged therein that the defendant Nida Aston was not the surviving spouse of said decedent and was not one of his heirs at law. No appeal was taken from this decree. Defendant Nida Aston appeals from the judgment in favor of plaintiff in the quiet title action, claiming that the evidence is insufficient to support the judgment.

Plaintiff Elsie Mertzmann Alger and the decedent, Dean E. Alger, were married for approximately thirty years. In 1944, while they were living together in Long Beach, the decedent sold his plumbing business for $6,000 and moved to Indio, where, on October 29, 1945, he purchased the property here involved in his own name, as a married man, and obtained a grant deed therefor.

In April of 1948 plaintiff Elsie Alger started divorce proceedings and obtained a final decree of divorce in December, 1949. In the interlocutory decree, dated November 17, 1948, pursuant to stipulation of the parties, the property involved was awarded to Dean E. Alger as his sole and separate property. He improved the premises by erecting thereon a plumbing shop and living quarters and was living on the premises in 1948. At that time appellant Nida Aston was living in a trailer parked on the premises.

On December 21, 1948, Dean Alger and Nida Aston were introduced to Grant Weaver, a notary public, in his office in Indio, and Dean Alger there executed a grant deed conveying the property involved to Nida I. Aston, an unmarried woman. This deed was acknowledged by Weaver and was recorded February 18, 1949. On December 22, 1948, Alger and appellant returned to Weaver's office and appellant there signed and acknowledged a deed granting the property involved to Dean E. Alger, an unmarried man. This deed was recorded on January 6, 1953, at the request of Mrs. B. L. McDanel, the daughter of Dean Alger and his wife, Elsie. The decree of the trial court quieting title and adjudging that Dean Alger, deceased, was the owner at the time of his death, on or about January 5, 1953, and had the right to possess the property involved was based on this deed and its execution and delivery are disputed by the appellant. She testified that the deed was executed on the date it bears; that on December 23, 1952, she took the deed out of her filing case and decedent Alger then eradicated her signature with Purex and instructed her to destroy it; that she then put the deed in her filing case and did not see it again after that date; and that the signature "Nida I. Aston", which now appears on the deed, is not in her handwriting.

Grant Weaver testified that he did not recall specifically what he did with the deed which appellant acknowledged on December 22, 1948, but that it was his custom to hand the instrument to the person whom he regarded as the principal and so designated in his record.

Betty Lou Frost, formerly Mrs. McDanel, testified that she was the daughter of Dean Alger and Elsie Alger; that she last saw her father in September, October or November of 1952, when he visited her in Long Beach; that this visit was definitely prior to December of 1952; that at that time her father gave her the deed involved (Plaintiff's exhibit 10); that she kept it in her possession until January 6, 1953, when she recorded it in Riverside county. The deed was shown to her and she testified that the signature line appeared to be in the condi-

tion in which it was at the time her father handed the deed to her. This testimony is in direct conflict with the testimony of appellant that Alger eradicated the signature on the deed on December 23, 1952, and the trial court resolved the conflict in favor of the testimony of Betty Frost.

[1] We are of the opinion that her testimony in this connection is sufficient to justify a finding that the deed was delivered to Alger and was by him delivered to his daughter, who retained it until its recordation. In this connection it appears that appellant understood at the time the deed was executed by her that she had divested herself of title for she testified that Alger said "Don't record it unless something happens"; that "It was agreeable to me. I wanted him to record it but he didn't want me to record it unless something happened because there was no need to."

[2] Even if the trial court accepted the testimony of appellant to the effect that the decedent had eradicated her signature on the deed which she signed and acknowledged on December 22, 1948, such an act was not sufficient to revest title in appellant. As is said in 15 Cal.Jur.2d, Sec. 203, page 607, "Neither cancellation nor destruction of a deed, nor redelivery to the grantor, operates to retransfer title, even when accompanied by an intention on the part of both grantor and grantee to revest title in the grantor by that means."

[3] A grant deed duly executed is presumed to be delivered at its date and possession by the grantee gives rise to an inference that the instrument was duly delivered. Miller v. Jansen, 21 Cal.2d 473, 477, 132 P.2d 801. This presumption and inference together with the testimony of the daughter of the decedent and the circumstances surrounding the transaction as shown by the record are sufficient to support the judgment herein.

Appellant further claims that the property in question was subject to a trust in favor of the defendant. This argument is based on appellant's testimony that she had paid Alger the sum of $1,000 toward the purchase price of the property and the further sum of $1,665, representing the cost of constructing a fence on the premises. However, the trial court was not bound to accept the testimony of appellant in this respect, especially in view of her testimony as to other matters involved in the trial. Spaulding v. Jones, 117 Cal.App.2d 541, 548, 256 P.2d 637. No contention was made at the trial that the property was subject to a trust. There is no pleading by appellant requiring a finding on this subject and there is nothing in the record indicating that it was an issue to be determined in the action.

Judgment affirmed.

SHEPARD, J., and STONE, J. pro tem., concur.



168 Cal.App.2d 39

Ida Marjorie AMES, Plaintiff and Appellant,

v.

Frank R. AMES, Defendant and Respondent.

Civ. 23456.

District Court of Appeal, Second District, Division 2, California.

Feb. 16, 1959.

Divorce action. From an order of the Superior Court of Los Angeles County, Victor J. Hayek, J. pro tem., granting defendant husband's motion for entry of a final decree of divorce, an appeal was taken. The District Court of Appeal, Ashburn, J., held that since no real attempt had been made to demonstrate lack of substantial evidence to support challenged findings, reviewing court would fine appellant's attorney $100 for taking a frivolous appeal.

Order affirmed.

1. Appeal and Error ⇐989

Where findings are attacked for insufficiency of evidence, reviewing court's power begins and ends with determination as to whether there is any substantial evidence to support them, and it has no power to judge of effect or value of evidence, to weigh evidence, consider credibility of witnesses, or to resolve conflicts in evidence or in reasonable inferences that may be drawn therefrom.

2. Divorce ⇐156

Evidence sustained finding that there had been no such reconciliation after granting of interlocutory decree as would justify denial of final divorce decree.

3. Costs ⇐260(6½)

Where no real attempt had been made to demonstrate lack of substantial evidence to support challenged findings, reviewing court, affirming order granting husband's motion for entry of final decree of divorce, fined appellant's attorney $100 for taking a frivolous appeal. West's Ann. Rules on Appeal, rule 26.

James L. Garcia, Los Angeles, for appellant.

Hahn, Ross & Saunders, Los Angeles, for respondent.

ASHBURN, Justice.

Plaintiff appeals from an order granting defendant husband's motion for entry of final decree of divorce. An interlocutory was granted to plaintiff on November 20, 1956. Defendant married another woman in Las Vegas on April 8, 1958. One week later plaintiff filed an affidavit alleging a reconciliation after the granting of the interlocutory and praying that no final decree be entered. Numerous other affidavits were filed in support of that position and in opposition thereto. On May 6, 1958, defendant filed a motion to enter a final decree which was supported by his own affidavit alleging that there had been no reconciliation and refuting the averments of the affidavits previously filed on behalf of plaintiff; there was also a supporting affidavit. The notice of motion stated that it would be based upon the affidavits and other records on file and upon oral testimony. This course was pursued. Plaintiff and defendant both testified; plaintiff called two witnesses and a stipulation was made as to what testimony two others would give if called; defendant called two witnesses supporting his version of the facts. The evidence was in substantial conflict. The trial judge found "that there was not a bona fide reconciliation" and ordered entry of a final decree, nunc pro tunc as of November 22, 1957. Same was entered on June 2, 1958, as of the date mentioned in the order and plaintiff promptly appealed.

[1] The language of Mr. Justice Valleé in Overton v. Vita-Food Corp., 94 Cal. App.2d 367, 370, 210 P.2d 757, 759, is directly pertinent: "With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. No one seems to listen. We are satisfied from an examination of the * * * transcript that the findings are amply supported by the evidence."

[2] Appellant's brief shows, as do the transcripts herein, that the evidence at bar is conflicting and appellant thus leaves no function for an appellate court to perform other than affirmance of the order. No real attempt is made to "demonstrate that there is no substantial evidence to support the challenged findings," as required by Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552, and numerous other authorities.

Appellant's counsel recognizes the authority of Beeler v. Beeler, 124 Cal.App.

2d 679, at page 682, 268 P.2d 1074, 1076, which he cites and which says: "The sole question presented to the trial court herein was identical to the question posed to the trial court in the Helbush case [Helbush v. Helbush, 209 Cal. 758, 290 P. 18]—a question of fact as to whether there was an unconditional agreement of reconciliation which justified a denial of the final decree, or whether the reconciliation was conditional and therefore warranted the granting of the final decree. Both here and in the Helbush case the evidence was conflicting. Again in both cases the trial court, in the exercise of its discretion, chose to resolve the factual conflict so presented in favor of defendant. Since the evidence was in conflict, and since it cannot be said that the court abused its discretion in resolving that conflict as it did, it necessarily follows in accordance with elementary principles the determination by the court under those circumstances is conclusive on this court and will not be disturbed on appeal. Helbush v. Helbush, supra." But counsel ignores this rule and essays nothing more than a re-weighing of the evidence. His brief says: "The evidence was sufficient to show that the parties had become reconciled. * * * [T]he appellant here contends that the evidence is sufficient to show a reconciliation such as to prevent the entry of the final decree. * * A careful analysis of the evidence shows that the parties did in fact become reconciled. * * * [T]he evidence on the whole shows that there had been an unconditional reconciliation. * * * We feel that the evidence here shows that the parties became reconciled. * * * We feel that the evidence offered by the plaintiff was not sufficiently controverted to support the order granting the motion to enter the final decree."

[3] The rule to which we have adverted has been reiterated so often and with so little effect upon certain members of the bar that it seems to call in this instance for application of Rule 26 of Rules on Appeal, which provides that in case of a frivolous appeal "the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require."

The order is affirmed and the attorney for appellant is fined the sum of one hundred dollars for taking a frivolous appeal, such amount to be added to respondent's costs on appeal.

FOX, P. J., and HERNDON, J., concur.



167 Cal.App.2d 680

Stewart BRAY and Retha Bray, Plaintiffs and Respondents,

v.

Julian H. ROSEN, Defendant and Appellant.

Civ. 5965.

District Court of Appeal, Fourth District, California.

Feb. 6, 1959.

Personal injury action. The Superior Court of Orange County, Kenneth E. Morrison, J., granted plaintiff a new trial on issue of damages alone, and defendant appealed. The District Court of Appeal, Shepard, J., held that quoted portion of statutory provision, for new trial on ground of insufficiency of evidence to justify verdict and judgment and "that they are against the law", includes the kind of situation wherein the findings are so inconsistent, ambiguous and uncertain that they are incapable of being reconciled and it is impossible to tell how a material issue is determined and those cases in which the evidence is insufficient in law and without any conflict in any material point; but held that the words "against the law" do not import a situation in which the court

weighs conflicting evidence and merely finds a balance against the verdict and judgment.

Reversed.

1. New Trial ⇐77(4)

Inadequate damages appearing to have been given under influence of passion or prejudice is not a new trial ground separate and independent of ground of "insufficiency of the evidence to justify the verdict and judgment and that they are against the law." West's Ann.Code Civ.Proc. § 657.

2. New Trial ⇐70

Such "insufficiency" of evidence as will justify granting new trial exists when evidence which supports verdict and judgment weighs less than evidence opposed to it. West's Ann.Code Civ.Proc. § 657.

See publication Words and Phrases, for other judicial constructions and definitions of "Insufficiency".

3. New Trial ⇐70, 72

Quoted portion of statutory provision, for new trial on ground of insufficiency of evidence to justify verdict and judgment and "that they are against the law", includes the kind of situation wherein the findings are so inconsistent, ambiguous and uncertain that they are incapable of being reconciled and it is impossible to tell how a material issue is determined and those cases in which the evidence is insufficient in law and without any conflict in any material point; but the words "against the law" do not import a situation in which the court weighs conflicting evidence and merely finds a balance against the verdict and judgment. West's Ann.Code Civ.Proc. § 657.

See publication Words and Phrases, for other judicial constructions and definitions of "Against the Law".

4. Trial ⇐28(1)

Jury's viewing was itself evidence.

5. Appeal and Error ⇐301

Failure of trial court to specify insufficiency of evidence as ground for granting new trial forecloses appellate court from considering that as a ground. West's Ann. Code Civ.Proc. § 657.

6. Appeal and Error ⇐302(6)

Rule requiring order granting new trial to specify if insufficiency of evidence was ground upon which motion was granted is interpreted liberally, so that if language used is reasonably susceptible of being interpreted as evincing an intent to grant a new trial on account of insufficiency of evidence to sustain verdict, or if it may be fairly inferred from language used that such was ground upon which order was made, it will be held that order sufficiently complies with rule, and no particular words or language are required if nature of order itself is such that it can reasonably be construed as including insufficiency of evidence. West's Ann.Code Civ.Proc. § 657.

Miller, Nisson, Kogler & Wenke, Santa Ana, for appellant.

Jacobs, Jacobs, Hayden & Nelson, Santa Ana, for respondents.

SHEPARD, Justice.

This is an appeal by defendant from an order granting a new trial on the subject of damages alone. Plaintiff Retha Bray claimed whiplash injuries resultant from defendant's car striking the rear of the car in which she was riding. Defendant admitted liability but contested the amount of damages. A jury awarded damages in the amount of $5,000 to plaintiff against defendant. Plaintiff moved for a new trial on damages alone.

The notice of intention to move for a new trial gives as the grounds upon which said motion will be based:

"1. Misconduct of the jury.

"2. Inadequate damages, appearing to have been given under the influence of passion or prejudice.

"3. Insufficiency of the evidence to justify the verdict and judgment and that they are against the law.

"4. Error in law, occurring at the trial and excepted to by the party making the application."

The court granted the motion and the only order appearing of record reads as follows:

"Motion for new trial having been taken under advisement and the Court having studied same, the Court now grants motion for new trial on damages only."

There is no transcript of the argument on motion for a new trial.

[1] Defendant in his appeal contends that the order is erroneous in that there was no misconduct of the jury and there was no error in law occurring at the trial and excepted to by the party making the application. The ground listed as inadequate damages appearing to have been given under the influence of passion or prejudice is not a ground separately recognized by our statutes as independent of the ground of "insufficiency of the evidence to justify the verdict and judgment and that they are against the law."

Plaintiff offered no affidavit in support of the ground of alleged misconduct of the jury. In her brief she does not point out any instances of such misconduct. This court's examination of the record does not disclose to us any such misconduct.

The plaintiff has not pointed out any "error in law, occurring at the trial and excepted to by the party making the application", and we have been unable to find any such error of a prejudicial character in our perusal of the transcript of the proceedings.

The ground set forth as "inadequate damages, appearing to have been given under the influence of passion or prejudice" is not in accordance with the statute and may be reached only under the ground of "insufficiency of the evidence to justify the verdict and judgment and that they are against the law." Bakurjian v. Pugh, 4 Cal.App.2d 450, 452(3), 41 P.2d 175; Lambert v. Kamp, 101 Cal.App. 388, 390(2), 281 P. 690; Ice-Kist Packing Co. v. J. F. Sloan Co., 157 Cal.App.2d 695, 696(1), 321 P.2d 840.

[2] The ground "insufficiency of the evidence to justify the verdict and judgment and that they are against the law" in reality divides itself into two parts. First is the insufficiency that arises in the mind of the trial judge when he weighs the conflicting evidence and finds that which supports the verdict and judgment weighs, in his opinion, less than that which is opposed to it. Peri v. Culley, 119 Cal. App. 117, 120(3), 6 P.2d 86; Harper v. Superior Air Parts, Inc., 124 Cal.App.2d 91, 94(4), 268 P.2d 115.

[3] The second portion of this clause, that is, "that they are against the law", includes the kind of a situation wherein "the findings are so inconsistent, ambiguous, and uncertain that they are incapable of being reconciled and it is impossible to tell how a material issue is determined", and those cases in which "the evidence is 'insufficient in law,' and without conflict in any material point." But the words "against the law" do not import a situation in which the court weighs conflicting evidence and merely finds a balance against the judgment. Renfer v. Skaggs, 96 Cal. App.2d 380, 382(1) (2), 215 P.2d 487, 489; Hawkinson v. Oesdean, 61 Cal.App.2d 712, 716(2), 143 P.2d 967.

[4] Plaintiff contends that the verdict and judgment is against the law and apparently seeks to assert that there was no conflict in the evidence as to the amount of damage sustained. With this we are unable to agree. The plaintiff was in the court room and took the witness stand. She was herself physical evidence in the case. Her manner of testifying and the coherence and logic of her testimony were matters for the jury to weigh. There was a sharp conflict between plaintiff's and defendant's witnesses as to the weight of the blow struck on the rear of plaintiff's automobile. There was some divergence between plaintiff's witnesses on this same point. There

is no way for us to know what the jury thought about some of the missing figures on the payroll records testified to on behalf of plaintiff. The medical testimony presented an osteopathic physician for plaintiff and a neuro-surgeon specialist for defendant. Their background of training was somewhat different. The defense witness testified that he "thought she would be able to do the work—average work—of a woman her age." He also reported that she had said to him that she had been working in her husband's business. He was unable to report any objective finding of injury to the neck. He said what he did find was not consistent with whiplash injury. He said he believed there was some injury to the back but did not know the cause. The jury looked at the bumper which was claimed to have been damaged. Such viewing was itself evidence. Owsley v. Hamner, 36 Cal.2d 710, 720(7), 227 P.2d 263, 24 A.L.R.2d 112; Nunneley v. Edgar Hotel, 36 Cal.2d 493, 501(6), 225 P.2d 497. We have thus recited but a few of the numerous points in which the jurors' minds could have taken divergent views from a reasonable view of the evidence. In this kind of a situation we cannot say that the verdict and judgment were against the law.

[5] The last paragraph of section 657, Code of Civil Procedure, reads as follows:

> "When a new trial is granted, on all *or part* of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground. The court may direct a party to prepare the order." (Emphasis ours.)

Thus, the failure of the trial court to specify insufficiency of the evidence as a ground for granting a new trial forecloses the appellate court from considering that as a ground. Malloy v. Fong, 37 Cal.2d 356, 376(16), 232 P.2d 241; Verzola v. Russi, 135 Cal.App.2d 330, 331(1), 287 P.2d 166.

[6] This rule is interpreted liberally so that if the language used is reasonably susceptible of being interpreted as an intent to grant a new trial on account of the insufficiency of the evidence to sustain the verdict, or if it may fairly inferred from the language used that such was the ground upon which the order was made, it will be held that the order sufficiently complies with the portion of section 657 hereinbefore quoted. Thus, no particular words or language is required if the nature of the order itself is such that it can reasonably be construed as including insufficiency of the evidence. Legg v. Mutual Benefit Health and Accident of Omaha, 136 Cal.App.2d 887, 891, 289 P.2d 550, 290 P.2d 87; Van Ostrum v. State, 148 Cal.App.2d 1, 4(1), 306 P.2d 44.

Unfortunately for plaintiff's contentions, however, it will be seen from the procedural facts hereinbefore related that the motion in the case at bar was for a new trial on the ground of damages only and cited as the reasons therefor five different grounds, among which was insufficiency of the evidence. Thus, in the case at bar, there is no possible means by which this court can accurately say that the trial court in its purely generalized order did not base its order on misconduct of the jury or errors in law occurring at the trial, and excepted to by the party making the application. Nor can we tell whether or not the trial court felt that one of these matters had misled the jury and that for that reason the damages were too much, or too little. The decision may not be made in this court by mere surmise, and we cannot rewrite the portion of section 657, Code of Civil Procedure, that is above quoted.

The order granting a new trial is reversed.

MUSSELL, Acting P. J., and STONE, J. pro tem., concur.

168 Cal.App.2d 15

Willie LAND, Plaintiff and Appellant,

v.

Archie G. GREGORY, Defendant and Respondent.

Civ. 5791.

District Court of Appeal, Fourth District, California.

Feb. 13, 1959.

Occupant of automobile brought action against driver of pickup truck for injuries sustained by occupant of automobile in collision, which occurred when truck driver applied his brakes to slow down and truck swerved over onto wrong side of highway into path of oncoming automobile. The Superior Court of San Bernardino County, Archie D. Mitchell, J., entered judgment adverse to the occupant of the automobile, and she appealed. The District Court of Appeal, Mussell, Acting P. J., held that evidence sustained finding that collision was the result of an unavoidable accident in so far as truck driver was concerned.

Judgment affirmed.

1. Automobiles ⇐244(10, 40)

In action by occupant of automobile against driver of pickup truck for injuries sustained by occupant of automobile in collision which occurred when truck driver applied his brakes to slow down and truck swerved over onto wrong side of highway into path of oncoming automobile, evidence sustained trial court's finding that truck driver was not negligent and that collision was the result of unavoidable accident. West's Ann.Vehicle Code, § 525.

2. Appeal and Error ⇐989

Where finding of fact is attacked, on ground that there is not any substantial evidence to sustain it, power of reviewing court begins and ends with determination whether there is any substantial evidence, contradicted or uncontradicted, which will support finding of fact.

3. Appeal and Error ⇐931(1)

Where finding of fact is attacked, on ground that there is not any substantial evidence to sustain it, every intendment and presumption not contradicted by or inconsistent with record on appeal must be indulged in by reviewing court in favor of judgment.

4. Automobiles ⇐242(7)

In action by occupant of automobile against driver of pickup truck for injuries sustained by occupant of automobile in collision which occurred when truck driver applied his brakes to slow down and truck swerved over onto wrong side of highway into path of oncoming automobile, occupant of automobile, in order to be entitled to judgment based on negligence, was required to prove that truck driver's act or omission was the proximate cause of the collision.

5. Automobiles ⇐201(10)

The defense of "inevitable accident" in automobile collision case is nothing more than a denial by defendant of negligence, or contention that his negligence, if any, was not the proximate cause of the injury.

See publication Words and Phrases, for other judicial constructions and definitions of "Inevitable Accident".

6. Automobiles ⇐247

In action by occupant of automobile against driver of pickup truck for injuries sustained by occupant of automobile in collision which occurred when truck driver applied his brakes to slow down and truck swerved over onto wrong side of highway into path of oncoming automobile, trial court's finding that collision was directly and proximately the result of an unavoidable accident, in so far as truck driver was concerned, was not inconsistent with finding that at all times mentioned in complaint truck driver was driving and operating his pickup truck with due care and caution.

Lewis Garrett and Lionel Richman, Los Angeles, for appellant.

Thompson & Colegate and Robert D. Allen, Riverside, for respondent.

MUSSELL, Acting Presiding Justice.

This is an action for damages for personal injuries alleged to have been sustained by plaintiff when an automobile in which she was riding collided with a pickup truck being driven by the defendant Archie G. Gregory. The action was dismissed as to the fictitious defendants and trial was had by the court sitting without a jury. The court found, inter alia, that the defendant "did not operate his said pickup truck in a careless and/or negligent and/or reckless manner, but on the contrary, the Court finds that at all times mentioned in said Complaint defendant Archie G. Gregory was driving and operating his said pickup truck with due care and caution. The Court finds that the collision between the said pickup truck driven by defendant Archie G. Gregory and the automobile in which plaintiff was riding was directly and proximately the result of an unavoidable accident insofar as defendant Archie G. Gregory was concerned." The trial court rendered judgment that plaintiff take nothing from the defendant Archie G. Gregory by reason of her complaint and she appeals therefrom, contending that the evidence is insufficient to support the findings and judgment.

The collision occurred on May 23, 1955, near the city of Chino on Riverside Drive, an east-west two lane highway, a few feet east of its intersection with Palmetto Street, which runs north and south. The manner in which the accident occurred is essentially undisputed.

The defendant testified that he was driving his newly-purchased 1955 green one-half ton pickup truck on Riverside Drive, in a westerly direction and within his proper lane, at approximately 40 miles per hour; that a gray pickup truck passed him about a quarter of a mile from Palmetto Street, returned to its proper lane and was proceeding 300 to 400 feet ahead of him; that when he was within approximately 100–150 feet behind the gray pickup he saw the brake lights go on and the driver give a hand signal for a right turn; that he was "Just driving normally, she was going to make a right turn signal, so I applied the brakes to slow down, not definitely to stop then, only to let her have time to make the turn so that I could go on"; that at that time the left front wheel on his truck "seemed to swerve across the road"; that the steering wheel pulled on his hand and that his vehicle turned abruptly to the left; that "there was a screeching sound and I was almost off the road. I seen this car coming at that time then and he was applying the brakes heavily and then I heard the crash." Defendant's testimony in this respect was corroborated by Allen Basque, a passenger in defendant's truck, who testified that when the defendant applied his brakes his truck "seemed like it went to the left, jerked to the left." In this connection William Land, plaintiff's husband and driver of the 1955 Studebaker automobile involved in the collision, testified that he was traveling easterly in the eastbound lane of Riverside Drive at a speed of approximately 55 miles per hour; that he observed defendant's pickup truck traveling westerly within the westbound lane on Riverside Drive and that when his car was approximately 50 feet from the defendant's truck, "It came across rather abruptly." "He just angled right across my lane."

Defendant further testified that he purchased a new 1955 Chevrolet pickup truck on April 14, 1955; that about a week before the accident occurred he had the first thousand mile checkup; that he had had no other checkup or any mechanical difficulty and had had no trouble with the brakes, the steering wheel, or either of the front wheels; that just prior to the accident he did not notice anything abnormal in the manner in which his truck was operating; that he drove it home from the scene of the accident and had no difficulty with the brakes or other mechanical difficulty, and that when his truck was in the garage for repairs following the accident, the left front wheel was checked and "they didn't find one thing wrong."

An examination of the highway made immediately after the collision disclosed a single black skid mark, commencing just within the westbound lane and adjacent to

the center white line and apparently made by the left front tire of defendant's truck. The skid mark was a few feet in length and extended at a 45 degree angle toward the southwest into the eastbound lane. There were no other skid marks made by defendant's vehicle.

[1] The undisputed evidence herein is amply sufficient to support the trial court's finding of lack of negligence on the part of the defendant Archie G. Gregory. The question of his negligence was one of fact for the trial court. As is said in Ferrell v. Matranga, 92 Cal.App.2d 620, 622, 207 P.2d 654, 655:

> "The question of negligence is generally one of fact for the jury, and its finding thereon, if supported by substantial evidence, is binding upon a reviewing court. It is only when there is no substantial conflict as to the facts, and from the facts reasonable persons can draw only the inference that a defendant was negligent, that the reviewing court will disturb the verdict of the jury rendered in favor of a defendant."

[2–4] When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. Primm v. Primm, 46 Cal.2d 690, 693, 299 P.2d 231. Every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in in favor of the judgment herein. Walling v. Kimball, 17 Cal.2d 364, 373, 110 P.2d 58. To be entitled to a judgment based on negligence, plaintiff must prove that defendant's act or wrongful omission was the proximate cause of plaintiff's injury. The question of whether plaintiff sustained the burden of establishing that defendant's negligence was the cause in fact from which her injuries resulted was for the trier of facts, and since there is substantial evidence that the injury may be reasonably attributed to a cause for which no liability attached to defendant, it was proper to find against plaintiff on the issue of negligence. Hill v. Matthews Paint Co., 149 Cal.App. 2d 714, 723, 308 P.2d 865.

Appellant contends that the disputed facts clearly show that the defendant violated section 525 of the Vehicle Code in crossing the center line of the highway; that such conduct was the proximate cause of plaintiff's injuries; that driving on the wrong side of the highway was prima facie evidence of negligence; and that the burden was on defendant to prove excuse or justification of such prima facie negligence. However, the trial court found that defendant was not negligent and the issue of negligence being one of fact, we are not vested with jurisdiction to retry that issue. Zorich v. Petroff, 152 Cal.App.2d 806, 813, 313 P.2d 118; Bank of America National Trust & Savings Ass'n v. Beard, 137 Cal. App.2d 405, 407, 290 P.2d 87.

In Alarid v. Vanier, 50 Cal.2d 617, 327 P. 2d 897, it was held that the presumption of negligence which arises from the violation of a statute is rebuttable and may be overcome by evidence of justification or excuse; that the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; that in that case the evidence presented a question for the jury as to whether defendant took sufficient steps to meet his obligation to maintain his brakes in good condition. In the instant case the evidence is sufficient to support the finding that the defendant did what might be expected of a person of ordinary prudence, acting under similar circumstances.

[5, 6] The so-called defense of inevitable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury. Butigan v. Yellow Cab Co., 49 Cal.2d 652, 658–659, 320 P.2d 500. We are not here dealing with the question of the effect of instructions to a jury on "unavoidable accident" and, the finding of the trial court that the collision

was directly and proximately the result of an unavoidable accident insofar as the defendant Archie G. Gregory was concerned is not inconsistent with the finding that at all times mentioned in the complaint said defendant was driving and operating his pickup truck with due care and caution.

Judgment affirmed.

SHEPARD, J., and STONE, J. pro tem., concur.



Loucylle Adams BEHR et al., Plaintiffs and Appellants,

v.

COUNTY OF SANTA CRUZ, Defendant and Respondent.

William R. JUNK et al., Plaintiffs and Appellants,

v.

COUNTY OF SANTA CRUZ, Defendant and Respondent.*

No. 17747.

District Court of Appeal, First District, Division 1, California.

Feb. 9, 1959.

Rehearing Granted March 11, 1959.

Actions by property owners for damages from spread of a fire originating in a refuse dump owned and operated by county. The actions were consolidated for trial. The Superior Court, County of Santa Cruz, Curtiss E. Wetter, J., entered judgment for county and plaintiffs appealed. The District Court of Appeal, Bray, J., held, inter alia, that jury's finding that county was not liable for permitting a dangerous and defective condition due to accumulation of inflammable material to remain, or due to its failure to extinguish smoldering and burning brush, constituted a bar to recovery on cause of action based on nuisance, since a dangerous or defective condition of the dump itself was a necessary part of the nuisance charge, although such jury finding did not bar trial of issue of whether county was liable for negligence in operation of a scoopmobile with the result that fire in question was started.

Judgments on first, third and fourth counts affirmed, judgments on second counts reversed.

1. Appeal and Error ⇐23

The question of jurisdiction of the District Court of Appeal to consider an appeal may be raised at any time.

2. Judgment ⇐203

There can be only one judgment in any case between the same parties.

3. Appeal and Error ⇐66

Where judgments on verdicts in consolidated cases did not purport to embrace a final disposition of the entire cause but by express terms were confined only to first counts, and erroneously failed to include a recital with reference to disposition of second, third and fourth counts by orders granting nonsuits, although judgments were not final, in view of fact all pertinent documents were before the District Court of Appeal, in the interest of justice and to prevent unnecessary delay, District Court of Appeal would order that judgments be amended by adding thereto a paragraph dismissing the second, third and fourth causes of action based upon orders granting nonsuits thereto, and notice of appeal could therefore be properly treated as a notice of appeal from the judgments thus amended.

4. Municipal Corporations ⇐751(1, 3)

A municipality is liable for the negligence or wrongful act of an employed independent contractor where the particular property or operation remains under the control of the municipality, where there is a positive duty imposed by law upon the municipality of such character that it cannot be delegated, or where the operations or work being performed are inherently dangerous.

5. Witnesses ⇐252, 272

In action for damages arising out of the spread of a fire originating in a refuse

* Opinion vacated 342 P.2d 987.

dump owned and operated by a county, contract between county and state division of forestry was admissible on direct examination, not for purpose of relieving the county from any obligation, but for the purpose of showing what the county did in regard to the dump to suppress fire and to prevent creation of fire, and the contract was admissible on cross-examination to bring out all the circumstances bearing on fire-fighting equipment available to the dump.

6. Witnesses ⇐268(3, 6)

A cross-examiner may bring out all the facts within the knowledge of a witness involving things testified to on direct examination and which are material to a thorough understanding of the testimony, or to elicit any matter which may tend to overcome, qualify or explain the direct testimony.

7. Evidence ⇐318(4)

In actions against a county for damages to property from spread of a fire originating in a refuse dump owned and operated by county, an official report made by a state fire ranger who was not present at the fire, but whose report was based primarily upon statements made to him by other persons, was not admissible under the Uniform Business Records as Evidence Act, or as an entry in a public record made in the performance of duty of a public officer of the state, since statutes dealing with such records do not apply to reports based entirely upon hearsay. West's Ann.Code Civ.Proc. §§ 1920, 1953e–1953h.

8. Counties ⇐144

In actions by property owners to recover damages from spread of a fire originating in a refuse dump owned and operated by county, evidence, including testimony that burned-out area fanned out from a scoopmobile operated by the county at the dump, together with opinion of chief ranger that most logical source of origin of the fire was the spinning of a wheel of the stuck scoopmobile against a log, was sufficient to present a question for the jury as to whether negligent operation of the scoopmobile ignited a fire in the dump which spread to plaintiffs' properties and caused the damage complained of.

9. Appeal and Error ⇐927(3)

On appeal from a nonsuit District Court of Appeal must consider the evidence and the reasonable inferences therefrom most favorable to the plaintiffs and determine therefrom whether there is substantial evidence that would have supported a verdict in their favor.

10. Counties ⇐144

Fact that negligence of a county in other respects may have contributed to cause of a fire at a dump operated by the county did not lessen county's liability under the Vehicle Code if the negligent operation of a motor vehicle also proximately contributed to its cause, as an independent act of negligence, since independent acts of negligence concurring to cause an injury are actionable. West's Ann. Vehicle Code, § 400.

11. Automobiles ⇐187

Section of the Vehicle Code providing certain exemptions of publicly-owned motor vehicles engaged in work upon the surface of a highway did not apply to a county-controlled scoopmobile working on a terrace on a garbage dump owned by the county, since such terrace could not be considered a "highway" within such statute. West's Ann.Vehicle Code, §§ 400, 453(b).

See publication Words and Phrases, for other judicial constructions and definitions of "Highway".

12. Counties ⇐222

Complaints for damages to property from spread of a fire originating in a refuse dump owned and operated by county, based on allegations that fire was caused by negligence in the maintenance of the dump and in the operation of a scoopmobile by the county, were insufficient to sustain a cause of action for nuisance.

13. Municipal Corporations ⇐736, 742(2)

A public agency or municipality may be liable for the maintenance of a nuisance

even though it is exercising a governmental function in the activity at issue, and any person whose property is affected or whose personal enjoyment is lessened by a nuisance may maintain an action for damages.

14. Counties ⇐222

Complaints by property owners seeking damages from spread of a fire originating in a refuse dump owned and operated by defendant, in view of allegations that county maintained the dump in such manner as to be injurious to, and to cause an obstruction to, the free use of plaintiffs' property, and so as to interfere with comfortable enjoyment of plaintiffs' property, sufficiently alleged a cause of action based on nuisance.

15. Counties ⇐224

In actions by property owners for damages from spread of a fire originating in a refuse dump owned and operated by county, jury's finding that county was not liable for permitting a dangerous and defective condition due to accumulation of inflammable material to remain, or due to its failure to extinguish smoldering and burning brush, constituted a bar to recovery on a cause of action based on nuisance, since a dangerous or defective condition of the dump itself was a necessary part of nuisance charge, although such jury finding did not bar trial of issue of whether county was liable for negligence in operation of a scoopmobile with the result that fire in question was started.

Lucas, Wyckoff & Miller, Santa Cruz, for appellants.

Wyckoff, Parker, Boyle & Pope, John L. McCarthy, Grunsky & Pybrum, Watsonville, for respondent.

BRAY, Justice.

Two actions by a number of property owners seeking damages to real and personal property from spread of a fire originating in a refuse dump owned and operated by defendant county were consolidated for trial. The two complaints are identical in their allegations except for parties plaintiff, and for the particular properties damaged, and are based upon three theories of recovery. The first count in each complaint is based on the Public Liability Act (Gov.Code § 53051 et seq.) and alleges dangerous and defective conditions. The second count alleges negligent operation by a county employee of a motor vehicle (self-propelled loader) which ignited a fire in the dump. The third count alleges maintenance of a nuisance. At the close of plaintiffs' evidence, on the court's suggestion that the third count did not properly allege nuisance, plaintiffs amended their complaints to set up fourth counts alleging nuisance. The court granted nonsuits as to the last three counts. The jury rendered verdicts in favor of defendant on the first counts. Plaintiffs appeal from the judgments thereon and claim to appeal from the orders granting nonsuits.

Questions Presented.

1. Did plaintiffs effectively appeal from the orders granting nonsuits? Corollary to this question is—Is there a final judgment in the action?

2. Alleged error in admission and exclusion of evidence.

3. Was the granting of the nonsuits erroneous? Is the question moot?

1. Appeal.

July 24, 1956, the minute orders granting the nonsuits were entered.

July 27, the jury verdicts were rendered.

August 3, judgments on the jury verdicts were entered.

September 20, notice of appeal was filed.[1]

[1–3] The only formal judgments entered show on their faces that they apply only to the verdicts, and not to the grant-

1. Plaintiffs moved for a new trial, thereby extending the time for appeal. The notice of appeal was timely, whether from the entry of the orders granting nonsuit or from the judgments on the verdicts.

ing of nonsuits. The notice of appeal refers only to the judgments entered August 3 and does not refer to the minute order of July 24. Thus, on the face of the record there is no appeal attempted from the orders granting nonsuits.[2] However, that fact under the circumstances here is not conclusive of the question of this court's jurisdiction to consider an appeal from the nonsuit orders. We first have to determine whether there has been a final judgment entered in the case. We are satisfied that there has not. There can be only one judgment in any case between the same parties. Gombos v. Ashe, 158 Cal.App. 2d 517, 520, 322 P.2d 933. The situation here is somewhat similar to that in the Gombos case. There the trial court sustained a demurrer to the third cause of action and entered a judgment of dismissal thereon. The case proceeded to trial on the first and second causes of action and the plaintiffs recovered judgment thereon. That judgment was satisfied of record. The defendant then moved for a dismissal of the appeal filed from the judgment of dismissal on the ground that such judgment was not a final one.[3] After pointing out that, as here, the action was attempted to be disposed of piecemeal, "that a single object, although stated in several counts, was sought to be attained by the action, and that this single and unseverable object was arbitrarily attempted to be split up as the basis for two distinct judgments" (158 Cal.App.2d at page 521, 322 P.2d at page 935), the court held that the judgment on the first two causes of action was not a final judgment and therefore not appealable. So here, the judgments on the verdicts did not purport to embrace a final disposition of the entire cause. By express terms they were confined to only the first counts, and erroneously failed to include a recital with reference to the disposition of the second, third and fourth counts. In the Gombos case this court held that the appeal from the judgment on the third cause of action was premature, said judgment not being a final one, and that the judgment of dismissal on the first two counts was not a complete judgment because it did not, as it should have done, dispose of the third count. We then pointed out that the appellants were entitled to a determination by the appellate court of the validity of the judgment on the third count and that this could be accomplished by dismissing the appeal with instructions to the trial court to amend the interlocutory judgment on the first two causes of action by including a disposition of the third cause of action. Then the appellants could appeal from the portion of the amended judgment disposing of the third cause of action. That would have required rebriefing of the very points that had already been briefed. Therefore, in the interests of justice, we ordered the judgment to be amended by adding a dismissal of the third cause of action. We then treated the notice of appeal from the premature judgment of dismissal as a notice of appeal from the judgment as amended. So here, while we could order the trial court to make the necessary amendment to the last judgments as entered, such a method would require rebriefing of all the points now fully briefed. As all the pertinent documents are before this court, and in the interests of justice and to prevent unnecessary delay, we order that the judgments of August 3, 1956, be and they are amended by adding thereto a paragraph dismissing the second, third and fourth causes of action based upon the orders granting nonsuits thereto.

This having been accomplished, the notice of appeal filed September 20 may be

2. It is interesting to note that both parties assumed in their briefs that there was such an appeal and that this question was not raised until oral argument. Of course, the question of jurisdiction of this court to consider an appeal may be raised at any time.

3. In Costa v. Regents of University of Cal., 103 Cal.App.2d 491, 229 P.2d 867, it was held that a minute order granting a nonsuit is in itself a judgment of dismissal and ordinarily as such is an appealable order.

properly treated as a notice of appeal from the judgments as thus amended, and we do so treat it. This brings us to the appeal on the merits.

2. Admission and Exclusion of Evidence.

Plaintiffs make no claim that the evidence does not support the verdicts against them. Their only contention for reversal on the first cause of action is that the court erred in the admission and exclusion of certain evidence.

The Fire Control Agreement.

The court over objection admitted a contract between defendant county and the State Division of Forestry, which provided that the State Forest Ranger should have charge of the work of fire prevention and suppression in certain areas of the county, which included the dump site. It also provided for fire stations, lookouts, personnel, facilities and equipment. The court informed the jury at some length that the contract was not admitted for the purpose of relieving the county from any obligation but merely for the purpose of showing what the county did in regard to the dump to suppress fire and to prevent the creation of fire and "If * * * it be contended," as it was, "that nothing was done to meet that obligation, then it becomes material to see what the county did * * * Whether that is sufficient or not is for you to determine * * *".

[4] Certainly the contract could not have been admissible to show that the defendant had either delegated its responsibility or was not the one primarily responsible for fire hazards in the dump. Assuming a duty, the foregoing would follow from the rule that a municipality is liable for the negligence or wrongful act of an employed independent contractor where the particular property or operation remains under the control of the municipality, where there is a positive duty imposed by law upon the municipality of such character that it cannot be delegated, or where the operations or work being performed are inherently dangerous. See 18 McQuillin, Municipal Corporations (3rd ed.) § 53.76, pp. 343–352; Mulder v. City of Los Angeles, 1930, 110 Cal.App. 663, 668, 294 P. 485, 487, "The city was not authorized to abdicate its powers or surrender to a private person its duty to exercise proper supervision of the work which it permitted to be done." But the contract was not admitted for that purpose and the jury was admonished in that regard.

[5, 6] The contract was admitted "only and solely for the purpose of showing what it did, not that that was sufficient nor that that is what is should have done, but it is only a circumstance indicating the actual situation from which you may draw the proper conclusion from the evidence and the law." This seems proper. For example, it showed that fire-fighting equipment and personnel were made available for the dump, in contrast to the evidence that the dump had no real fire-fighting equipment except an ax and a shovel.

The contract was admissible on cross-examination to bring out all the circumstances bearing on fire-fighting equipment available to the dump. A cross-examiner may bring out all the facts within the knowledge of a witness involving things testified to on direct and which are material to a thorough understanding of the testimony, or to elicit any matter which may tend to overcome, qualify or explain the direct testimony. People v. Dotson, 1956, 46 Cal.2d 891, 898, 299 P.2d 875; People v. Whitehead, 1952, 113 Cal.App.2d 43, 50, 247 P.2d 717.

The court properly admitted the agreement for the limited purpose expressed by it.

The Official Fire Report.

[7] One of the duties of the Fire Ranger following a fire was to investigate and make an official report concerning its cause. The court refused to admit the official report made by the ranger of his investigation of the fire in question. Admittedly he was not present at the fire. The report was based primarily upon statements made to him by other persons.

Plaintiffs contend that the report was admissible under section 1920, Code of Civil Procedure, "Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein," or under the Uniform Business Records as Evidence Act, sections 1953e–1953h, Code of Civil Procedure. The report is of a similar type to an accident report made by police officers, concerning which the court in Hoel v. City of Los Angeles, 1955, 136 Cal.App.2d 295, 309–310, 288 P.2d 989, 997, said: "Not all official reports and not all business records are made competent by the cited sections of the code. Essentially accident reports, especially those compiled by police at the scene of an accident—based on statements of participants, bystanders, measurements, deductions and conclusions of their own,—fail to qualify as admissible official records or business records. See Needle v. New York Rys. Corp., 227 App.Div. 276, 237 N.Y.S. 547, 549; Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517, 518. That accident reports are not admissible under statutes such as our Uniform Business Records as Evidence Act Code Civ.Proc., §§ 1953e–1953h, was held in Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, [144 A.L.R. 719]. In McGowan v. City of Los Angeles, 100 Cal.App.2d 386, 392, 223 P.2d 862, 866, 21 A.L.R.2d 1206, this court said: 'The statute does not change the rules of competency or relevancy with respect to recorded facts. It does not make that proof which is not proof. It merely provides a method of proof of an *admissible* "act, condition or event." It does not make the record admissible when oral testimony of the same facts would be inadmissible.' This language was repeated in Reisman v. Los Angeles City School Dist., 123 Cal. App.2d 493, 506, 267 P.2d 36, 45, in holding that certain reports prepared by public officials were inadmissible under section 1953f; and this was followed by application of the same principle to so-called public records."

In Harrigan v. Chaperon, 118 Cal.App. 2d 167, 168, 257 P.2d 716, a report of a city fire inspector who was not present at the fire stating the cause of the fire was admitted in evidence without objection. It was the only purported evidence of the cause of the fire. The reviewing court held that as it was based entirely upon hearsay and therefore that section 1920, Code of Civil Procedure, was not applicable, it could not be considered evidence to support the court's finding of the cause of the fire.

Here, had the fire ranger been testifying orally, his testimony, being based entirely upon hearsay, would not have been admissible.[4] Merely placing the same material in a written report could not replace the rules of evidence. The above mentioned code sections could never have been intended to apply to reports based entirely upon hearsay.

The court acted properly in excluding the report.

3. The Nonsuits.

[8] The second counts alleged that defendant county so negligently operated at the dump a motor vehicle, a self-propelled loader, as to ignite a fire in the dump which spread to plaintiffs' properties and caused the damage complained of. Section 400, Vehicle Code, provides that a county is responsible to every person who sustains damage by injury to person or property "as the result of the negligent operation of any said motor vehicle by an * * * employee * * * when acting within the scope of his * * * employment * * *"

About 1 p. m. July 29, 1954, fire broke out in the rubbish dump owned, maintained and operated in the Santa Cruz mountains by defendant county. The general area is forested, in which there is grass and weed

4. We are not dealing with expert testimony based upon assumed questions of fact. Such testimony of the Chief Ranger was admitted.

cover. The State Division of Forestry classifies the area as a Number One Fire Zone. In the opinion of the Chief Ranger it is not a safe place for the operation of an open rubbish disposal dump. The day of the fire was a high fire hazard one. The dump had two terraces, the upper being used by local garbarge collectors and the lower by defendant and the public for disposal of all kinds of materials. The dumped material was thrown on top of the ground or over the bank. The material included wet garbage, brush, rags, bottles, cardboard, paper, shingles, wood and tree trimmings. Some of these materials created sources of ignition (bottles acting as magnifying glass) within the dump itself. Brush grew within the dump area itself and within 35 to 40 feet of a pile of brush and tree trimmings considered by one witness to be the place of origin of the fire. Prior to this fire there had been numerous fires in the dump, one of which almost escaped beyond the dump's confines. Fire in the dump was never actually out; the materials were smoldering almost constantly.

The pile of brush and tree trimmings deposited at the westerly end of the lower terrace of the dump projected onto the terrace. The caretaker had requested the defendant's road foreman in the area to send up a piece of equipment to push this material and other debris over the bank. In compliance with this request a county employee came to the dump with a scoopmobile to do the work. A scoopmobile or skiploader is a three-wheeled motor vehicle with two drive wheels in front and a steering wheel in the rear. It had a bucket on an arm which operated in front of the vehicle to pick up and drop materials and was equipped with rubber pneumatic tires. The front axle had a differential so that one of the drive wheels might spin while the other remained stationary. It was not equipped with a spark arrester but it had a muffler, which is considered a sort of arrester. The soil at the dump was sandy and a vehicle of this type is not a proper one for operation in that type of soil because of the risk of its getting stuck in the soil.

On the day in question, the scoopmobile went over the bank and became stuck as it was carrying brush off the terrace into the dump proper. Its front wheels were over the bank and resting upon brush and tree limbs, about four feet below the edge of the terrace, and its rear wheel was up on the bank, with its muffler and exhaust near the surface of the edge of the terrace. At the time the fire broke out the operator was engaged in attempting to extricate it which caused its wheels to spin. The burned out vehicle was found in the same position after the fire.

After the fire it was noted that the burned out area in the dump fanned out in a southerly direction from the scoopmobile, with the vehicle located at the apex of the fan. At the start of the fire the wind was blowing out of the north. Normally, the point of origin of a fire is at the apex of the burned out area. It was also found that the left front wheel of the scoopmobile rested on a partially burned log approximately 8 to 12 inches in diameter, having a rounded-out depression at its point of contact with the wheel.

There is no testimony by any of the witnesses who were at the dump at the time of the fire as to the exact location of its start or the source of ignition. However, prior thereto one witness had seen smoke, but no flame, about 10 feet below the rim of the dump, and another saw smoldering at the bottom of the dump in the general trash located there. The Chief Ranger for the Division of Forestry for the area gave expert testimony. He testified that he had supervised and participated in the investigation of the source of ignition, discussed it with his assistant, and visited the dump after the fire had been brought under control, probably again the next day, and again several days after the discussion with his assistant. Based on the investigation and his personal inspection of the ground which disclosed that the fire had fanned out from the apex where the scoopmobile was located, that the scoopmobile was over the bank,

that the partially burned out log was under the left front wheel of the scoopmobile, it was his opinion that the most logical source of ignition was the friction caused by spinning the wheel in attempting to extricate the vehicle. In arriving at this conclusion he eliminated three other possible causes as less logical. They are: (1) Oil, rags, wet garbage under the cover of the dump which could have ignited by spontaneous combustion. (2) Possible prior chemical treatment of the debris upon which the scoopmobile was working, which could have caused ignition by "the rig pressure." (3) The exhaust from the scoopmobile igniting material that was possibly under the scoopmobile.

The fact that the burned out area fanned out from the scoopmobile and the opinion of the Chief Ranger that the most logical source of origin was the spinning of the wheels against the log, plus the photographs showing the fan-like burned area and the testimony of the witness Gum to the effect of a spinning wheel, were sufficient evidence that the fire might have started from the scoopmobile to require that the issues under the second count be submitted to the jury.

[9] The ranger's opinion was based upon his personal investigation. Applicable here is: "In this case the experts set forth in detail the facts and reasons on which they based their opinions. Their conclusion that the fire was caused by careless smoking was reached by a process of elimination of other possible causes." George v. Bekins Van & Storage Co., 1949, 33 Cal.2d 834, 844, 205 P.2d 1037, 1044. Such evidence would support a finding in plaintiffs' favor on these issues had one been made. The weight to be attached to the opinion and whether it was contradicted by other evidence is not material here since on an appeal from a nonsuit we must consider the evidence and the reasonable inferences therefrom most favorable to the plaintiffs and determine therefrom whether there is substantial evidence that would have supported a verdict in their favor.

[10] Defendant contends that the second counts fail because the Public Liability Act and not section 400, Vehicle Code, applies. By rather involved reasoning it contends that because the counts apparently alleged a combination of the manner in which the dump itself was maintained with the negligent operation of the scoopmobile no recovery could be had under section 400. The scoopmobile was in " 'operation' " as it was in a " 'state of being at work' " and was " 'in the active exercise of some specific function' by performing work or producing effects at the time and place the injury is inflicted." Chilcote v. San Bernardino County, 1933, 218 Cal. 444, 445, 23 P.2d 748, 749. The fact that negligence of the county in other respects may have contributed to the cause of the fire does not lessen the county's liability under section 400 if the negligent operation of a motor vehicle also proximately contributed to its causes as an independent act of negligence. Independent acts of negligence concurring to cause an injury are actionable. In Behling v. County of Los Angeles, 139 Cal.App.2d 684, 294 P.2d 534, one of the county's bulldozers was inoperative because its blade was on the ground and could not be lifted by the bulldozer itself. Another of the county's bulldozers was moved to a position where its blade was butted against the broken blade so that the second bulldozer could lift the broken blade to enable the inoperative bulldozer to be towed away. It was alleged that the operative bulldozer was so negligently operated in lifting the broken blade as to cause it to fall on the plaintiff's hand. It was held that this was " 'the negligent operation of any said motor vehicle' " as the phrase is used in section 400. 139 Cal.App. 2d at page 685, 294 P.2d at page 535. If defendant's contention that the negligent operation of the scoopmobile in our case is immaterial in determining liability then in the Behling case there could have been no cause of action stated for the negligent operation of the operative bulldozer for the reason that the defective condition of the other bulldozer was also involved. Yet there the cause of action which the court upheld was based upon section 400, Vehicle Code.

Chilcote v. San Bernardino County, supra, 218 Cal. 444, 23 P.2d 748, cited by defendant for the proposition that recovery, if any, could be had only under the second counts under the Public Liability Law (the jury verdict under the first counts determined that there was no liability under that law) is not in point. There the complaint charged a defective and dangerous condition of the highway due to a large pool of oil left standing on the highway which caused the plaintiff's motorcycle to overturn. "Supplementing these facts are allegations that the condition of the highway was due to the negligent operation of motor oil trucks by servants of said county * * *" 218 Cal. at page 446, 23 P.2d at page 749. This referred to the deposit of oil on the highway by such trucks. The court in holding that the latter fact was not the type of "operation" of a motor vehicle contemplated by section 1714½, Civil Code, the predecessor of section 400, Vehicle Code, referred to the Public Liability Law and pointed out that it would cover the oil negligently permitted on the highway, but that section 1714½, Civil Code, was intended to apply only to motor vehicles actually performing work on the highway. The court at no time held, or even discussed, the question of the effect of concurrent acts of negligence.

[11] Defendant contends that section 453, subdivision (b), of the Vehicle Code, providing certain exemptions of publicly owned motor vehicles "engaged in work upon the surface of a highway" applies. Here the scoopmobile was engaged in working on a part of the dump and not in work "upon the surface of a highway." In Behling v. County of Los Angeles, supra, 139 Cal.App.2d 684, 294 P.2d 534, the accident occurred on a dirt roadway, ungraded and unpaved, in a forest reserve, not open to the public travel and blocked off by means of a chain and lock. The court held that this was not a "highway" within the meaning of the Vehicle Code. The county road commissioner testified that the terrace where the scoopmobile was working was not a part of the county road system. By no stretch of the imagination can a terrace on a garbage dump be considered a "highway."

Third and Fourth Counts. Nuisance.

[12] As pointed out by the trial court, the third counts did not state causes of action for nuisance as there are no allegations of nuisance in it. They merely allege that the fire was caused by negligence in the maintenance of the dump and in the operation of the scoopmobile. Therefore, the nonsuit on the ground that the counts did not allege nuisance was properly granted. Plaintiffs followed the suggestion of the court and filed fourth counts in which nuisance is properly alleged. While perhaps these counts allege too much in that they incorporate the allegations of the second counts, they do allege that the defendant maintained the dump in such manner as to be injurious to, and to cause an obstruction to the free use of the plaintiffs' property and so as to interfere with the comfortable enjoyment of life and property.

[13, 14] Defendant's first contention is that inasmuch as the maintenance and operation of a refuse disposal dump by the county is a governmental function maintained under authority of the statute[5] "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Civ.Code § 3482. In Ambrosini v. Alisal Sanitary Dist., 154 Cal.App.2d 720, 727, 317 P.2d 33, it was held that that code section is not applicable to a defectively constructed sewer outfall line. The rule in California is that a public agency or municipality may be liable for the maintenance of a nuisance even though it is exercising a governmental function in the activity at issue, and any person whose property is affected or whose personal enjoyment is lessened by a nui-

5. Section 25820, Government Code, provides that the board of supervisors of a county may acquire, maintain and operate dump sites and other disposal plants for the disposal of combustible or noncombustible garbage or rubbish or both.

sance may maintain an action for damages. Phillips v. City of Pasadena, 27 Cal.2d 104, 106, 162 P.2d 625. In Hassell v. San Francisco, 11 Cal.2d 168, 171, 78 P.2d 1021, it is stated that authority given a municipality by charter to have exclusive control and management of parks, including the right to erect and superintend the erection of buildings therein, does not give it the right to exercise the power in such a manner as to create a nuisance.

The fourth counts of the complaints, therefore, pleaded causes of action.

Moot?

[15] Defendant contends that the finding of the jury on the first causes of action makes the second and fourth causes moot. This is not true as to the second counts. The first counts charge, under the Public Liability Law, a dangerous and defective condition due to the accumulation of inflammable material, the habitual burning of brush at all hours of the day and night, failure to extinguish such smoldering and burning brush. The jury found against plaintiffs on this issue. While evidence of the negligent operation of the scoopmobile was admitted, the instructions to the jury were not based upon the theory of that negligence but on the theory of dangerous or defective condition. Hence the jury's finding could in no way be a bar to a subsequent determination of the question of the negligent operation of the scoopmobile. In a trial of the issues raised by the second count, the question will be not was a dangerous or defective condition of the dump a proximate cause of the fire, but the negligent operation of the scoopmobile.

As to the fourth causes of action a different situation arises. A dangerous or defective condition of the dump itself is a necessary part of the nuisance charge. Without it there could be no nuisance. To determine that would be the retrial of a matter of which the jury has already judged. Plaintiffs contend that the jury verdicts under the first counts might have been based, not upon a finding that there was no dangerous condition of the dump, but on a finding that one or more of three requirements of recovery under the Public Liability Law were not proved, to wit, notice of the condition, reasonable time to remedy it, and filing of the required claim against the county, none of which are requirements to prove a nuisance. However, under the evidence in this case the jury could not have based its finding on those grounds. The evidence was conclusive that the county knew of the condition of the dump for more than a reasonable time to remedy it if the condition needed remedying. No contention was made that the claim was not properly filed. In Hassell v. San Francisco, supra, 11 Cal.2d 168, 171, 78 P.2d 1021, 1022, the court said: "'A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury.' 46 Cor.Jur. p. 674." Under that rule the grant of power to the county to maintain and operate a refuse dump including the burning of refuse thereon, protects the county from liability for the ordinary operation of the dump. Necessarily implied in the grant of power under section 25820 is the right to operate the dump in the usual and customary manner in which similar dumps are operated. However, a dump may not be operated in a negligent manner nor in such manner as to constitute a nuisance. See Ambrosini v. Alisal Sanitary Dist., supra, 154 Cal.App.2d 720, 726, 317 P.2d 33; 63 C.J.S. Municipal Corporations § 770, pp. 69–70. But in this case there is a jury finding that the dump was not operated in a negligent manner (the only basis for nuisance charged) and that the acts upon which plaintiffs base their claim of nuisance did not occur. The finding of the jury on the factual issues under the

first causes of action is determinative of the same issues under the fourth causes even though different legal conclusions might be drawn had the jury found the other way upon them.

Under the pleadings, the evidence and the findings of the jury in this case, the charges in the fourth causes become moot.

The judgments on the first, third and fourth counts are affirmed. The judgments on the second counts are reversed. Each party will bear its own costs.

PETERS, P. J., and FRED B. WOOD, J., concur.



168 Cal.App.2d 67

Herbert H. KERTZ, Plaintiff and Cross-Defendant and Respondent,

v.

Sam M. PARIS and Helen L. Paris, Defendants and Cross-Complainants, and Appellants.

Civ. 18157.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1959.

Action to foreclose chattel mortgage on former tenants' business fixtures and equipment left on leased premises when mortgagors in default in payment of rent quit premises pursuant to written notice. The mortgagors filed cross complaint for conversion of mortgaged chattels. The Superior Court, San Mateo County, Louis B. Dematteis, J., rendered judgment on a verdict for mortgagee on question of conversion, and the mortgagors appealed. The District Court of Appeal, Kaufman, P. J., held that use of mortgaged chattels and sale of part of them by mortgagee's new tenants did not constitute conversion by mortgagee as a matter of law and that the evidence supported verdict for mortgagee on question of conversion.

Judgment affirmed.

1. Chattel Mortgages ⇐169

Where original possession is lawfully obtained, or there is an acknowledgment of mortgagor's interest, dominion exercised by mortgagee is not unlawful and hence not a conversion. West's Ann.Civ.Code, § 2910.

2. Landlord and Tenant ⇐161(1)

Lessor is not liable in damages for alleged conversion of lessee's property, where it appears that the property remains on the premises and lessee has not been refused possession thereof. West's Ann. Civ.Code, § 2910.

3. Chattel Mortgages ⇐166

A chattel mortgagee in possession after default may act to protect his rights under lien.

4. Trover and Conversion ⇐1

An act which is done to preserve and protect property in order that it may remain subject to lien, and which is equally beneficial to those having subordinate rights, and not in antagonism thereto, is not a wrongful "conversion" within meaning of Civil Code. West's Ann.Civ.Code, § 2910.

See publication Words and Phrases, for other judicial constructions and definitions of "Conversion".

5. Landlord and Tenant ⇐161(3)

Where tenants in default in payment of rent quit leased premises pursuant to written notice, leaving therein business fixtures and equipment subject to mortgage to landlord, and made no demand on mortgagee for return of mortgaged chattels or that mortgagee's new tenants quit using them, and mortgagee never claimed to own such chattels but advised new tenants that former tenants were owners thereof, use of such chattels by mortgagee's new tenants did not constitute "conversion" by mortgagee as a matter of law. West's Ann.Civ.Code, § 2910.

6. Landlord and Tenant ⇐161(3)

In action against landlord for conversion of former tenants' business fixtures and equipment subject to mortgage to landlord, evidence supported verdict for mortgagee on question of whether use of mortgaged chattels by mortgagee's new tenants constituted conversion thereof by mortgagee. West's Ann.Civ.Code, § 2910.

7. Landlord and Tenant ⇐195(2)

Where tenants in default in payment of rent under 10-year lease quit leased premises pursuant to written notice, landlord was entitled to relet premises, and fact that he did so inured to the benefit of former tenants, who would otherwise remain liable for rent under lease.

8. Landlord and Tenant ⇐161(1)

Where tenants in default in payment of rent quit leased premises pursuant to written notice, leaving therein business fixtures and equipment subject to mortgage to landlord, sale of portion of mortgaged chattels by mortgagee's new tenants did not constitute "conversion" by mortgagee as a matter of law, in absence of evidence that mortgagee authorized or participated in sale. West's Ann.Civ.Code, § 2910.

9. Landlord and Tenant ⇐161(3)

Sale by mortgagee's new tenants of portion of former tenants' mortgaged business equipment, which had not been used for several months, did not constitute conversion of other chattels subject to mortgage as a matter of law. West's Ann.Civ.Code, § 2910.

10. Landlord and Tenant ⇐161(3)

In action for conversion of former tenants' business fixtures and equipment subject to mortgage to landlord, evidence supported verdict for mortgagee on question of whether sale by mortgagee's new tenants of portion of mortgaged chattels which had not been used for several months constituted conversion by mortgagee. West's Ann.Civ.Code, § 2910.

11. Trial ⇐260(1)

Where trial court fully and fairly instructed jury, refusal to give requested instructions was not error.

Robert O. Wilhelm, Redwood City, for appellants.

Ropers & Majeski, Robert F. Kane, Redwood City, Stanley W. Blackfield, Hayward, for respondent.

KAUFMAN, Presiding Justice.

Respondent Kertz instituted this action to foreclose a chattel mortgage on appellants' property. Appellants filed a cross-complaint, which admitted a debt of $10,625.79 owed to the respondent, alleged that respondent committed an act of conversion by transferring property of the appellants of the reasonable value of $14,500, without sale or permission, and asked for damages in the amount of $3,874.21, the difference between the debt and the reasonable value of the property.

This appeal is taken from a judgment rendered on a jury verdict in the action for conversion. The contentions on appeal are that the evidence established a conversion of appellants' chattels by the respondent as a matter of law and that appellants were seriously prejudiced by the failure of the trial court to give certain requested instructions to the jury.

The facts which are not in dispute are as follows: From 1953 until 1956, appellants occupied respondent's building in Redwood City under a lease for a term of 10 years at a monthly rental of $300. Appellants operated a cleaning business and owned all of the fixtures, personal property, and equipment used in the operation of the business. On August 10, 1954, appellants executed a promissory note to the respondent. On the same date, appellants executed a chattel mortgage, securing the note and the lease on the building. The respondent recorded the mortgage. On October 1, 1956, appellants quit the premises pursuant to a written three-day notice to pay rent or quit, personally served on them. The personal property belonging to appellants and listed on the chattel mortgage remained in the building.

In October 1956, two new tenants, McLennon and Rosenstack went into possession of respondent's building as tenants

from month to month. They paid no rent until February 1957, when they began to pay a monthly rental of $300. McLennon and Rosenstack used appellants' chattels and kept them in repair. Appellants made no demand on respondent for return of the chattels, and did not demand that McLennon and Rosenstack cease using the chattels. Respondent never claimed to own appellants' property, but advised his new tenants that appellants were the owners of the chattels, and instituted this action to foreclose the chattel mortgage.

In October 1956, McLennon and Rosenstack personally sold and disposed of a pressing machine and an extractor upon being ordered to do so by the fire marshal. These items were sold for junk and the proceeds of the sale went to McLennon and Rosenstack. Appellant Sam Paris testified that the extractor and pressing machine were in storage on the premises and had not been a part of the active laundry plant for at least 18 to 22 months.

[1, 2] The first question is whether the use of appellants' chattels by respondent's tenants constituted conversion as a matter of law. After appellants' default, respondent, by proper steps, acquired the right of possession of the leased premises, in accordance with the terms of the lease. As pointed out above, respondent advised his new tenants that appellants were the owners of the chattels in the building. Where the original possession is lawfully obtained, or there is an acknowledgment of the mortgagor's interest, the dominion exercised by the mortgagee is not unlawful and thus not a conversion. Home v. Kramer, 7 Cal.2d 361, 60 P.2d 854; Bush v. Lane, 139 Cal.App.2d 376, 293 P.2d 465. Damages against a lessor for the alleged conversion of the lessee's property are properly refused where it appears that the property remains on the premises and lessee has not been refused its possession. Pehau v. Stewart, 112 Cal.App.2d 90, 245 P.2d 692.

Both appellants' witness and respondent's witness testified that it was better to keep the equipment in operation than to permit it to remain idle. The evidence indicated that as a result of the McLennon and Rosenstack's care and repair of the appellants' chattels, they were in 25 to 50 per cent better condition at the time of the trial than they were after appellants left them.

[3–6] A chattel mortgagee in possession after default may act to protect his rights under the lien. An act done to preserve and protect property in order that it may remain subject to the lien, and which is equally beneficial to those having subordinate rights, and not in antagonism, thereto, is not a wrongful conversion within the meaning of Civil Code section 2910. Sutton v. Stephan, 101 Cal. 545, 36 P. 106; Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243. It follows therefore that the use of appellants' chattels by respondent's tenants McLennon and Rosenstack was not conversion by respondent as a matter of law, and that the evidence amply supports the verdict on this issue.

[7] The second question is whether the sale of the extractor and pressing machine by respondent's tenants constitutes conversion by the respondent as a matter of law. Respondent testified that he did not sell these items or authorize their sale. The testimony of McLennon and Rosenstack is to the same effect. There is no evidence to the contrary. Respondent had the right to relet the premises, and the fact that he did so, inures to the benefit of the appellants who would otherwise remain liable for the rent due.

[8–10] In a very similar case, it has been held that a lessor who secures possession of the leased premises upon default by the lessee in payment of rent, and transfers possession of the premises to one who takes and holds with notice and knowledge of lessee's rights in the furnishings, is not liable to the lessee for a tortious conversion of the furnishings by the lessee, in the absence of a showing that the lessor participated in the conversion. Warwick v. Macchiaroli, 96 Cal. App. 133, 273 P. 1109. Nor can it be

said as a matter of law that the sale of the extractor and pressing machine which had been lying idle constituted conversion of the remainder of the chattels by the respondent. Horn v. Klatt, 65 Cal.App.2d 510, 151 P.2d 149. We can only conclude therefore that the result reached by the jury was the correct one and amply supported by the evidence.

[11] It is not necessary to consider in detail appellants' various contentions relating to the court's refusal to give certain requested instructions to the jury. After a careful perusal of all of the instructions given, we conclude that the court fully and fairly instructed the jury.

In view of the foregoing the judgment must be affirmed.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.



168 Cal.App.2d 1

Angela RUBALCABA, Plaintiff and Appellant,

v.

Edward F. SWEENEY, Jr., Defendant and Respondent.

Civ. 9440.

District Court of Appeal, Third District, California.

Feb. 13, 1959.

Hearing Denied April 8, 1959.

Action for personal injuries received when plaintiff was struck by defendant's automobile at night on city street. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment for defendant and plaintiff appealed. The Third District Court of Appeal, Van Dyke, P. J., held that since there was sufficient evidence from which jury could have concluded that plaintiff was crossing street when hit, it was proper for court to instruct upon plaintiff's duties as a pedestrian crossing street, but instruction to effect that failure to yield to one whom the law has given right of way is negligence unless circumstances resulting from cause beyond control of driver or pedestrian are such as to excuse and justify him in such failure, was prejudicially erroneous in placing upon plaintiff an almost impossible burden if jury should find that he had failed to yield right of way.

Judgment reversed.

1. Automobiles ⇐246(58)

In action by plaintiff for personal injuries received when struck on city street at night by defendant's automobile, even though plaintiff testified at trial he was not crossing street but starting to open door on driver's side of his parked automobile, there was sufficient other testimony from which jury could have concluded that plaintiff was a pedestrian crossing street when hit, and hence it was proper to instruct upon the duties of one crossing the street. West's Ann.Vehicle Code, § 562.

2. Automobiles ⇐246(49)
Trial ⇐236(2)

In action for personal injuries received when plaintiff was struck by defendant's automobile in city street, where proof of driver's negligence rested on his own testimony that he did not see plaintiff until moment of impact, it was error to refuse to give instruction to effect that where there is evidence that one looked but did not see what was in plain sight either some part of such evidence is untrue or person was negligently inattentive, and it should have been further stated that when a defendant testifies that he looked but did not see that which was clearly visible, jury can infer that he is falsely testifying in order to excuse his failure to avoid injuring plaintiff, and is to be distrusted in other parts of his testimony.

3. Automobiles ⇐246(4, 30)

In action for personal injuries received when plaintiff was struck by defendant's au-

tomobile on city street at night, court committed error in refusing to give instructions to effect that both plaintiff and defendant were chargeable only with exercise of ordinary care but that a greater amount of such care was required of defendant by reason of fact he was operating an automobile.

4. Automobiles ⇐246(49)

In action for personal injuries received when plaintiff was struck by defendant's automobile while plaintiff was on city street, court committed error in refusing to give instruction to the effect that if it should appear from evidence that driver through negligence did not know of plaintiff's presence on street, such fact did not excuse conduct which would have been negligent or careless if driver had known of plaintiff's presence.

5. Appeal and Error ⇐1064(1)
Automobiles ⇐246(30)

In action for personal injuries received by plaintiff when he was struck by defendant's automobile while on city street, giving of instructions to the effect that a failure to yield to one to whom law has given right of way is negligence unless circumstances resulting from causes beyond the control of driver or pedestrian are such as to excuse and justify him in such failure, was prejudicially erroneous for placing on plaintiff an almost impossible burden if jury should find that he had failed to yield right of way.

6. Appeal and Error ⇐699(4)

Even though record did not disclose who requested erroneous instruction of which appellant did not complain, it was proper to consider instruction and its possible effect in determining whether, on the whole record, judgment ought to be reversed.

Mannino & Lancaster, Sacramento, for appellant.

Desmond, McLaughlin & Russell, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered upon a defense verdict in a personal injury action.

Appellant was injured when struck by respondent's automobile on a street in downtown Sacramento. The complaint as amended alleged that at the time of the accident, which occurred at night, appellant was "a pedestrian proceeding in a generally southerly direction across Capitol Avenue". However, at the trial appellant testified that he was not crossing the street, but was starting to open the door on the driver's side of his parked automobile. Other than the statements in the verified complaint and some testimony given by plaintiff in a pretrial deposition, there was no proof that when injured appellant was crossing the street. Respondent testified that he did not see appellant until the moment of impact.

[1] Appellant contends that, taking the whole record, it was error for the court to instruct upon his duties as a pedestrian crossing the street. The court told the jury that Section 562 of the Vehicle Code requires a pedestrian crossing a roadway at any point other than a marked crosswalk or within an unmarked crosswalk at an intersection to yield the right of way to all vehicles upon the street; that although a pedestrian has a right to cross a street at any point the statutory standard of care which must govern his conduct while so doing requires (1) that if he crosses within a marked crosswalk or at an intersection within a crosswalk, whether marked or not, he has the right of way over vehicles, but (2) if he crosses the street in any other place he is required to yield the right of way to all vehicles on the street that are so near as to constitute an immediate hazard.

It has been held to be prejudicially erroneous to instruct a jury as to the provisions of Section 562 of the Vehicle Code where the evidence does not show that the plaintiff was in fact crossing the street.

Kuist v. Curran, 116 Cal.App.2d 404, 408–409, 253 P.2d 681. However, we are persuaded that in this case the jury could conclude that plaintiff was in fact crossing Capitol Avenue from north to south between the crosswalks and therefore that it was not error to give the instruction complained of as to his duties under such circumstances. As heretofore noted, there was an allegation in plaintiff's complaint that at the time of the accident he was a pedestrian proceeding in a generally northerly direction across Capitol Avenue. Prior to trial his deposition was taken and the following questions and answers appear in that document which was introduced in evidence for all purposes:

"Q. Were you going to go across Capitol Avenue at the time of the accident? A. Yes. * * *

"Q. Were you out in the street when you saw the car? A. Yes. * * *

"Q. How far did you get out in the street before you were hit? A. I remember starting to cross but I don't remember anything after that.

"Q. You say you remember starting to cross. Do you mean that you just got out just a few steps or so when you were hit? A. Yes, I believe that is what happened. * * *

"Q. In any event, you were intending to go across Capitol Avenue, is that correct? A. Yes."

It is true that there were also answers contained in the deposition which apparently conflict with the foregoing, and it is an unfortunate part of this phase of the case that plaintiff, being deficient in the English language, was compelled to give his testimony through an interpreter. When the whole of his testimony on deposition is read it is quite apparent that it lacks clarity and definition due to language difficulties. However, all these matters were before the jury. The entire deposition was read to them, the issue as to whether he was standing by his automobile, as he said at the trial he was, or was crossing between intersections was thoroughly presented to the jury and it must be said that they could have concluded that he was crossing when hit and in that situation it was proper to give the instructions upon the duties of one so crossing.

[2] Appellant next contends that it was prejudicial error for the court to refuse to give the following instruction: "General human experience justifies the inference that when one looks in the direction of an object clearly visible he sees it. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened but did not hear that which he could have heard in the exercise of ordinary care, it follows that either some part of such evidence is untrue or the person was negligently inattentive. * * *"

The instruction should have been given. The proof of defendant's negligence rested significantly in his own testimony that he did not see the plaintiff until the moment of impact, notwithstanding his lights were on high beam. It was fairly inferable that plaintiff was clearly visible to him had he been looking in the direction he was traveling. While it has sometimes been said that the instruction on looking but not seeing deals with the commonplace, that is with matters well within the knowledge of any jury, nevertheless in this case and on this record the instruction should have been given. Further it ought to have been brought to the jury's attention that, when a defendant testifies he looked but did not see that which was clearly visible, the jury can infer he is falsely testifying in order to excuse his failure to avoid injuring plaintiff, and that therefore he is to be distrusted in other parts of his testimony.

[3] Plaintiff requested and the court refused to give the following instruction: "You are instructed that the plaintiff and the defendant were both chargeable only with the exercise of ordinary care, but a greater amount of such care was required of the defendant at the time of the accident in question by reason of the fact that he

was driving and operating an automobile, which is an instrumentality capable of inflicting serious and often fatal injuries upon others using the highway." This was a correct instruction and ought to have been given. Other instructions spoke only of the obligation resting upon both the plaintiff and the defendant to use ordinary care in their conduct toward each other. It should have been called to the attention of the jury that although the degree of care, that is ordinary care, was the same as to both, nevertheless since defendant was operating an automobile he was chargeable with a duty to use a greater quantum of care by reason of the added danger of the instrumentality he was propelling than the quantum of care required of plaintiff as a pedestrian. See Dawson v. Lalanne, 22 Cal.App.2d 314, 70 P.2d 1002; Cucinella v. Weston Biscuit Co., Inc., 42 Cal.2d 71, 265 P.2d 513. In the Cucinella case, although the Supreme Court stated that the instruction here under discussion should have been given in order to point out the disparity of the amount of care required of the operator of an automobile and the amount of care required of a pedestrian, nevertheless in that case there were a number of instructions found by the Supreme Court to minimize the effect of the refusal to give the instruction we are discussing. We find no such minimizing effect in this case from any other instructions that were given. A perusal of the instructions leaves one with the impression that the amount of care required was the same for drivers and pedestrians.

[4] Appellant also requested the following instruction and charges error in the court's refusal to give it: "If it should appear from the evidence in this case that the defendant driver Sweeney, through negligence did not know of plaintiff's presence on the street, this fact is no excuse for conduct which would be negligent or careless if he had known of Mr. Rubalcaba's presence." This instruction also should have been given. We think it easier for a jury to excuse a driver who collides with a pedestrian if they believe that the driver did not see the pedestrian than it is for them to excuse the driver who sees and nevertheless injures the pedestrian.

[5, 6] The remaining question is whether or not the errors in refusal of instructions were prejudicial to the extent to require reversal under the constitutional admonition. In considering that question we wish to call attention to an instruction that was given and which, since the trial of the above entitled case, has been declared by the Supreme Court to be erroneous. Alarid v. Vanier, 50 Cal.2d 617, 624, 327 P.2d 897. The court instructed the jury that: "Failure to yield to one whom the law has given the right of way is negligence unless circumstances resulting from causes beyond the control of the driver or pedestrian are such as to excuse and justify him in such failure, judging his conduct in the light of what reasonably might have been expected from a person of ordinary prudence." Appellant does not complain of the giving of that instruction and we cannot tell from the record brought up who requested it. It may well be that it was requested by appellant himself. Nevertheless it was erroneous and it did place upon appellant a well-nigh impossible burden if the jury should find that he failed to yield the right of way, for it could hardly be said to be possible for him to have proved under the facts shown in this case that circumstances beyond his control had caused him to fail to obey the law. We think it proper therefore to consider this instruction and its possible effect in determining whether on the whole record the judgment ought to be reversed. After considering that record we come to the conclusion that the errors pointed out do require reversal.

Accordingly, the judgment appealed from is reversed.

PEEK and SCHOTTKY, JJ., concur.

168 Cal.App.2d 31

A. LINCOLN, Plaintiff and Appellant,

v.

W. Turney FOX, Allen W. Ashburn, and Philip H. Richards, Defendants and Respondents.

Civ. 18234.

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1959.

Hearing Denied April 15, 1959.

Action against three members of court for alleged refusal to grant writ of habeas corpus after proper application. The Superior Court, County of Los Angeles, Burnett Wolfson, J., sustained demurrer to complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Draper, J., held that allegations in petition for habeas corpus that reporter's transcript of testimony contained no more than gossip, that accusatory affidavit was defective and insufficient, that contempt proceedings had been fixed, rigged, and prejudged and that county jail was unsafe, unfit, overcrowded and had been condemned were merely conclusions, and failed to state any ground for issuance of the writ, and petitioner was not entitled to recover from judges.

Affirmed.

1. Habeas Corpus ⇐53

A reviewing court is entitled to and does require of convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned.

2. Habeas Corpus ⇐53

Petition for habeas corpus must show facts entitling petitioner to be discharged. West's Ann.Pen.Code, § 1474.

3. Judges ⇐36

Party seeking damages for refusal to grant writ of habeas corpus cannot claim benefit of greater presumptions than attach to an incarcerated person seeking relief from imprisonment. West's Ann.Pen.Code, §§ 1474, 1505.

4. Habeas Corpus ⇐53

Judges commonly are lenient in overlooking technical deficiencies in petitions for writ of habeas corpus of incarcerated petitioners, but they are entitled to insist upon at least some compliance with rules of pleading. West's Ann.Pen.Code, §§ 1474, 1505.

5. Judges ⇐36

Allegations in petition for habeas corpus that reporter's transcript of testimony contained no more than gossip, that accusatory affidavit was defective and insufficient, that contempt proceedings had been fixed, rigged, and prejudged and that county jail was unsafe, unfit, overcrowded and had been condemned were merely conclusions and failed to state any ground for issuance of the writ, and petitioner was not entitled to recover from judges for refusal to grant order for writ of habeas corpus. West's Ann.Pen.Code, §§ 1474, 1505.

6. Habeas Corpus ⇐55

Even if transcript of proceedings in which defendant was convicted were before trial court, trial court would not be required to ferret out necessary elements of cause of action by referring to exhibits attached to pleading. West's Ann.Pen. Code, § 1474.

7. Contempt ⇐52

If contempt were in immediate view and presence of court, proceedings for punishment would be wholly summary in character. West's Ann.Code Civ.Proc. § 1211.

8. Habeas Corpus ⇐85.2(2)

Petitioner for habeas corpus must show that deprivation of counsel resulted in an unfair trial or, in substance, in no trial at all. West's Ann.Pen.Code, § 1474.

A. Lincoln, in pro. per.

Edmund G. Brown, Atty. Gen., Delbert E. Wong, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

Demurrer to amended complaint was sustained without leave to amend. Plain-

tiff appeals from judgment of dismissal thereafter entered. The amended complaint alleges denial by a District Court of Appeal of an application for writ of habeas corpus. In identical terms, a separate cause of action is alleged against each of three members of that court.

The pleading alleges that the action is brought under Penal Code, section 1505, which provides: "If any Judge, after a proper application is made, refuses to grant an order for a writ of habeas corpus, * * * he shall forfeit and pay to the person aggrieved" an amount not exceeding a specified sum. Application for the writ of habeas corpus is made by petition. "If the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists." Pen.Code, § 1474.

The amended complaint alleges only that each judge "did unlawfully fail and refuse" to grant an order for the writ after "proper application therefor." However, copy of the petition filed with the District Court of Appeal is attached to and made a part of the pleading. This petition alleges that petitioner is confined "under a void and invalid order of contempt, made by the Superior Court." The only specifications of the alleged invalidity are that the "reporter's transcript of all the testimony * * * contains no more than gossip"; that "the accusatory affidavit is defective and insufficient"; the "contempt proceeding has been fixed, rigged and prejudged"; and the county jail "is unsafe, unfit, overcrowded, and has been condemned."

[1–5] It is apparent that these allegations are but conclusions. An appellate court is entitled to and does "require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned." In re Swain, 34 Cal.2d 300, 304, 209 P.2d 793, 796; see also In re Razutis, 35 Cal.2d 532, 219 P.2d 15. The petition for the writ must show facts entitling the petitioner to be discharged. In re Shelton, 178 Cal. 552, 174 P. 31; In re Williams, 44 Cal.App. 510, 186 P. 610. Plaintiff, seeking damages, cannot claim the benefit of greater presumptions than attach to an incarcerated person seeking relief from imprisonment. Judges commonly are lenient in overlooking technical deficiencies in the petitions of incarcerated petitioners. But they are entitled, if not required, to insist upon at least some compliance with the rules of pleading. Under the most lenient view, the petition alleged by plaintiff failed to establish any ground for issuance of the writ.

[6] The petition to the District Court of Appeal does state that a transcript "is filed herewith." That transcript is not in the record here, is not referred to in the briefs, and is not shown to have been before the superior court. Even if it were, the latter court would not be required "to ferret out necessary elements of a cause of action * * * by referring to exhibits attached to a pleading." California Trust Co. v. Gustason, 15 Cal.2d 268, 272–273, 101 P.2d 74, 76.

[7, 8] The petition also states that applicant's request for counsel "was ignored and refused." The petition does not show whether the contempt alleged was "in the immediate view and presence of the court." If it were, the proceedings for punishment would be wholly summary in character. Code Civ.Proc. § 1211; 12 Cal.Jur.2d Contempt, § 57. Appellant's complaint apparently is not that counsel engaged by him was denied the right to appear in his behalf, but only that the trial court failed to appoint counsel for him in the contempt proceeding. He cites no authority requiring appointment of counsel by the court in proceedings involving an indirect contempt. In any event, the petitioner for habeas corpus must show that deprivation of counsel "resulted in an unfair trial or in substance in no trial at all." In re Egan, 24 Cal.2d 323, 337, 149 P.2d 693, 701. No such showing is even attempted here.

We do not find it necessary to pass upon the question whether section 1505 attempts to subject a judicial officer to personal liability for the exercise of discretion, nor whether such an attempt would be constitutional. See State ex rel. Walker v. Dob-

son, 135 Mo. 1, 36 S.W. 238, 242. The amended complaint here states no cause of action under any construction of that section. Since the deficiencies lie in the petition for the writ, leave to amend the amended complaint would serve no purpose.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



COUNTY OF SAN BERNARDINO, a body corporate and politic, Plaintiff and Respondent,

v.

HARSH CALIFORNIA CORPORATION, a California Corporation, Defendant, United States of America, Petitioner In Intervention and Appellant.*

Civ. 5949.

District Court of Appeal, Fourth District, California.

Feb. 16, 1959.

Rehearing Denied March 16, 1959.

Hearing Granted April 15, 1959.

Action brought by county to collect unsecured personal property taxes levied against defendant's leasehold interest in land leased to defendant by federal government for furnishing of housing units for military or civilian personnel of federal government. The Superior Court of San Bernardino, S. Thomas Bucciarelli, J., entered an order refusing permission to intervene, and an appeal was taken. The District Court of Appeal, Shepard, J., held that the United States, which claimed to have paid, through "in lieu" money, the very taxes which plaintiff sought to recover from defendant was entitled to intervene.

Order reversed.

* Opinion vacated 340 P.2d 617.

1. Appeal and Error ⇐949
Parties ⇐45

The right of intervention is purely statutory and is not a matter of absolute right but rests in sound discretion of trial court; and reviewing court will not disturb trial court's order unless it is satisfied that trial court did not properly exercise its discretion. West's Ann.Code Civ.Proc. §§ 387, 389.

2. Parties ⇐40(2)

To justify intervention, intervener's interest must be of such direct and immediate character that intervener will either gain or lose by direct legal operation and effect of judgment. West's Ann.Code Civ. Proc. § 387.

3. Parties ⇐40(2)

The disjunctive second clause of civil procedure code section, providing "at any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding" must be interpreted, through application of rule of ejusdem generis, to read "any person, who has an interest * * * in the success of either of the parties * * * may intervene * * * etc." West's Ann.Code Civ.Proc. § 387.

4. Taxation ⇐174

Property of sovereign cannot be taxed without sovereign's consent.

5. United States ⇐1

First and primary sovereignty rests in the people of the state, and federal government exists at will and sufferance of people of various states as expressed through federal Constitution.

6. United States ⇐135

The United States, which claimed to have paid through "in lieu" money the very taxes which plaintiff sought to recover from defendant, was entitled to intervene in action brought by county to collect unsecured personal property taxes levied against defendant's leasehold interest in land leased to defendant by federal government for furnishing of housing units for military or

civilian personnel of federal government. National Housing Act, § 1 et seq., as amended 12 U.S.C.A. § 1701 et seq.; West's Ann. Code Civ.Proc. § 387.

Charles K. Rice, Asst. Atty. Gen., Lee A. Jackson, John J. Crown, Dept. of Justice, Washington, D. C., Laughlin E. Waters, U. S. Atty., Edward R. McHale, Asst. U. S. Atty., Los Angeles, for appellant.

Albert E. Weller, J. B. Lawrence, San Bernardino, for respondent.

SHEPARD, Justice.

This is an action to collect unsecured personal property taxes levied against defendant's possessory leasehold interest in a certain parcel of land consisting of 103.285 acres in the county of San Bernardino. The lease provides: a maximum term of 75 years; that defendant shall build and operate on said land 337 housing units for use by designated military or civilian personnel of the United States of America, which is hereinafter called intervener; that intervener may designate who shall be eligible as sublessee occupants, may declare certain occupants ineligible, whereupon defendant must eject such occupant; that defendant must pay all taxes even though such taxes may, with the consent of Congress, be on the interest of the United States; that intervener has the right to ultimate control of rentals to be charged occupants; that fire and police protection are, if available, furnished by intervener; that buildings and other improvements and fixtures become the property of intervener immediately on construction or attachment; that all disputes between defendant and intervener are subject to final decision by intervener's Secretary of the Navy; that all ores useful to atomic energy production are reserved to intervener; that lessee must carry full insurance on the buildings. Numerous other provisions for the most part follow the line of ordinary commercial leases. Apparently this building construction was under the authority of the National Housing Act, 12 U.S.C.A. § 1701 et seq. and was substantially financed with funds of intervener.

In 1956, following the decision of the United States Supreme Court in Offutt Housing Co. v. Sarpy County, 351 U.S. 253, 76 S.Ct. 814, 100 L.Ed. 1151, and the holding therein that the lessee's possessory interest is taxable, Congress amended the Housing Act of 1955. Such amendment provides, among other matters, that the interest of the lessees will be subject to local taxes, properly equalized, less payments made by intervener to local tax agencies with respect to such property and also less any money expended for facilities or services normally provided by such local taxing agencies.

By its petition and proposed answer in intervention, intervener alleges: that it has actually paid to local taxing agencies in which said land is located more money for facilities or services normally provided by such local taxing agencies than the amount of the total tax levied against said possessory interest; that said money so paid to the local taxing agencies was essentially in lieu of such taxes; that pursuant to the laws of the United States the Secretary of Defense of intervener did, by letter of August 13, 1957, notify the board of supervisors of plaintiff of his determination that the local taxes on defendant's possessory interest must be reduced by the sum of $27,759 in that said sum was paid by intervener to local taxing or other public agencies involved as in lieu money. It further appears that the total amount of the taxes levied by plaintiff is in the amount of $23,099.04 and that, therefore, intervener claims to have paid several thousand dollars more in lieu of taxes than the taxes themselves amount to. With its petition for permission to intervene intervener filed its proposed answer placing in issue vital parts of plaintiff's complaint. The order was first made granting the petition but later, on motion, that order was set aside and intervention refused. Intervener has appealed from the order refusing to permit intervention.

Code of Civil Procedure Section 387, insofar as it affects the matter here in controversy, reads as follows:

"At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding."

The section then goes on to provide that the intervener must take a position either with plaintiff or with the defendant, or adversely to both plaintiff and defendant. Code of Civil Procedure Section 389 provides that:

"* * * when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in * * *."

Then follows a provision for an application by an interested party for intervention similar to the provisions of said section 387.

Our courts have held that the burden is on the intervener to present a pleading stating "facts sufficient, if true, to establish the right or interest which he claims." Moran v. Bonynge, 157 Cal. 295, 298, 107 P. 312, 314. It is further held by our courts that the interest which entitles a party to intervene must be in the suit as originally brought and he cannot broaden the scope of the proceeding by bringing in contentions that have their proper forum elsewhere. People v. Brophy, 49 Cal.App. 2d 15, 34(18) (19), 120 P.2d 946.

[1] The right of intervention is purely statutory and is not a matter of absolute right but rests in the sound discretion of the trial court. This court will not disturb the trial court's order unless it is satisfied that the trial court did not properly exercise its discretion. Faus v. Pacific Elec. Ry. Co., 134 Cal.App.2d 352, 355(1) (2), 285 P.2d 1017.

[2] The general rule is that the interest referred to must be " 'of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.' " Allen v. California Water & Tel. Co., 31 Cal.2d 104, 109(4), 187 P.2d 393, 395.

Numerous cases have been cited by counsel on both sides of this controversy giving examples of the application in individual instances of the rules hereinbefore set forth. Numerous other such cases are to be found throughout the decisions of California, but none cited nor any that this court has been able to discover involve a case in which a sovereign agency such as the intervener claims to have paid through "lieu money" the very taxes the plaintiff seeks to recover from the defendant.

In the case at bar the intervener does so allege. It directly and unequivocally opposes the position of plaintiff and supports the position of the defendant. It further claims that it is the landlord of the defendant, the owner of the property the possessory interest to which is being taxed, and that any decision in this case that it has or has not paid the amount here sought to be recovered must inevitably affect the financial relationship between it and defendant, as well as in its dealings with the personnel of the armed forces. The question as to whether or not it did, in fact, pay the "in lieu" money referred to, as well as whether or not any such "in lieu" money was properly applied by plaintiff, and whether or not the Act by which Congress has sought to restrict taxes to be levied by a local taxing agency is valid in all its details, is a matter of immediate and vital concern and legal interest to intervener and are questions inherent in the case at bar.

[3–6] None of the cases we have found appear to directly discuss the disjunctive second clause of the quoted portion of said Section 387. This clause, through application of the rule of *ejusdem generis,* must be interpreted to read "any person, who has an interest * * * *in the success of either of the parties* * * * may intervene * * * etc." (Emphasis ours.) This clause is not exactly synonymous with the words "interest in the matter in litigation." It is easily understandable

that, as here, the intervener may well have an interest in both "the matter in litigation" as well as the success of one of the parties while in other cases such interest might be separable. It is clear in the case at bar that the intervener "has an interest" in the success of defendant.

Some point has been made in the briefs and in the oral argument respecting the sovereignty of the intervener. The property of a sovereignty cannot be taxed without the sovereignty's consent. P. I. Wilsey & Co. v. County of San Bernardino, 155 Cal.App.2d 145, 146(1), 317 P.2d 71. All Americans, of course, are aware that the first and primary sovereignty rests in the people of the state and that the federal government exists at the will and sufferance of the people of the various states as may be from time to time expressed through the United States Constitution. However, it is clear that among the various and sundry things in which a portion of that sovereignty has been confided to the federal government through the Constitution of our United States is the power and duty to provide for our army and navy, through them for the common defense of our country, and to do all things immediately necessary therefor. The housing of military and naval personnel is one of those immediately necessary things the federal government must do. In the course of doing this, Congress has been called upon frequently to recognize local taxation hardship by reason of federally owned property being nontaxable, and the local taxing agencies having nevertheless to furnish the local service which such non-leviable taxes would have supported. One of the most common of these is the public school, which often suffers because of large numbers of children coming into an area wherein armed forces establishments are located, without commensurate taxes for support of such schools.

As above noted, whether the Act providing for "in lieu" money is valid in the particular details contained in the Congressional enactment here involved is one of the questions to be resolved in the action in which intervener seeks to participate. It is not before this appellate court at this time.

We think that in matters of this kind the courts ought to be realistic. While the question of sovereignty is not, in our opinion, involved, as such, nevertheless the manifold and complicated duties that fall on the shoulders of the federal government are such that where, as here, it reasonably asserts a direct interest in the very sum sought to be recovered, it ought to be permitted to intervene.

The order refusing intervention is reversed.

MUSSELL, Acting P. J., and STONE, J. pro tem., concur.



167 Cal.App.2d 736

CITY OF LOS ANGELES, a municipal corporation, and Department of Water and Power of City of Los Angeles, Plaintiffs and Appellants,

v.

COUNTY OF INYO, Defendant and Respondent.

Civ. 5918.

District Court of Appeal, Fourth District, California.

Feb. 9, 1959.

Action by city and department of water and power of city for recovery of taxes paid under protest to county. From adverse judgment of the Superior Court, Inyo County, R. Bruce Findlay, J., the city and board appealed. The District Court of Appeal, Mussell, Acting P. J., held that where city of Los Angeles, in connection with construction of aqueduct, purchased water rights appurtenant to three residential lots in another town for 25% of value of lots and improvements,

assessment of three separate lots including separately assessed water rights at 2½ to 3 times assessment of other lots of comparable nature was discriminatory, excessive and invalid.

Reversed.

1. Taxation ⇐348

Where city of Los Angeles, in connection with construction of aqueduct, purchased water rights appurtenant to three residential lots in another town for 25% of value of lots and improvements, assessment of three separate lots including separately assessed water rights at 2½ to 3 times assessment of other lots of comparable nature was discriminatory, excessive and invalid.

2. Taxation ⇐64

Water rights are as separably assessable as land.

Roger Arnebergh, City Atty., Gilmore Tillman, Chief Asst. City Atty., Los Angeles, for Dept. of Water and Power.

A. H. Driscoll, Asst. City Atty., and O. M. Lloyd, Deputy City Atty., Los Angeles, for appellants.

Boyd A. Taylor, Dist. Atty., Bishop, of Inyo County, for respondent.

MUSSELL, Acting Presiding Justice.

[1] This is an appeal from a judgment in two actions, consolidated for trial, brought by appellants city of Los Angeles and the Department of Water and Power of said city (hereinafter collectively referred to as the "City") for the recovery of taxes paid under protest to the county of Inyo (hereinafter referred to as the "County") for the tax years 1955–1956 and 1956–1957. Before paying these taxes, the City made appropriate application to the State Board of Equalization for relief from the assessments. A hearing was had before said board and an opinion was rendered and filed by it ordering an adjustment, reduction and correction of said assessments. The causes were submitted to the trial court on the record of the proceedings before the State Board of Equalization and the trial court rendered judgment that the City take nothing by the action.

The issues involved herein relate to the assessment of taxable water rights owned by the City and formerly appurtenant to three residential lots in the town of Independence. The City contends that each of these water rights has been subjected to an excessive and discriminatory assessment by the arbitrary action of the county assessor in fixing said assessment at an amount equivalent to 25% of the assessed value of the lot to which said water rights were formerly appurtenant, plus 25% of the assessed value of the improvements on said lot.

In 1913 the City completed an aqueduct to convey the waters of the Owens River, in Inyo County, to the City of Los Angeles for the purpose of supplying it and its inhabitants with water. Prior to the construction of the aqueduct, the City purchased substantially all riparian lands and water rights on the Owens River downstream from the point at which the waters of said river were diverted into the aqueduct. As a result of the passage of the "Reparations Act" (Stats.1925, Ch. 109)[1] and pending and threatened litigation, the City undertook the acquisition of all property in the Owens River Valley remaining in private ownership. The City caused an appraisal to be made of all property in Bishop, Laws, Big Pine, Independence and Lone Pine. The City then purchased 3,000 parcels of land both within and without these towns, adding up to 40% to the appraised value in an attempt to compensate the property owners not only for the land and improvements purchased but also for all other claims, including those recognized by the Reparations Act. Each of these purchases included a release of the City from any damages claimed under the said Reparations Act. However, there are more than 100 lots in Independence which the City did not acquire. Where only the water

1. Now Water Code, § 1245 et seq.

rights were purchased, as a consideration therefor, the City paid the seller 25% of the value of the lots and improvements, and the written agreements for the sale of the water rights gave the sellers the option, to be exercised within a period of five years, to sell to the City the real property at sums which represented the balance of 75% of the value. The conveyances granted to the City all water rights appurtenant to the lots, including riparian and appropriative rights, together with the right to divert underground as well as surface waters. The seller was permitted "the right to develop and use upon said lands described herein but not elsewhere any portion thereof remaining of the surface or subsurface waters thereof for household, domestic or gardening purposes thereon."

In 1931 each of the owners of the water rights here involved and the lots to which water rights were then appurtenant accepted from the City an amount equal to 25% of the City's appraised value of the land and improvements thereon, in consideration of a release of the City from any claims for damages under the said Reparations Act and a conveyance to the City of the water rights appurtenant to the lot, reserving to the seller the right to develop and use upon said land described herein but not elsewhere any portion thereof remaining of the surface or subsurface water thereof for household, domestic, or gardening purposes thereon.

The history of the assessments on the three lots and water rights involved is as follows:

Tax Parcel No.	Year	Land With Water Rights	Land Without Water Rights	Water Rights	Total of Land and Water Rights
2–033–1	1952–4	$260.00			$260.00
	1955		$280.00	$350.00	630.00
	1956		280.00	350.00	630.00
2–102–4	1952–4	300.00			300.00
	1955		350.00	610.00	960.00
	1956		350.00	610.00	960.00
2–102–5	1952–4	250.00			250.00
	1955		250.00	450.00	700.00
	1956		250.00	450.00	700.00

The record shows that there are approximately 700 separate lots or parcels in the town of Independence. All lots in the town except the three involved herein were assessed in 1955 and 1956 on a uniform basis and in amounts comparable to the assessments in the above history for the years 1952–1954. In the block which contains tax parcel 2–033–1, and in all adjacent blocks, the corner lots are assessed at $280 each and all inside lots at $250 each and, except as to the above tax parcel, all such assessments included all water rights. The assessments on each of the three lots in question, including separately assessed water rights, are far in excess of the assessment on any other lots of similar value in the town and the assessment on the water rights exceed the assessment of the fee ownership and water rights of all other lots.

It is the contention of the City that each of the water rights involved has been subjected to an excessive and discriminatory assessment and we are in accord with this contention.

In Birch v. County of Orange, 186 Cal. 736, 741, 200 P. 647, it was held that the taxpayer is entitled to the exercise of good faith and fair consideration on the part of the taxing power in assessing his property, at the same rate and on the

same basis of valuation as that applied to other property of like character and similarly situated, and that inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax. Citing Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A.L.R. 1277. And in Birch v. County of Orange, 88 Cal.App. 82, 85, 262 P. 788, it is said that in determining whether an unequal burden of taxation has been placed upon him, a complaining taxpayer's assessment is to be compared with the average assessment of all other property in the county. (Citing cases.)

In Rancho Santa Margarita v. San Diego County, 126 Cal.App. 186, 197, 14 P. 2d 588, 592, the court said:

> "It is a fundamental rule that a tax, to be valid, must be equal as to its burdens and uniform as to its operation. Property must be assessed according to a just and uniform standard of value and the rate must be levied uniformly. In considering the validity of a revenue law it is immaterial whether the inequality or lack of uniformity in the levy is the result of design, accident or inadvertence."

In Mahoney v. City of San Diego, 198 Cal. 388, 404, 245 P. 189, it was held that there is no other or different immunity available to boards of equalization than those which are available to assessors when the acts of the former are found to be arbitrary and when the proven discriminations and inequalities of the latter in making assessments are perpetuated thereby; and that the courts will grant relief in the one case as readily as in the other when the record before them justifies the granting of such relief.

In the instant case many corner lots in Independence are assessed at $280 and inside lots at $250. These assessments include the water rights, since there is nothing appearing in the assessment rolls denoting a contrary intention. Spring Valley Water Co. v. County of Alameda, 88 Cal.App. 157, 163, 263 P. 318. The water rights assessed to the City without fee ownership of the lots involved are assessed at from $350 to $610 and the assessments on these water rights, plus assessment on the fee ownership, aggregate from $630 to $960, nearly three times the assessment on any other comparable property in Independence.

In this connection witness Sidney Parratt, district engineer for the Los Angeles Aqueduct Division of the Department of Water and Power of the City, testified that

> "Buyers and sellers of lots in the Town of Independence have likewise placed no value upon such water rights as purchases and sales of comparable property with and without water rights have been made at comparable prices. For example, in 1953, the City sold some town lots in all four Owens Valley towns, namely, Independence, Lone Pine, Big Pine and Bishop, at public auction, and all of said lots were sold at market prices comparable to the sales of similar lots with water rights attached. Subsequent resale of said lots have been made at the same or higher prices than those which were obtained by the City."

This testimony is uncontradicted and indicates to some extent the value placed on the water rights.

The record shows that the assessor determined the amount of the assessment for each of the water rights involved by adding the aggregate annual assessments on the lot to which the water right was appurtenant before it was severed and the aggregate annual assessments on the improvements thereon for the years 1932 to 1955, inclusive, and assessing the water right in an amount equal to 25% of the sum of those aggregate annual assessments; thus treating the water rights for the years prior to the year 1955 as having escaped assessment within the meaning of section 531 of the Revenue and Taxation Code. However, the proper entry on the roll for that was not made as required by

section 533 of said code, which provides that "Property escaping assessment shall be entered on the roll prepared in the assessment year when it is so discovered, and if this is not the roll for the assessment year in which it escaped assessment, the entry shall be followed with 'Escaped assessment for the year 19—'."

The State Board of Equalization in its opinion and order herein concluded that the City's water rights did not escape assessment for the years prior to 1955 and that to assess them now pursuant to section 531 of the Revenue and Taxation Code would result in double taxation and would be improper; that for the years from 1932 to 1954, inclusive, the assessments on the rolls for the three parcels involved did not show that the City's water rights were excluded; that consequently the water rights were included in the assessments of the lands. Citing Spring Valley Water Co. v. Alameda, 24 Cal.App. 278, 141 P. 38. This conclusion is supported by the record and we are in accord therewith.

[2] It is well settled that water rights are as separately assessable as land. City and County of San Francisco v. County of Alameda, 5 Cal.2d 243, 54 P.2d 462; Waterford Irrigation Dist. v. County of Stanislaus, 102 Cal.App.2d 839, 228 P.2d 341. In Alpaugh Irrigation District v. County of Kern, 113 Cal.App.2d 286(14), 248 P.2d 117, it is said that in assessing a water right it may be necessary to adopt a method different from that commonly used in assessing land and it cannot be said as a matter of law that the assessor used an invalid method in arriving at the assessed value of an irrigation district's water rights by taking the number of acre feet of water which it exported, multiplied by the net value of the water per acre foot, etc., where he testified that this method is comparable to that used in assessing oil and gas rights.

In the instant case the State Board of Equalization concluded that the assessor's method of valuing the water rights for the purpose of assessment does not conform to accepted standards and processes but held that

> "The method of arriving at the value of property is committed to the assessor's discretion, in the absence of fraud, and is to be used according to his best judgment. Utah Construction Co. v. Richardson, 187 Cal. 649, 203 P. 401. As stated in Miller & Lux, Inc. v. Richardson, 182 Cal. 115, 187 P. 111, '* * * the discretion of the assessing officials as to the valuation to be fixed is final in the absence of fraud or mistake * * *. In order that there be fraud, there must exist, on the part of the assessing official, a conscious failure to exercise that fair and impartial judgment which the law requires of him.'
>
> "It is presumed that the assessing officer has properly performed the duties entrusted to him and that his assessments are regularly and correctly made. Utah Construction Co. v. Richardson, supra. The burden of showing that the assessment is incorrect is one the petitioner. Hammond Lumber Co. v. County of Los Angeles, 104 Cal.App. 235, 285 P. 896; Wild Goose Country Club v. County of Butte, 60 Cal.App. 339, 212 P. 711."

We conclude that the evidence herein shows that the method followed by the assessor was incorrect and resulted in an excessive assessment of the City's water rights. All water rights in the town of Independence were not assessed uniformly. Town lots in Independence, including water rights, were assessed on a uniform basis except for the three lots here involved, which, including the separately assessed water rights, were assessed at two and one-half to three times the assessments on any other lots. These assessments were in our opinion discriminatory, excessive and invalid.

Judgment reversed.

SHEPARD, J., and STONE, J. pro tem., concur.

Darlene Ruth CHRISTENSEN, a minor, by Ruth Christensen, her guardian ad litem, Plaintiff and Appellant,

v.

Eugene Francis BOCIAN, Defendant and Respondent.

Civ. 23281. *

District Court of Appeal, Second District, Division 2, California.

Feb. 16, 1959.

Rehearing Granted March 3, 1959.

For Opinion on Rehearing see 336 P.2d 1018.

Action for injuries sustained by a guest in an automobile collision at an intersection. From the judgment based on an adverse jury verdict in the Superior Court of Los Angeles County, Fred Miller, J., the guest appealed. The District Court of Appeal, Ashburn, J., held that the issue of contributory negligence was properly submitted to the jury and that the guest was not entitled to complain of the instructions.

Judgment affirmed.

1. Automobiles ⇐245(87)

In action for injuries sustained by guest in an automobile collision at intersection, guest's contributory negligence was properly submitted to the jury. West's Ann.Vehicle Code, § 511(a) (3).

2. Appeal and Error ⇐499(1)

Appellant could not complain of submission of the case to the jury where the record did not show affirmatively any actual notice to the trial judge that appellant considered the evidence insufficient to justify submission of the issues of contributory negligence to the jury.

3. Appeal and Error ⇐882(12)

Plaintiff could not complain of instructions offered by defendant in tendering the issue of contributory negligence where plaintiff also requested instructions involving that issue.

Robert H. Lund, Fred M. Nelson, Long Beach, for appellant.

Ball, Hunt & Hart, Long Beach, for respondent.

ASHBURN, Justice.

Plaintiff appeals from a judgment based upon an adverse jury verdict in a personal injury action. Her attorneys rely upon the single contention that the court prejudicially erred in giving instructions to the jury upon the subject of contributory negligence.

Plaintiff was injured in a collision of automobiles which took place on November 25, 1956, within the intersection of Elm and Burnett Streets, in the city of Long Beach. Plaintiff, 15 years of age, was riding as a guest in the front seat of a Mercury automobile owned and driven by Donald Seaborn, traveling southerly on Elm Street. She was in the middle, her brother Steve being to the right. The three were on their way to a skating rink where they intended to practice for a competition. Defendant Bocian was driving east on Burnett Street. The intersection was within a residential district and was not controlled by stop signs or in any other manner. The view of each driver was obstructed to the extent that the 15-mile prima facie speed limit was applicable, under Vehicle Code § 511(a) (3), as the statute then stood. Each driver was traveling in excess of 15 miles an hour and saw the other car before the impact, but neither was able to stop in time to avoid a collision. The Bocian car ran into the side of Seaborn's. The facts in their entirety are such that either or both of the drivers could have been found negligent. It does not appear whether the verdict for defendant rested upon a finding of absence of negligence on his part or upon contributory negligence of plaintiff.

She had ridden with Seaborn some five to seven previous times, but there is no evidence that she had any occasion to mistrust his driving or that she did so. She herself had never driven an automobile and was paying no attention to his driving while they traveled along. As they entered the intersection she saw Bocian's car for the first time and realized it would hit the

* Opinion vacated 336 P.2d 1018.

one in which she was riding, whereupon she screamed and told Seaborn the other car was going to hit them. She received injuries which were substantial but not very serious.

Appellant's counsel argues, somewhat persuasively, that there was no evidence of negligence on her part and that instructions on contributory negligence were therefore inappropriate and prejudicial. The language of Murphy v. National Ice Cream Co., 114 Cal.App. 482, 489, 300 P. 91, 94, is apposite: "Mrs. Murphy as a guest was not charged with the responsibility for observing the condition of the traffic upon the highway, nor was there anything she could have done after the danger was imminent to avoid a collision. Martinelli v. Poley, 210 Cal. 450, 292 P. 451, 454; Marchetti v. Southern Pac. Co., 204 Cal. 679, 269 P. 529, 531. The former case presented a somewhat similar situation, and in holding that the guest was not guilty of contributory negligence the court said: 'We find nothing in the evidence, either that admitted on behalf of the plaintiff, or that introduced by the defendants, that would tend to show that plaintiff was guilty of contributory negligence. He was simply riding with the appellant as a guest of the latter, and had no power of control over the machine in which they were traveling. Nothing had happened during the trip, so far as the evidence shows, at least until the collision occurred, which indicated in any manner that the appellant was not driving his machine in a perfectly proper and careful manner. There was no reason for the plaintiff, therefore, to be apprehensive of his safety while riding with appellant, or to take any unusual precautions against their running into danger. Just before the accident happened, he was observing the houses along the highway, and was not looking in front of the machine, and therefore did not see Barlow's truck until it was about 5 feet from the car in which he was riding. It was then too late for him to caution appellant regarding the latter's driving, or to do anything else to avoid the collision. There is nothing in this conduct of the plaintiff which would tend in the least to prove that he was guilty of contributory negligence in causing the injury sustained by him as a result of the collision.' In the latter case, in holding that the responsibility for observing danger does not rest upon the guest, the doctrine is stated substantially the same. There the court apparently goes further in saying that, even when the danger of collision becomes suddenly imminent, the guest is not obliged to 'displace the driver, seize the operating levers, and endeavor to avoid the impending catastrophe'." Crawford v. Rose, 2 Cal.App.2d 734, 738, 39 P.2d 217, 218: "It is not the law that under all possible circumstances one who is riding as a guest in such a vehicle must watch the road and the driver, and hold himself in readiness to give directions to the driver concerning the dangers of the road."

These are well-settled principles (see, 7 Cal.Jur.2d § 340, p. 239) and the divergence between the cases cited by the respective parties grows out of their application to varying factual situations rather than any uncertainty as to the state of the law; hence, further discussion of them would be without profit.

[1, 2] Were we to sustain appellant's contention that the evidence was insufficient to warrant submission of the issue of contributory negligence to the jury, we nevertheless would be precluded by the exact state of the record from reversing the case. Appellant complains of invited error. The case was argued to the jury but the arguments were not transcribed. The record does not affirmatively show any actual notice to the trial judge that plaintiff's counsel considered the evidence insufficient to justify submission of the issue of contributory negligence to the jury.

[3] Counsel specifically mention BAJI instructions numbered 103.1, 113, 116A, 133 and 222B, all of which were requested by defendant and given as modified. Each

of them tenders the issue of contributory negligence. But plaintiff also requested instructions involving that issue; they are set forth in the margin[1] and were given by the court.

Hazelett v. Miller, 115 Cal.App.2d 801, 805, 252 P.2d 997, 999, is apposite: "Plaintiffs may not now be heard to complain about the giving of a general instruction offered by defendant in reference to contributory negligence of one or more of plaintiffs, under the evidence here produced, particularly where plaintiffs offered and the court gave plaintiffs' instruction offered by them on the same subject. Matsumoto v. Renner, 90 Cal.App.2d 406, 202 P.2d 1051; Lee v. Hackney, 110 Cal. App.2d 444, 242 P.2d 933." Zuckerman v. Underwriters at Lloyd's, 42 Cal.2d 460, 470, 267 P.2d 777, 783: "However, the beneficiaries are in no position to criticize the instruction presented by Underwriters because the jury was given a substantially similar instruction requested by them. It is well established that a party cannot complain of an error in an instruction given at the request of his adversary when one requested by him also contains the same error. Wells v. Lloyd, 21 Cal.2d 452, 460, 132 P.2d 471; Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 P. 772." To the same effect, see, Butigan v. Yellow Cab Co., 49 Cal.2d 652, 657, 320 P.2d 500; Jentick v. Pacific Gas & Elec. Co., 18 Cal.2d 117, 121, 114 P.2d 343; Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 P. 772; Hughes v. Pacific Electric Ry. Co., 58 Cal.App. 375, 380, 208 P. 335; Bender v. Perry, 37 Cal.App.2d 206, 212–213, 99 P.2d 319; George v. City of Los Angeles, 51 Cal.App.2d 311, 319, 124 P.2d 872; Knowles v. Roberts-at-The-Beach Co., 115 Cal.App. 2d 196, 198, 251 P.2d 389; Smith v. City & County of San Francisco, 117 Cal.App.2d 749, 751, 256 P.2d 999; Rosenthal v. Harris Motor Co., 118 Cal.App.2d 403, 406, 257 P.2d 1034; Fuentes v. Panella, 120 Cal.App. 2d 175, 182, 260 P.2d 853; Smith v. Kile, 147 Cal.App.2d 314, 317, 304 P.2d 1034; see also, 4 Cal.Jur.2d § 557, p. 423.

1. "BAJI 101–I Requested by Plaintiff Given as Mod.

"A plaintiff who (was not guilty of contributory negligence and who) was injured as a proximate result of some negligent conduct on the part of (the) defendant is entitled to recover from such defendant compensation for such injury."

"BAJI 104–A Requested by Plaintiff Given

"This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause. (To give rise to liability, however, or to constitute contributory negligence, any such proximate cause must have consisted of negligent conduct.)"

"BAJI 104–B Requested by Plaintiff Given

"When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contribute concurrently and as proximate causes to the injury of another, each of such persons is liable (in the absence of contributory negligence). This is true regardless of the relative degree of the contribution. (It is no defense for one of such persons that some other person, not joined as a defendant in the action, participated in causing the injury) (even if it should appear to you that the negligence of that other person was greater in either its wrongful nature or its effect)."

"BAJI 147 Requested by Plaintiff Given as Modified

"A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience. There is no precise age at which, as a matter of law, a child comes to be held accountable for (her) actions by the same standard as applies an adult. It is for you to determine the mental capacity and experience of, and whether (her) conduct was or was not such as might reasonably have been expected from a child of like age, capacity and experience, under the same or similar circumstances. * * *"

Application of these authorities to the situation disclosed by the record at bar requires affirmance.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.



168 Cal.App.2d 20

Margaret B. SCHWAB, Plaintiff and Respondent,

v.

Arthur C. SCHWAB, Defendant and Appellant.

No. 18092.

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1959.

Action by assignor's widow to set aside assignment to his son of deed of trust on realty sold by assignor and note secured thereby for unpaid portion of purchase price. The Superior Court, Santa Clara County, John R. Kahle, J., rendered judgment setting aside assignment as to plaintiff's one-half interest, and defendant assignee appealed. The District Court of Appeal, Dooling, J., held that finding that assignor and wife had orally agreed, in consideration of reconciliation, that realty, in which wife had conveyed to assignor her interest as joint tenant at time of separation, should immediately become and remain their community property was supported by the evidence and was sufficient to support judgment.

Judgment affirmed.

1. Husband and Wife ⇐266

Husband and wife may by their oral agreement transmute any property owned by either to community property.

2. Appeal and Error ⇐989

In action by assignor's widow to set aside assignment of deed of trust on realty and note secured thereby on ground that they represented community property, weighing the evidence, reconciling inconsistencies therein, and determining its effect were the function of trial court.

3. Husband and Wife ⇐266

In action by assignor's widow to set aside assignment to his son of deed of trust on realty and note secured thereby for unpaid portion of purchase price of realty sold by assignor after reconciliation with wife, evidence as to oral reconciliation agreement that such property would belong to both assignor and wife as it did prior to separation and conveyance of wife's interest therein as joint tenant to assignor was sufficient to support finding that assignor and wife understood that such realty should immediately become and remain their community property upon resumption of marital relations.

4. Appeal and Error ⇐1010(1)
Witnesses ⇐183½

Rule that when one party to oral agreements is dead, the testimony of the other concerning such agreements must be viewed with extreme caution and subjected to careful scrutiny is a rule for guidance of trial court, and all that is required on appeal is that trial court's finding must be supported by the evidence.

5. Evidence ⇐313

In action by assignor's widow to set aside assignment to his son of deed of trust on realty and note secured thereby for unpaid portion of purchase price of realty which allegedly constituted community property of assignor and wife, it was for trial court to determine from all the testimony the effect of oral agreement between assignor and wife at time of reconciliation as to ownership of such property, and statement, attributed to assignor, that in case of death such property would be evenly divided could be treated as nothing more than statement of his understanding of the effect of community nature of such property.

6. Appeal and Error ⇐1071(6)
Husband and Wife ⇐273(12)

In action by assignor's widow to set aside assignment to his son of deed of trust on realty sold by assignor and note secured thereby for unpaid portion of purchase price, finding that, in consideration of reconciliation, assignor and wife, who had previously conveyed to assignor her interest in realty as joint tenant, orally agreed that such realty should immediately become and remain their community property supported judgment setting aside assignment as to widow's one-half interest in the property and was inconsistent with theory of second count of complaint that assignor had promised to devise one half of property to widow, and hence failure to find on second count was not prejudicial to assignee.

7. Trial ⇐397(2)

Where findings on one count support judgment, trial court need not find upon another count.

8. Contracts ⇐111

Oral reconciliation agreement by husband and wife that realty, in which wife had conveyed to husband her interest as joint tenant at time of separation, should immediately become and remain their community property was executed, and not executory, but in any event, consideration for agreement included reconciliation of parties who had previously separated, and, even though separation was not by agreement of the parties in writing, fact that consideration for reconciliation agreement also included wife's promise to perform normal duties of a spouse would not invalidate agreement as being against public policy. West's Ann.Civ.Code, § 159.

9. Contracts ⇐111

Agreement promoting reconciliation of husband and wife is favored by the law and is not illegal, regardless of whether separation was by agreement of the parties in writing. West's Ann.Civ.Code, § 159.

Donovan, Stuhr & Martin, San Francisco, for appellant.

Beresford, Jacobs & Rosenberg, Robert Beresford, Robert Francis Jacobs, San Jose, for respondent.

DOOLING, Justice.

Defendant Arthur C. Schwab appeals from a judgment in favor of plaintiff setting aside, as to a one-half interest, an assignment of her deceased husband to appellant of a promissory note secured by deed of trust on an apartment building.

Respondent and the decedent John Schwab were married in 1936. At that time John requested her to convey to him as joint tenant a one-half interest in a home owned by her and in which they subsequently lived. This she did.

In 1944 respondent and her husband purchased an apartment building. Record title was taken in their names as joint tenants but it was their understanding that it was community property and over one-half the purchase price came from respondent's earnings.

On April 17, 1950, respondent by deed conveyed to her husband her interest in the apartment and he conveyed to her his interest in the home. Respondent testified that these transfers were prompted by marital difficulties, her husband having told her that he wanted to separate from her and move to Colorado. Thereafter John did leave her and go away for a short period. After a brief absence John returned and they resumed their marital relations. She testified that upon his return it was orally agreed between them that the ownership of the apartment should be as it had been before her conveyance but that the home should remain her separate property. Respondent did not ask her husband to retransfer by deed an interest in the apartment and the record title remained in him.

John sold the apartment in 1951 and received a promissory note secured by deed of trust for the unpaid portion of the purchase price. In May, 1951 John executed an assignment of the note and deed of trust to appellant, his son by a former mar-

riage, upon the understanding that he would continue to receive the monthly payments so long as he lived. John died in August, 1955 and respondent did not learn of this assignment until about two months before his death. She asked the appellant to assign to her the note and deed of trust but he refused.

The complaint was in two counts. The first count alleged the separation and transfer from respondent of her interest in the apartment. It then pleaded the reconciliation and alleged that at that time the parties "mutually agreed that said real property thereupon became and would continue to be their community property."

The second count alleged that in consideration of their resumption of marital relations and her promise to care for him John promised to devise and bequeath to her one-half of said property.

The trial court found the allegations of the first count to be true and made no findings on the second count.

[1] It is now too well settled for dispute that husband and wife may by their oral agreement transmute any property owned by either to community property. Woods v. Security First Nat. Bank, 46 Cal.2d 697, 701, 299 P.2d 657; In re Estate of Hartnett, 155 Cal.App.2d 280, 283, 318 P.2d 81; 10 Cal.Jur.2d, Community Property, § 58, pp. 733–734.

Appellant however attacks the sufficiency of the evidence to support the agreement. Respondent testified:

"Well, he said that nobody seemed to understand him or take care of him the way I did, and he wanted to come back, and for me to take care of him, and that everything would be the same. The property would go back to belonging to us both. * * *

"Well, he said in case of his death, the property would be evenly divided, and that I would not be sorry for taking him back and caring for him the way he wanted me to. * * *

"Well, he said it would go back to both our names again, and that it would be—mine and his, just like it was before. * *

"Well, he told me that the 5th Street property (the apartment) would be back in both our names. * * *

"Well, he told me that that place was ours, we worked for it together, and we bought it, and it was ours. * * *

"He said, and I said, that the property would be community property again. * *

"Q. (By Mr. Stuhr) You used those words: 'The property will be community property again'?

"A. Both—yes, he and I said that, yes."

On cross-examination respondent was asked: "That he agreed with you that if you would care for him and administer to him as a wife normally does to a husband, that he would give to you this property, is that correct?"

Her answer was: "Yes, something like that. * * *

"Q. And he would give you the property?

"A. Yes, that is what he told me."

[2, 3] Appellant argues that this evidence was too uncertain to support a finding of an agreement presently transmuting the property to community property. The weighing of the evidence, the reconciling of inconsistencies therein and the determination of its effect is the trial court's function and the evidence is sufficient to support the trial court's finding that it was the understanding of the parties that this property should immediately become their community property upon the resumption of their marital relations.

[4] Appellant adverts to the rule that when one party is dead the testimony of the other concerning oral agreements between them must be viewed with extreme caution and subjected to careful scrutiny. In re Estate of Henderson, 128 Cal.App. 397, 17 P.2d 786; 10 Cal.Jur.2d, Community Property, § 59, p. 734. This is a rule for the guidance of the trial court

and all that is required on appeal is that the finding be supported by the evidence. McRay v. Winter, 118 Cal.App.2d 800, 802, 258 P.2d 872.

[5–7] Appellant further seizes on the one answer of respondent that "he said in case of his death, the property would be evenly divided" and argues 1. that this is inconsistent with the intention of the husband that the property should be immediately transmuted to community property and 2. that it was therefore prejudicial error to fail to find on the allegations of count 2 of the complaint. The finding that the property was immediately transmuted to the community is inconsistent with the theory of count 2 that the agreement was one to devise one-half. It was for the trial court to determine from all of the testimony the effect of the agreement of the parties. If the trial court believed respondent's other testimony the parties agreed that the property should immediately become their community property in which event the statement that in case of death the property would be evenly divided amounted to no more than the husband's statement of his understanding of the effect of its community character. The failure to find on the second count did not prejudice appellant since the findings on the first count not only fully support the judgment but are inconsistent with the theory pleaded in count 2. Where the findings on one count support the judgment there is no necessity to find upon another. 24 Cal.Jur., Trial, § 184, p. 939; Adams v. Helbing, 107 Cal. 298, 302, 40 P. 422.

[8, 9] Finally appellant argues that the oral agreement of the parties was against public policy since the consideration was the wife's promise to perform the normal duties of a spouse. Civil Code, § 159; Brooks v. Brooks, 48 Cal.App.2d 347, 119 P.2d 970. The agreement transmuting the character of the property was executed, not executory, but assuming that we must look to the consideration for the executed agreement it included the reconciliation of the parties who had previously separated. An agreement promoting reconciliation is favored by the law and is not illegal. Bowden v. Bowden, 175 Cal. 711, 167 P. 154, L.R.A.1918A, 380; Dale v. Dale, 87 Cal.App. 359, 364, 262 P. 339; Restatement Contracts, § 585. We can find no support in law for appellant's claim that in order to make this rule applicable there must be a separation by agreement of the parties in writing. The cases last above cited are to the contrary.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.



168 Cal.App.2d 47

Frank E. DIFLOE, Plaintiff and Respondent,

v.

Helen R. DIFLOE, Defendant and Appellant.

Civ. 17933.

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1959.

Hearing Denied April 15, 1959.

Divorce action by husband. The Superior Court, City and County of San Francisco, Twain Michelsen, J., granted divorce to husband on ground of extreme cruelty, and wife appealed. The District Court of Appeal, Peters, P. J., held that where wife had custody of child and husband on active duty with navy had reasonable visitation rights, wife who changed twice to new addresses in same city where she and husband had resided, who notified tenants at old address of the change, whose changed address and telephone numbers were listed, in telephone book and city directory, who notified commanding officer and chaplain of husband's ship, and who notified Naval Allotment Board but did

not notify the husband, was not guilty of extreme cruelty.

Reversed.

1. Divorce ⇐147

In action for divorce, what is or is not grievous mental suffering is fact question.

2. Divorce ⇐184(10)

In action for divorce, finding of trial court on issue of existence of grievous mental cruelty will not be upset unless evidence to support the finding is so slight as to indicate abuse of discretion.

3. Divorce ⇐27(1)

Where spouse having custody of child conceals whereabouts of child from spouse having visitation rights, proper case of extreme cruelty is shown.

4. Divorce ⇐27(1)

Where spouse having visitation rights makes no reasonable efforts to see child upon failure to receive notification of change of address of child from spouse having custody, spouse with visitation rights may not claim mental anguish as ground for divorce.

5. Divorce ⇐27(1)

Where wife had custody of child, and husband on active duty with navy had reasonable visitation rights, wife who changed twice to new addresses in same city where she and husband had resided, who notified tenants at old address of the change, whose changed address and telephone numbers were listed in telephone book and city directory, who notified commanding officer and chaplain of husband's ship, and who notified Naval Allotment Board, but did not notify the husband of the change was not guilty of "extreme cruelty", and husband was not entitled to divorce.

See publication Words and Phrases, for other judicial constructions and definitions of "Extreme Cruelty".

Kenneth L. Johnson, Everett H. Roan, San Francisco, for appellant.

Ted James Kukula, San Francisco, for respondent.

PETERS, Presiding Justice.

The trial court granted Frank Difloe a divorce from Helen Difloe, finding that the wife was guilty of extreme cruelty in that "since on or about Christmas 1953 defendant [wife] has failed and refused to permit plaintiff to see or visit the minor child of the parties, * * * and has concealed the child's whereabouts from the plaintiff, without any justification on defendant's part or provocation on plaintiff's part." Helen Difloe appeals.

The plaintiff is a chief gunner's mate in the United States Navy, on active duty. During the times here involved he was in San Francisco on relatively rare intervals, and but for short periods of time. The parties were married on March 3, 1945, and separated on January 11, 1952. There is one child of the marriage. In December of 1955, the husband filed the present action for divorce, alleging extreme cruelty. In 1953 the husband brought a prior action for divorce, which was denied by the trial court. In that action, without a cross-complaint by the wife, or without any claim for affirmative relief by her, the trial court granted the wife custody of the child, with reasonable visitation rights in the husband, and awarded the wife $200 per month alimony and support money. In the present action the cruelty charged is that the wife failed and refused to permit plaintiff to see or to visit the minor child of the parties and concealed that child from the plaintiff. As already pointed out, the trial court found that that charge was supported, awarded the custody of the child to the wife, granted the husband reasonable visitation rights, and awarded attorney's fees to the wife. The wife appeals, her major contention being that the finding above quoted is unsupported.

The factual situation is somewhat unusual. The so-called separate maintenance decree awarding the wife custody of the child and granting the husband reasonable

visitation rights was entered in August of 1953, after a trial in June of 1953. At that time the parties were living in a multiple dwelling project on Pali Street in San Francisco. The wife and child continued to live there after the separation of the parties. The husband went to sea. Early in December, 1953, the wife moved to Folsom Street. She did not inform her husband of her change of address, although, admittedly, she knew how to communicate with him. On Christmas Eve of 1953 the husband arrived in San Francisco and proceeded to their former address on Pali Street to visit his child and to bring her some Christmas gifts. He discovered that his wife had moved and that the then tenant of the premises did not know her new address. He made no inquiry of other tenants in the apartment. He did look in the telephone directory, but his wife's name was not listed. The parties did not have a telephone at the Pali Street address, but the wife did secure a telephone at the Folsom Street home, but it was not listed in the directory until that book came out in July of 1954. The husband had to leave on December 27th and did not return to San Francisco until March of 1954, when he again looked through the appropriate directories and could not find her address.

The wife stayed at the Folsom Street address until June of 1954 and then moved to a house on Vicente Street. Here, too, she had a listed telephone. She did not notify her husband of this new address. She sent her husband a packet and a letter containing certain documents but, according to the husband, did not place a return address on the envelopes. The wife admitted that after the separation in 1952 she did not offer to write to the plaintiff on behalf of the child, nor did she suggest to the child that she would do so.

The husband also testified that he wrote to his wife's parents in Detroit asking for his wife's present address, but received no answer. He admitted that in the latter part of 1954 when he was in San Francisco on a 3-day visit he found his wife's address in a telephone book but did not call upon her, nor did he telephone, because, so he testified, he was too busy with official naval duties, and had decided to file this case asking for a divorce. He made no attempt, after discovering his wife's address, to get in touch with his wife or child. The original complaint in this action was filed in December, 1955.

This is a fair summary of the husband's testimony as to his unsuccessful efforts to find or to see his child. He admitted that his wife at no time had told him that he could not see the child. The wife testified that she had moved from Pali Street to Folsom, and then to Vicente, for health reasons and on doctor's orders; that at no time was she trying to conceal her address from her husband, nor was she trying to prohibit him from seeing the child. The Pali Street abode was part of an 8-family multiple unit and when she moved from there she told at least four of the tenants where she was going. Admittedly, when the husband called at the Pali Street address in December of 1953 he inquired for his wife and child only at his own old address, and made no effort to make inquiry of the other tenants who were friends of him and his wife.

Admittedly, the wife notified the Navy Allotment Board of her various changes of address, and admittedly the husband knew that this had been done and that her new address could be secured from that office. He made no such inquiry. The wife also testified that she notified the commanding officer, and the chaplain of the ship on which the husband was serving, of her change of addresses. The husband testified that he made no inquiry of these people because he did not want to mix his personal affairs with official naval affairs. The wife also testified that in December of 1953 she took the child down to the ship on which her husband was serving and talked to the commander but was unable to see her husband. She stated that she had no desire to deprive her husband

of his visitation rights, that she wanted him to see the child, and that it was for that reason that she left her change of address with the officials of her husband's ship.

There was corroborated evidence that the husband's failure to see his child caused him mental anguish.

On this evidence the trial court granted the divorce to the husband, finding that "defendant has failed and refused to permit plaintiff to see or visit the minor child * * * and has concealed the child's whereabouts from the plaintiff."

[1, 2] If this finding is supported, there is no doubt that such actions could constitute extreme cruelty sufficient to warrant a divorce. Of course, what is or is not grievous mental suffering is a fact question. The finding of the trial court on such an issue will not be set aside unless the evidence to support it is so slight as to indicate an abuse of discretion. Keener v. Keener, 18 Cal.2d 445, 116 P.2d 1; Griffith v. Griffith, 129 Cal.App.2d 803, 277 P.2d 850; Wasserstrom v. Wasserstrom, 139 Cal.App.2d 798, 294 P.2d 497; Ohligschlager v. Ohligschlager, 125 Cal. App.2d 458, 270 P.2d 577; see cases collected 16 Cal.Jur.2d 317, § 21. While the finding of infliction of grievous mental suffering is generally a matter within the discretion of the trial court, such a finding will be set aside, however, if there is not some substantial evidence to support it. Farrand v. Farrand, 77 Cal.App.2d 840, 176 P.2d 773; Truax v. Truax, 62 Cal.App.2d 441, 145 P.2d 88; Negley v. Negley, 82 Cal.App.2d 355, 186 P.2d 151.

[3, 4] The trial judge in the instant case was of the opinion that the wife was under a positive duty to notify her husband of each change of address so that his visitation rights should not be impaired, and that her failure to notify him constituted extreme cruelty. The judge was also apparently of the opinion that the failure of the husband to make reasonable efforts to discover that address was of no legal significance. We do not think that that is the law. Certainly the spouse having custody of a child of the marriage cannot properly conceal or hide the whereabouts of the child from the spouse having visitation rights. If the spouse having custody commits such acts, a proper case of extreme cruelty has been shown. But the spouse having visitation rights cannot sit back and await notification of a change of address, and, when it is not forthcoming, make no reasonable efforts to see the child, and then claim, as a grounds of divorce, that he has suffered mental anguish because he has not seen his child. In such a case the claimed mental anguish is not attributable to the failure to furnish the change of address, but is directly attributable, in part at least, to that spouse's failure to exercise reasonable diligence to find the child.

[5] In the instant case the trial court made no finding on the acts of the husband. Had such a finding been made it necessarily would have been to the effect that the husband's lack of due diligence was at least one of the basic causes of his mental anguish. In such a situation, the husband had not proved grounds for a divorce.

In the present case the wife made no effort to conceal or hide the child. At no time did she leave San Francisco. After January of 1954 she had a telephone, and a simple inquiry of the telephone company would have elicited that number. After July of 1954, and continuously thereafter, her name, address and phone number were listed in the telephone book and city directory. The wife told four of the other seven tenants living in the same apartment house where she and her husband had lived, of her Folsom Street address. The wife notified the Naval Allotment Board of her change of addresses, and her husband knew this, and knew that a simple inquiry would have secured her present address. The wife notified the commanding officer and chaplain of her husband's ship of her addresses, but the husband made no inquiry of them. Certainly such acts do not support a finding that the wife has "refused to permit" her husband to see the child and has "concealed"

the child from her husband. It would have been a gracious act to have notified her husband of her new addresses, and perhaps she should have done so, but her failure to do so under the circumstances cannot be held to constitute extreme cruelty. Particularly is this so where the evidence without contradiction shows that, had the husband exercised the slightest diligence, he could have discovered the child's whereabouts. After July of 1954 (and he visited San Francisco several times between July and December of that year), all he had to do was to look into a telephone book. He admitted that he did so in the latter part of 1954 and discovered the address, but made no effort to telephone or to see the child. This hardly supports findings that the child was concealed from him or that he was suffering severe mental anguish because of his inability to see the child.

We are not unmindful of the fact that plaintiff was in the Navy and at sea much of the time. But plaintiff testified that he was in San Francisco at least six times in 1954, at least three of which were after July, and that on these three occasions he made no effort to find his wife or child. On the other three visits in 1954 only in March did he make any effort at all to find them. Plaintiff admitted to being in San Francisco in February and again in May of 1955, and that on these occasions he made no attempt to see his wife or child or to find them, although he then knew their address. Each visit was of three to seven days' duration.

Under these circumstances it must be held that the challenged finding is unsupported.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

PETERS, J., not participating.

168 Cal.App.2d 42

Florence CAREY, Glen Holloway, Minnie Hite, Dorothy Watts and Ruth Coley, Plaintiffs and Appellants,

v.

LIMA, SALMON AND TULLY MORTUARY et al., Defendants and Respondents.

No. 17862.

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1959.

Action for damages allegedly caused by negligence of defendant embalmers in performing their contract to embalm the body of plaintiffs' deceased father and ship it from California to Oklahoma, which body arrived in a decayed condition, malodorous and dripping fluid. From a judgment of the Superior Court, County of Santa Clara, Harold Holden, J., granting a directed verdict for defendants, the plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that the evidence was sufficient for jury on issue of defendants' negligence and whether such negligence was an effective cause of the decomposition of the body and of consequent injury to the plaintiffs.

Reversed.

1. Dead Bodies ⇐9

The mental and emotional shock suffered by children upon learning that body of their father, which defendants had contracted to embalm and ship from California to Oklahoma, was in a decayed condition, malodorous and dripping fluid, was an element of compensable injury.

2. Dead Bodies ⇐9

In action for damages allegedly caused by negligence of defendant embalmers in performing their contract to embalm the body of plaintiffs' father and ship it from California to Oklahoma, evidence including showing that body arrived in Oklahoma in a decayed condition, malodorous and dripping fluid, was sufficient

for jury on issue of defendants' negligence and whether such negligence was an effective cause of decomposition of the body and of consequent injury to plaintiffs.

3. Evidence ⇐507

Although an expert should not be asked to give his opinion as to an ultimate fact in case when ultimate fact is one which can be determined from common experience, the decisive consideration in determining admissibility of expert opinion evidence is whether subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as witness or whether the matter is sufficiently beyond common experience that opinion of an expert would assist the trier of fact.

4. Appeal and Error ⇐1048(6)

In action for damages caused by alleged negligence of defendant embalmers in performing their contract to embalm body of plaintiffs' father and ship it from California to Oklahoma, which body arrived in a decayed condition, malodorous and dripping fluid, alleged error in sustaining objection propounded to defendants' expert witness on cross-examination whether "looking at those black and white pictures, that this was a satisfactory job of embalming?" did not require reversal where court might have determined that answer might be given too much weight by jury and that testimony might in effect have been cumulative because jury was sufficiently apprised of basis for their own determination of the issue.

5. Appeal and Error ⇐205

Before ruling of trial court sustaining an objection to question propounded to an expert witness on cross-examination will be reviewed on appeal an offer of what is proposed to be proven must first be made to trial court so that reviewing court may determine whether evidence would be beneficial to party offering it.

6. Trial ⇐56

In action for damages caused by negligence of defendant embalmers in performing contract to embalm body of plaintiffs' father and ship it from California to Oklahoma, which body arrived in a decayed condition, malodorous and dripping fluid, wherein plaintiffs introduced seven black and white photographs of the body which were not claimed to be inadequate, and there was testimony describing condition of the body, two additional colored photographs were properly rejected as cumulative.

Melvin M. Belli, Ashe & Pinney, Van H. Pinney, San Francisco, for appellants.

Robert J. Popelka, San Jose, for respondents.

FRED B. WOOD, Justice.

Plaintiffs brought this action for damages allegedly caused by the negligence of the defendant embalmers in performing their contract to embalm the body of plaintiffs' deceased father and ship it from San Jose, California, to Enid, Oklahoma. Upon the conclusion of the trial the court granted a directed verdict for the defendants.

[1] The body arrived at Enid in a decayed condition, malodorous and dripping fluid. The mental and emotional shock suffered by plaintiffs upon learning that the body was in such a condition made them ill, an element of compensable injury that is within the purview of the legal principles expounded and applied in Chelini v. Nieri, 32 Cal.2d 480, 196 P.2d 915.

[2] Plaintiffs claim there was evidence that should have gone to the jury on the question of defendants' negligence. They refer to the testimony of Richard M. Parkis, funeral director and mortician, who examined the body upon its arrival at Enid. He expressed the opinion, based upon the condition of the body, that the embalming fluid used in this case had not circulated throughout the body. He also testified that there are several methods whereby an embalmer can determine whether or not the embalming fluid has circulated throughout the body, and if it appears that the fluid has not circulated in some part of the body

an embalmer can pick up an artery in that part and inject embalming fluid in that area; also, when a body is to be shipped one is usually more careful to make sure he has adequate circulation, adequate fluid; you take more precautions in such a case.

Parkis also testified that his morticians worked some 17 to 20 hours upon restoration of this body, and that normally when a body has been shipped from somewhere else there are some small things an embalmer has to do, "but mostly what it has been has been makeup."

The witnesses on both sides were agreed that circulation of the embalming fluid throughout the body is the purpose of a proper embalming job.

Defendant Lima said that with the aid of an assistant he embalmed this body; that during the embalming process and twice a day during the two or three days before shipment he examined the body and from various indicia was satisfied that he had obtained proper circulation of the embalming fluid. There was testimony also that there are a number of factors that may accelerate deterioration.

There resulted a conflict in the evidence. A jury verdict in favor of the defendants would have found support in the evidence. However, it does not appear to us that such evidence would cancel or override Parkis' expert testimony as a matter of law. His testimony would support findings that the defendants did not properly embalm the body, that their conduct in that regard was negligent and was an effective cause of the decomposition of the body and of the consequent injury to the plaintiffs.

Defendants argue that there was no evidence that they contracted to preserve the body for any particular period of time. That is not the point. The jury could infer an implied promise to do a proper job and exercise workmanlike care, especially in the light of defendants' knowledge that the body was to be shipped to Oklahoma where the funeral would be held.

Defendants also contend that the testimony, including that of plaintiffs' witness, Mr. Parkis, makes it equally as possible that other factors caused the result as that improper embalming caused it, and in that situation plaintiffs have failed to carry their burden of proof. Although Mr. Parkis testified as to the variable factors, he did not testify that these are uncontrollable. They are factors that influence the care and method of embalming. Mr. Parkis did testify that "[o]nce in a while you have something develop, yes, every embalmer will," but this was in response to a question as to whether before bodies are buried, it is uncommon to have to do "some other additional touch up and things like that * * *" The question was not directed at major reconstruction such as was involved here. Mr. Parkis' testimony indicates that, in his opinion, the cause of the body's condition was improper distribution of embalming fluid, a condition that a mortician can determine, and not that it was equally possible that the body could have arrived in the condition it did as a result of other factors over which a mortician has no control.

In this situation, the jury could believe Mr. Parkis' testimony and find for the plaintiffs. It cannot be said that there is "no evidence of sufficient substantiality to support a verdict in favor" of plaintiffs. It was error to direct a verdict for defendants. See Sokolow v. City of Hope, 41 Cal.2d 668, 670, 262 P.2d 841.

[3, 4] D. E. Ashworth, an expert witness for the defendants, was asked upon cross-examination "Would you say, from looking at those black and white pictures, that this was a satisfactory job of embalming?" Defendants' objection that this called for the witness' opinion and conclusion on the ultimate fact here, a question for the jury to decide, was sustained.[1] Although an expert should not be asked to give his opinion as to an ultimate fact in the case when the ultimate fact is one

1. A like objection was made by defendants to a question asked of plaintiffs' expert "whether or not a workmanlike job had been done in embalming this particular body." It is not clear from the record

which can be determined from common experience (Hogan v. Miller, 153 Cal.App. 2d 107, 314 P.2d 230; Sappenfield v. Main St. & A. P. R. Co., 91 Cal. 48, 60, 27 P. 590), "the decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." People v. Cole, 47 Cal.2d 99, 103, 301 P.2d 854, 856, 56 A.L.R.2d 1435. Applying this principle, the court in the Cole case held that expert testimony was not inadmissible merely because it coincided with an ultimate issue of fact in the case. At page 105 of 47 Cal.2d, at page 857 of 301 P.2d. See also Wells Truckways, Ltd. v. Cebrian, 122 Cal.App. 2d 666, 678, 265 P.2d 557. However, the court in the Cole case also observed that where "expert opinion evidence is offered, much must be left to the discretion of the trial court." At page 105 of 47 Cal.2d, at page 857 of 301 P.2d. Here, exclusion of the testimony may not have been an abuse of such discretion because in this case there was evidence that the object of proper embalming was to distribute the fluid throughout the body and Mr. Parkis testified that it appeared to him that such was not done here. Accordingly, the jury might have concluded that the job was not properly done. Thus the evidence in the case sufficiently explained the process and the desired results, so as to enable the jury to form their own conclusions without further aid of an expert.

Therefore, although it would appear erroneous to sustain the objection if the question were considered out of context, the sustaining of the objection could not be a basis for reversal of the judgment here. An abuse of discretion does not clearly appear, because the court may have determined that the answer might be given too much weight by the jury and that the testimony might in effect have been cumulative because the jury was sufficiently apprised of the basis for their own determination of the issue.

[5] Moreover, it did not appear whether Ashworth's answer would be favorable to the examiner. In such a case "before the ruling will be reviewed on appeal an offer of what is proposed to be proven must first be made to the trial court so that the reviewing court may determine whether the evidence would be beneficial to the party offering it." Ogden v. Title Insurance & Trust Co., 129 Cal.App.2d 26, 28, 276 P.2d 146, 147. See also Hogan v. Miller, 153 Cal.App.2d 107, 116, 314 P.2d 230; Duff v. Schaefer Ambulance Service, Inc., 132 Cal.App.2d 655, 671, 283 P.2d 91.

[6] The plaintiffs introduced into evidence seven black and white photographs of the body. Later they attempted to introduce two color transparencies of the body. The court, in refusing to admit the color pictures into evidence, stated, "These are the same pictures, as I understand it, as the others, except they're in color, and he's testified to the condition of the body. I can't see any further purpose for additional pictures. They are the same." Plaintiffs' counsel did not point out any differences in the pictures, although now he contends the excluded photographs "displayed the condition of the body in a different manner than—and one more readily apparent to the jury than the black and white photographs." Although the color photographs might have been more vivid, plaintiffs do not contend that the black and white photographs were not adequate. In view of this, and the testimony describing the condition of the body, the colored photographs were properly rejected as cumulative.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

that a ruling thereon was made. Plaintiffs apparently did not press for a ruling and took up another subject with the witness.

168 Cal.App.2d 25

Matter of the ESTATE of Janet M. PECK, Deceased.

Aaron M. SARGENT, Cornelia M. Sargent, Madelyn Georgian, Guardian ad litem of Helen M. Sargent, Jr., Frank M. Howell, Jr., Orrin P. Howell, Marietta Gann Bundy, Elizabeth Gann Handel, Louise Flinn, Fred Howell, Charlotte More Meloney, Frank More and Margaret More White, Appellants,

v.

BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, Respondent.

Civ. 18130.

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1959.

Rehearing Denied March 18, 1959.

Hearing Denied April 15, 1959.

Estate proceeding. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered a decree determining heirship and finding a charitable trust created by the will of testatrix valid, and children of first cousins of testatrix appealed and also filed a motion requesting findings on appeal. The District Court of Appeal, Kaufman, J., held that where a testamentary will indicated that testatrix desired to contribute toward world peace by setting up a trust to provide education for newspapermen, such a purpose was fundamentally educational, and a trust constituted a valid charitable trust.

Decree affirmed and motion for findings on appeal denied.

1. Wills ⇐448

A construction of a will favorable to testacy will be adopted when the language used reasonably admits of such construction.

2. Charities ⇐31

Courts look with favor upon all attempted charitable bequests and will not construe a charitable bequest as legally void if it can possibly be made good.

3. Charities ⇐31

It is the policy of the law to favor gifts for charitable purposes and a will providing such gifts will be liberally construed to accomplish the intent of the donor.

4. Charities ⇐12

Where a testamentary will indicated that testatrix desired to contribute toward world peace by setting up a trust to provide education for newspapermen, such a purpose was fundamentally educational, and the trust constituted a valid charitable trust.

5. Charities ⇐12

A trust for educational purposes is a trust for charitable purposes.

6. Charities ⇐10

A trust set up for the purpose of promoting peace and world understanding was a trust for valid charitable purpose.

7. Charities ⇐10

A trust with the object of creating a more enlightened public opinion is a valid trust.

8. Charities ⇐22(2)

Where a will restricted use of trust property solely to charitable purposes, with a direction to the trustees to establish a foundation of world relations, and to use net income of the trust property for operation of the foundation, and under terms of the founding grant, trustees were prohibited from using income and profits of the trust for any private purpose, and trustees were given only discretionary power to determine particular plans for carrying out the purposes of the trust, trust could not be deemed invalid on ground that it permitted noncharitable as well as charitable uses.

9. Wills ⇐516

Where will bequeathed testatrix' property in trust to "the trustees of the Leland Stanford Junior University", there was no ambiguity or uncertainty in such language, and such a bequest was not one to the individuals who happened to be trustees of the University at the date of testatrix' death, but a bequest to the governing body

of the University. West's Ann.Const. art. 9, § 10.

Doyle & Clecak, Aaron M. Sargent, San Francisco, for appellants.

Robert Minge Brown, Albert J. Moorman, Graham B. Moody, Jr., McCutchen, Doyle, Brown & Enersen, San Francisco, for respondent.

KAUFMAN, Justice.

The only question on this appeal is the validity of a charitable trust created by the will of Janet Peck. By a decree determining heirship and ordering preliminary distribution, the probate court found the trust valid and ordered distribution accordingly, to the Board of Trustees of The Leland Stanford Junior University, respondent herein. Appellants assert that the trust is void and claim the estate on grounds of intestacy.

Janet Peck died in 1956, leaving an estate valued at over $480,000. Her closest surviving relative was a first cousin, Edmund More, Jr. Appellants are the children of persons who were first cousins of the testatrix. By her will, dated 1936, Janet Peck left her estate in trust to the Trustees of Stanford University, subject only to certain annuities.

Appellants contend that: 1) The trust is not a valid charitable trust as the property must not be used exclusively for educational purposes; 2) The testatrix intended to make a bequest to the trustees individually; 3) The trial court erred in denying appellant's petition for preliminary distribution and determination of heirship. Appellants have also filed a motion requesting findings on appeal, based on substantially the same contentions. There is no merit in the appellants' position.

The relevant language of the will is as follows:

> "*Second:* The ever-recurring misunderstandings between the various nations and the peoples of different races which impede human progress and lead to devastating wars, are obviously attributable, in large measure, to differences of environment and language. I believe that these handicaps can be largely overcome, if the men and women whose vocation vests in them the power to mold public opinion, make a conscious effort to that end. However, their effort will go for naught, unless based on sound education on their own part, and thorough understanding of the economics of the various countries of the world, as well as their historic, diplomatic and political backgrounds. The molding of public opinion in the United States, insofar as concerns the attitude of our citizens toward anything foreign, rests almost entirely with the press which, in turn, must depend upon editorial staffs and foreign correspondents. Based on past experience, I believe that it is fair to say that there is a woeful lack of any real education on their part in what should be the foundation of one of the most important patriotic contributions which they could make to our country and the welfare of its citizens. I have therefore long cherished the hope that I might be able to do something to help toward the correction of these conditions, and to that end I hereby give and bequeath to The Trustees of The Leland Standford Junior University (hereinafter referred to as my 'Trustees') all of my estate and property, both real and personal and wheresoever the same may be situate, *in trust* for the foregoing purposes,—subject to the express terms and conditions hereinafter set forth:
>
> "(a) My said Trustees shall establish a *Foundation of World Relations*, for the aforesaid purposes; and my said Trustees shall use and apply the net income derived from said trust estate for the maintenance of said Foundation. My said Trustees shall, in their own discretion, determine from time to time the manner in which said net in-

come may be best expended for said purposes, in view of the amount available therefor; and they may, if they deem such course wise, postpone the expenditure of any sums for my said trust purposes, until such time as the income available therefor shall, in their opinion, be adequate to meet such expense as may be necessary to accomplish something substantial in the said field of learing [sic] to which said trust is dedicated."

[1–3] We start with several fundamental principles of the law. First, that a construction of a will favorable to testacy will be adopted when the language used reasonably admits of such construction, (In re Estate of Wellings, 197 Cal. 189, 240 P. 21; In re Estate of Dunphy, 147 Cal. 95, 81 P. 315; In re Estate of Heywood, 148 Cal. 184, 82 P. 755). Second, courts look with favor upon all attempted charitable bequests and there is no authority to construe a charitable bequest as legally void if it can possibly be made good. It is the policy of the law to favor gifts for charitable purposes and a will providing such gifts will be liberally construed to accomplish the intent of the donor. In re Estate of Quinn, 156 Cal.App.2d 684, 320 P.2d 219; In re Estate of Tarrant, 38 Cal.2d 42, 237 P.2d 505, 28 A.L.R.2d 419; In re Estate of Bunn, 33 Cal.2d 897, 206 P.2d 635; Collier v. Lindley, 203 Cal. 641, 266 P. 526; In re Estate of Hinckley, 58 Cal. 457.

[4, 5] We think any reasonable construction of the language used by the testatrix indicates that the testatrix desired to contribute toward world peace by providing education for newspapermen. Such a purpose is fundamentally educational. It has long been the law in this state, that a trust for educational purposes is a trust for charitable purposes. Lundberg v. County of Alameda, 46 Cal.2d 644, 298 P.2d 1; In re Estate of Yule, 57 Cal.App.2d 652, 135 P.2d 386; In re Estate of Bailey, 19 Cal. App.2d 135, 65 P.2d 102; In re Estate of Bartlett, 122 Cal.App. 375, 10 P.2d 126; In re Estate of Purington, 199 Cal. 661, 250 P. 657; In re Estate of Royer, 123 Cal. 614, 56 P. 461, 44 L.R.A. 364; People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L.R.A. 269; In re Estate of Hinckley, supra, 58 Cal. 457.

[6] Nor can it be doubted in this day and time, that an ultimate purpose to promote peace and world understanding is a valid charitable purpose. Our courts have long recognized that "The enforcement of charitable uses cannot be limited to any narrow and stated formula. As has been well said, it must expand with the advancement of civilization and the daily increasing needs of men. New discoveries in science, new fields and opportunities for human action, the differing condition, character, and wants of communities and nations, change and enlarge the scope of charity; and, where new necessities are created, new charitable uses must be established. The underlying principle is the same. Its application is as varying as the wants of humanity." People ex rel. Attorney General v. Dashaway Ass'n, 84 Cal. 114, 122, 24 P. 277, 279, 12 L.R.A. 117; see also People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 P. 270. Bequests to promote peace and world understanding have been upheld in other jurisdictions. Tappan v. Deblois, 45 Me. 122; Mills v. Montclair Trust Co., 139 N.J.Eq. 56, 49 A.2d 889; In re Harmon's Will, Sur., 80 N.Y.S.2d 903.

[7] Appellants argue that the trust is one solely for propaganda. Even if this were so, a trust with the object of creating a more enlightened public opinion and a bequest to an organization with political purposes have been held to be valid charitable trusts in this state. Collier v. Lindley, 203 Cal. 641, 266 P. 526; In re Estate of Murphey, 7 Cal.2d 712, 62 P.2d 374.

[8] Appellants further argue that the language of the will permits non-charitable as well as charitable uses. The appellants rely chiefly on In re Estate of Sutro, 155 Cal. 727, 102 P. 920. As we recently pointed out in Estate of Rollins, 163 Cal.App.2d 225, 328 P.2d 1005, the earlier decisions were somewhat quick to find the possibility

of a non-charitable use, while the recent cases are less inclined to search minutely for the possibility of a non-charitable use. In the Sutro case as in In re Estate of Kline, 138 Cal.App. 514, 32 P.2d 677; In re Estate of Peabody, 21 Cal.App.2d 690, 70 P.2d 249, the trustees were authorized to apply the trust fund for the benefit of generally described existing institutions, some of which were charitable and some of which were privately operated for profit. In the instant case, the will restricts the use of trust property solely to charitable purposes. The only institution mentioned in the will is Stanford University which is organized for public benefit and not for private profit. The trustees are to establish a Foundation of World Relations and to use the net income of the trust property for the operation of the Foundation. If the trust income is sufficient, the trustees are to establish a professorship.

Furthermore, under the terms of the Founding Grant, which is made applicable to all bequests to the Stanford Trustees by Section 10 of Article IX of the State Constitution, the Stanford Trustees are prohibited from using the income and profits of the trust for any private purposes. Contrary to appellants' argument, the trustees are not given an unlimited and uncontrolled discretion to select non-charitable objects, employ non-charitable means, or use the income for non-charitable purposes. The trustees are given only the discretionary power to determine the particular plan for carrying out the purposes of the trust. This is proper and in accord with the law. As stated in In re Estate of Butin, 81 Cal.App. 2d 76 at pages 81, 82, 183 P.2d 304 at page 307: "* * * it is not necessary that a detailed plan of execution shall be stated. When the general nature of the trust is adequately designated, its execution may be delegated to the named trustees, subject to the approval of court. Russell v. Allen, 107 U.S. 163, 2 S.Ct. 327, 27 L.Ed. 397; 14 C.J.S. Charities § 7, p. 436." See also In re Estate of Clippinger, 75 Cal.App.2d 426, 171 P.2d 567.

Appellants also cite Davenport v. Davenport Foundation, 36 Cal.2d 67, 222 P.2d 11, in which one of the stated purposes of the trust was the making of annuity payments to named individuals for a period longer than that permitted by the rule against perpetuities. In the instant case, all of the annuitants, except Mrs. Railton, predeceased the testatrix, and the annuity to Mrs. Railton terminates 15 years after the death of the testatrix or the death of Mrs. Railton, whichever occurs first.

[9] Appellants also argue that the will bequeaths the trust to the individuals who happened to be the Trustees of Stanford University at the date of her death and not to the Board of Trustees of Stanford University. The dispositive language of the will is to "the trustees of the Leland Stanford Junior University—(hereinafter referred to as 'my Trustees')". There is no ambiguity or uncertainty in this language. The testatrix intended to make a bequest to the governing body of Stanford University as the trial court found. The court's finding and distribution to the Board of Trustees of Stanford University was in accordance with Sec. 10 of Article IX of the State Constitution which is as follows:

> "* * * The Board of Trustees of the Leland Stanford Junior University, as such, or in the name of the institution, or by other intelligible designation of the trustees or of the institution, may receive property, real or personal, and wherever situated, by gift, grant, devise, or bequest for the benefit of the institution, or of any department thereof, and such property, unless otherwise provided, shall be held by the trustees of the Leland Stanford Junior University upon the trusts provided for in the grant founding the university, and amendments thereof, and grants, bequests and devises supplementary thereto."

Appellants' final contention on appeal relates to the trial court's alleged failure to grant their petition for preliminary distribution and determination of heirship.

This contention need not be answered here in view of our upholding the validity of the trust.

In view of the foregoing, the decrees appealed from are hereby affirmed and the appellants' motion for findings on appeal is denied.

DRAPER, J., concurs.



168 Cal.App.2d 57

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Walton Van Nort STUART, Defendant and Appellant.

Cr. 3490.

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1959.

Hearing Denied April 15, 1959.

Prosecution for performing an abortion. The Superior Court, Alameda County, Cecil Mosbacher, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Bray, J., held that where defendant gave his reason for allegedly not treating victim the fact that he found that she was pregnant and on cross-examination said that he would not fit a woman who was pregnant with a pessary because it might cause a miscarriage, prosecutor was entitled to cross-examine defendant to show that defendant had in fact fitted other pregnant women with pessaries.

Affirmed.

1. Witnesses ⇐337(4)

In prosecution for abortion by means of introduction of air, where defendant testified that he had not treated victim because he found that she was pregnant and he would not fit a woman who was pregnant with a pessary because it might cause a miscarriage, prosecutor was entitled to cross-examine defendant to prove that in spite of his statement he had in fact fitted other pregnant women with pessaries.

2. Criminal Law ⇐370, 371(1), 372(1)

Where defendant was prosecuted for performing an abortion by use of air to induce abortion, evidence of his use of pessaries to procure a miscarriage could not have been asked or introduced for purpose of showing intent, preparation, guilty knowledge, identity, or scheme, plan, or design, since abortions would be effected by a means different from those for which defendant was on trial.

3. Criminal Law ⇐372(1)

Evidence of other abortions is admissible where those abortions are similar to the one at issue.

4. Witnesses ⇐277(4)

Mere fact that defendant testified as to certain matters on direct examination does not automatically permit cross-examination on those matters.

5. Criminal Law ⇐824(1)

In prosecution for abortion, instruction to the effect that statements and arguments of counsel were not evidence and any statements made by counsel during trial or argument not supported by evidence or inconsistent with court's instructions as to the law are to be disregarded, was clear and proper, and if defendant desired anything further on subject because his own attorneys had testified at trial, he should have offered an instruction.

6. Criminal Law ⇐706

In prosecution for performing an abortion, the asking of defendant by prosecution if he had been previously convicted of crime of abortion and was then serving a term in named prison was not improper since prosecution instead of asking defendant could have introduced record of conviction and such record would have shown that defendant had been committed to prison.

7. Criminal Law ⇐713

In prosecution for crime of abortion, prosecutor's statement during trial that defendant had seen a particular exhibit in a previous trial against another victim, was not improper where there had already been reference to previous trial in which defendant was admittedly convicted of crime of abortion.

Haley, McInerney & Logan, Richard G. Logan, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment of conviction of abortion after jury verdict and from the order denying new trial.

Questions Presented.

1. Was cross-examination of defendant as to other abortions by means of pessaries proper?

2. Alleged error in instruction to disregard arguments and statements of counsel.

3. Alleged misconduct of district attorney.

Facts.

As no contention is made that the evidence does not support the verdict the evidence will not be detailed in full. The prosecuting witness, Pat, a 21 year old burlesque entertainer, testified that she went to the office of defendant (a chiropractor) and told him that she was pregnant and wanted to get rid of it. He ministered to her but performed no actual operation. She returned the next day and he inserted air into her womb to induce the abortion. This resulted in what was diagnosed at the hospital to which she later went, as an incomplete abortion. She paid defendant $90 for the operation.

One Lois testified to defendant performing a similar operation to abort her, after on two different occasions fitting her with a pessary which did not accomplish results.

Defendant denied attempting an abortion on Pat, testifying that she came to him to be fitted with a "permanent diaphram"—a pessary. On examining her for a fitting he discovered that she was pregnant and refused to proceed further. Defendant likewise denied attempting to abort Lois, or knowing that she was pregnant. He did fit her with a permanent diaphram and also treated her for ovaritis with an ultrasonic device.

1. Cross-Examination.

[1] As above stated, defendant gave as a reason for not treating Pat the fact that he found that she was pregnant. On cross-examination defendant said that he would not fit a woman who was pregnant with a pessary because it might cause a miscarriage. The prosecutor then asked defendant if he had not fitted five named women with pessaries when they were pregnant. As to one, defendant admitted fitting her but denied that she was pregnant. As to three of the others, he could not tell whether he had fitted them, without looking at his records. As to one, the question was not answered, being lost in argument of counsel.

[2–4] Such questions or the evidence sought to be reached by the questions could not have been asked or introduced independently for the purpose of showing intent, preparation, guilty knowledge, identity, or scheme, plan or design, since the abortions would have been effected by means different from those for which defendant was on trial. See People v. Darby, 1944, 64 Cal.App.2d 25, 31, 148 P.2d 28. Evidence of other abortions is admissible where those abortions were similar to the one at issue. People v. Green, 1952, 111 Cal.App.2d 794, 245 P.2d 526; People v. Vosburg, 1954, 123 Cal.App.2d 535, 266 P.2d 927. Although the fact that a defendant testified to certain matters on direct examination does not automatically permit cross-examination on those matters (see People v. Wells, 1949, 33 Cal.2d 330, 340, 202 P.2d 53, to the effect that the "open the gates doctrine" does not always apply),

here the questions asked dealt directly with a subject important to defendant's defense. Defendant introduced it to show why he did not treat Pat, and why he did not fit Lois with a pessary. The district attorney could not have objected to defendant's testimony as it was a part of his claimed defense. Therefore the district attorney had a right to show that it was not true, that in spite of defendant's statement that he would not fit a pregnant woman, he had done so on several occasions.

The situation here was analogous to that in People v. Westek, 31 Cal.2d 469, 190 P. 2d 9. There the defendant was charged with sodomy and violation of section 288, Penal Code, in relation to several young boys. The defendant testified that never at any time had he ever committed any act of sodomy or lewdness upon any boy. Upon rebuttal, the prosecution produced three boys who testified to such acts by defendant upon them. After pointing out that evidence of other crimes is not admissible where it is offered solely to prove criminal disposition or propensity, the court held that the evidence was admissible there because the defendant, "apparently actuated by a desire to place himself in an especially favorable light before the jury, injected into the case in the course of his direct examination the whole subject matter of his past conduct with any boy, and it was to offset the effect of this gratuitous testimony that the prosecution introduced the challenged evidence." 31 Cal.2d at page 476, 190 P.2d at page 13.

In People v. Hoffman, 199 Cal. 155, 248 P. 504, a prosecution for murder, the appellant on direct examination testified that he had never had trouble or difficulty with anybody before. On cross-examination, over the objection of the appellant's counsel, the appellant testified that never in his life had he ever drawn a gun on anybody. The reviewing court held that the cross-examination was proper, as was the admission of testimony in rebuttal to the effect that the appellant had threatened another person with a gun. The court said that the rebuttal evidence tended to impeach the testimony given by the appellant that he had led an untroubled life and had never drawn a gun on any one, and that in so doing the court was not unmindful of the rule that a witness may not be impeached as to collateral matters.

2. Instruction As To Attorney's Statements.

[5] The court gave the following instruction: "The statements and arguments of counsel are not evident [sic] in the case and any statement made by counsel either during the trial or argument which is not supported by the evidence or which is inconsistent with the Court's instructions as to the law are to be disregarded by you. This, however, does not apply to stipulation of fact by counsel which stipulation of fact must be treated by you as proven facts in the case." Defendant contends that this instruction should not have been given because two of defendant's attorneys testified as to a conversation between them, Pat's employer and Pat. Their testimony and that of the employer as to whether the facts of the case were discussed differed from Pat's version. Defendant contends that the instruction misled the jury, and that this fact is shown because on the second day of its deliberation the jury requested the reading of the testimony of the employer and of all Pat's and Lois' testimony. The asking for *all* of Pat's and Lois' testimony as well as that of the employer in nowise indicated that the jury was misled by the instruction. To some extent the alleged impeachment was on a collateral matter, namely, whether the attorneys asked Pat if there was anything she could add to her testimony previously given that would be favorable to defendant. She testified that after that conversation, she was fired from her job. Both the attorneys and the employer testified that the attorneys had not asked for her discharge. The instruction is clear, unequivocal and proper. If defendant desired anything further on the subject he should have offered an instruction.

3. Alleged Misconduct.

[6] The prosecution asked defendant if he had been previously convicted of a felony, to wit, abortion, and was then serving a term in San Quentin. Defendant objected to the question and asked the court to admonish the jury. The court, on the ground that it was complex and compound, ordered it stricken, but did not admonish the jury. The question was reframed omitting the part about San Quentin.

Defendant concedes that the portion of the question concerning his conviction was proper but contends that mention that he was then in San Quentin was improper. Had the prosecution, instead of asking defendant, introduced the record of the conviction, as it had the right to do (see People v. Darcy, 101 Cal.App.2d 665, 671, 226 P.2d 53), such record would have shown that defendant had been committed to prison. There was no misconduct by the district attorney in asking the question. There is nothing in either People v. Darcy, supra, 101 Cal.App.2d 665, 226 P.2d 53, or People v. Wynn, 44 Cal.App.2d 723, 112 P.2d 979, holding it prejudicial error in proving a prior conviction for the purposes of impeachment in bringing out incarceration in prison. In the Darcy case the prosecution introduced in evidence not only the record of the judgment of conviction but also the defendant's record in the penitentiary, his prison photographs and fingerprints. Although the court held that these latter were not admissible, it held that the error in admitting them was not prejudicial. The failure of the court, after sustaining an objection to the question to admonish the jury was not prejudicial.

[7] During argument between counsel the prosecutor stated, "Your Honor, this is cross-examination, not impeachment but he has seen this. This was his exhibit, a previous trial against another victim." Defendant charges the reference to a previous trial and the use of the words "another victim" were misconduct. So far as the reference to the previous trial is concerned, defense counsel on several occasions had referred to that trial. As to the words "another victim" defendant had admitted his conviction of the crime of abortion. The word "victim" is a reasonable characterization of a person upon whom an abortion has been performed. There was no misconduct in the action of the district attorney.

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; PETERS, J., not participating.



168 Cal.App.2d 62

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Walton Van Nort STUART, Defendant and Appellant.

Cr. 3431.

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1959.

Hearing Denied April 15, 1959.

Prosecution for abortion. The Superior Court, County of Alameda, Victor S. Wagler, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Bray, J., held that instruction in the language of statute was not erroneous on ground that court of its own motion should have instructed that to be guilty of abortion defendant must have known or believed victim was pregnant, or that such instruction in conjunction with instruction on second degree murder was misleading.

Affirmed.

1. Abortion ⇦1

To constitute crime of abortion defendant must know or believe that victim is pregnant and must intend by means employed to produce a miscarriage. West's Ann.Pen.Code, § 274.

2. Criminal Law ⇐808½, 825(2)

In prosecution for abortion where defendant requested no instructions, court's instruction in language of statute was not erroneous on ground that court on its own motion should have instructed jury that to be guilty defendant must have known or believed that victim was pregnant or that instruction in conjunction with instruction on second degree murder was misleading. West's Ann.Pen.Code, § 274.

3. Criminal Law ⇐706

In prosecution for crime of abortion where defendant had testified that he would not fit a pregnant woman with a pessary and had not done so in case of two witnesses who had testified to contrary, fact that defendant had not used a pessary on victim whom he allegedly tried to abort by use of air, did not render improper asking of question about pessaries. West's Ann.Pen.Code, § 274.

Haley, McInerney & Logan, Richard G. Logan, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from a judgment of conviction of abortion, after jury verdict, and from the order denying new trial.

Questions Presented.

1. Failure of court on its own motion to instruct on intent additionally to giving section 274, Penal Code.

2. Alleged misconduct of district attorney.

Facts.[1]

Defendant, a chiropractor, was indicted for the murder and abortion of Marion. The jury found him not guilty of murder but guilty of abortion.

Mrs. Devore, a friend of Marion's, telephoned defendant that she had a friend who was pregnant and did not desire to have the baby, and that the friend had tried to abort herself. Defendant stated that he would talk to the friend. Nothing was said about defendant committing an abortion. That afternoon Mrs. Devore and Marion went to defendant's office. While waiting for defendant to see them, Marion handed Mrs. Devore $250. Mrs. Devore introduced Marion to defendant, Mrs. Devore had a conversation with defendant in which he discussed the fact that all of them would be accomplices, and that Marion was only 6 weeks along so it should not be hard. Marion and defendant went into an inner office. After 15 minutes had passed, defendant called Mrs. Devore. She entered the inner office and defendant told her to call the fire department as Marion had suffered a heart attack. Mrs. Devore called the department. Defendant told her to get rid of the instruments and the money Mrs. Devore threw the instruments under a couch. Marion was dead on arrival at a hospital. The prosecution's theory was that defendant had tried to abort by the introduction of air into the uterus by use of a soft rubber catheter and a rubber syringe or bulb. Both such type items were found in his office and introduced into evidence. Two other women testified that he had aborted them by the use of air. Defendant denied using the catheter or syringe. He testified that he only used the syringe as an ear syringe and had never at any time used the catheter. He stated that after Marion had entered the treatment room she told him that she was pregnant but did not want any more children, that she had tried to commit suicide and had tried to abort herself. He then suggested that he examine her to see if she had injured herself. He inserted a vaginal speculum. He noticed a white discharge and blood. He asked her what she had been doing to herself. She mumbled something like "air." He then removed the speculum and said he could do nothing for

1. As no contention is made that the evidence does not support the verdict, a detailed statement of all the evidence is unnecessary.

her. As he turned his back she cried "I can't breathe." He turned and began artificial respiration, and tried various methods to revive her, and continued these efforts until the fire department arrived. He denied treating the other two women as testified by them. He stated that one of them desired that he fit her with a pessary. On examining her he discovered that she was pregnant and refused to do so because a pessary might cause a miscarriage. He admitted fitting the other woman with a pessary but denied doing so to produce a miscarriage as he did not know that she was pregnant.

1. Instruction.

The court instructed in the language of section 274, Penal Code, to wit: "Section 274 of the Penal Code provides as follows: 'Every person who provides, supplies or administers to any woman, or procures any woman to take any medicine, drug, or substance or uses or employs an[y] instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is guilty of a felony.'" Defendant offered no instructions. Defendant contends (a) that the court of its own motion should have instructed that to be guilty of abortion defendant must have known or believed that Marion was pregnant, and (b) that in conjunction with the instructions on second degree murder, the given instruction was misleading.

(a) *Belief of pregnancy.*

[1, 2] There can be do doubt but that to constitute the crime of abortion the defendant must know or believe that the victim is pregnant (People v. Murphy, 60 Cal.App.2d 762, 770, 141 P.2d 755) and must intend by the means employed to produce a miscarriage. People v. Collins, 80 Cal.App.2d 526, 534, 182 P.2d 585. The instruction given informed the jury that the means employed must have been employed "'* * * with intent thereby to procure the miscarriage * * *'" It is impossible to conceive how a person could have the intent to procure a miscarriage without knowing or believing that the person he was treating was pregnant. If defendant desired further instructions on the subject he should have offered them.

This instruction was given in People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29, apparently without any further instruction on the subject of intent. The instruction here was sufficient, particularly in view of the fact that admittedly defendant believed that Marion was pregnant. He stated that she had told him so, and he asked her why she wanted to get rid of the unborn child. As to the intent to abort, there could not possibly have been any other purpose of using the means which the jury impliedly found were employed.

(b) *Instruction was not misleading.*

There was no confusion between the instructions on second degree murder and the one on abortion. The court instructed in the portion of the instruction dealing with second degree murder that it was not necessary to show that death was intended or contemplated by defendant but that it was only necessary to show intent to commit the crime of abortion. It then stated that if the jury believed beyond a reasonable doubt that the victim died as a proximate result of the use of any instrument upon the body of the victim "'* * * with the intent thereby to procure a miscarriage * * *'" and that its use was not necessary to preserve her life, defendant would be guilty of second degree murder. Previously in discussing the purpose of the admission of evidence of other abortions the court instructed that the value of such evidence depends on whether or not it tends to show "That the defendant entertained the intent which is a necessary element for the alleged crime for which he is now on trial * * *" There was nothing anywhere in the instructions which indicated in the slightest manner that intent to abort was not a necessary element of the crime of abortion.

Defendant contends that because the jury found defendant not guilty of murder but guilty of abortion it necessarily follows that it must have been confused. This is not so. Under the evidence the jury could

have, and probably did, find that Marion's death was due to a cardiac failure not proximately resulting from the means used to abort.

2. Alleged Misconduct.

[3] Apparently to rebut defendant's statements that he would not fit a pregnant woman with a pessary and had not done so in the case of the two witnesses who testified that with them, knowing that they were pregnant, he had first tried pessaries before using the air method, the district attorney on cross-examination asked defendant if he had not fitted a pessary on one Dolores (neither of the women above mentioned) who was then pregnant. The court sustained an objection to the question. Defendant concedes that the testimony of the two women above mentioned was admissible but contends that because the defendant did not use a pessary on Marion this reference to use of a pessary constituted misconduct.

We see no misconduct in the district attorney's asking this question even though the court prior thereto had sustained an objection to a question asked another doctor as to whether he had informed defendant that the use of a pessary on a pregnant woman could cause an abortion. It would appear from our decision in People v. Stuart, Cal.App., 335 P.2d 189, and People v. Westek, 31 Cal.2d 469, 478–479, 190 P.2d 9, that the question was proper. In any event, as the court sustained the objection and later instructed the jury that they were not to consider the offer of any evidence which was not admitted by the court, or statement of fact contained in any question asked by counsel, and in view of the evidence in the case, there could have been no prejudice in the asking of the question.

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; PETERS, J., not participating.

167 Cal.App.2d 686

REDWOOD CITY COMPANY OF JEHOVAH'S WITNESSES, INC., a California non-profit corporation, and Frank Hart, as the Presiding Minister of the Menlo Park Congregation of Jehovah's Witnesses, Plaintiffs, Petitioners and Appellants,

v.

CITY OF MENLO PARK, a Municipal Corporation, and the City Council of Menlo Park, and Dale S. Andrus, Ira E. Bonde, Charles P. Burgess, George S. Ford, and William R. Lawson, individually and as Duly Elected and Acting Members of the City Council of Menlo Park, Defendants and Respondents.

Civ. 17796.

District Court of Appeal, First District, Division 1, California.

Feb. 9, 1959.

Proceeding for a writ of mandate to compel the issuance of a permit in order to build a church pursuant to city zoning ordinances. From an adverse order in the Superior Court, County of San Mateo, A. R. Cotton, J., the petitioners appealed. The District Court of Appeal, Fred B. Wood, J., held that the constitutionality of the ordinance itself was not involved on appeal, that the petitioners complied with the off-street parking requirements and that the refusal to grant the permit was arbitrary and capricious.

Judgment reversed with instructions to issue the permit as prayed for.

1. Appeal and Error ⇐1078(3)

Where no mention was made of an order striking all references to the members of the city council either in the petitioner's brief or an oral argument, the appellate court would assume that the petitioners had abandoned such portion of the appeal.

2. Mandamus ⇐168(4)

In a proceeding for a writ of mandate to compel the issuance of a use permit in order to build a church pursuant to city zoning ordinance, record disclosed that the matter under review was the result of the

impact of the action of the city council on the constitutional and statutory rights of the petitioners and did not involve the constitutionality of the ordinance itself.

3. Mandamus ⇐168(4)

In proceeding for a writ of mandate to compel the issuance of a use permit for a church pursuant to the city zoning ordinance, evidence established that the petitioners had technically complied with the off-street parking requirements of the ordinance.

4. Municipal Corporations ⇐591, 601(9)

In zoning matters, an ordinance must establish a standard to operate uniformly and govern its administration and enforcement in all cases, and an ordinance is invalid where it leaves its interpretation, administration or enforcement to the ungoverned discretion of the administrative agency.

5. Municipal Corporations ⇐601(9)

Where a zoning ordinance lays down certain standards such as the requirement of one parking space for each ten seats of a church in adopting zone classifications within the terms, standards and requirements pertinent thereto, the city exhausts its discretion as to standards.

6. Municipal Corporations ⇐625

In proceeding for a writ of mandate to compel the issuance of a use permit in order to build a church pursuant to city's zoning ordinances where the petitioners complied with the off-street parking requirements of the ordinance and the only other requirements in the ordinance related to the public health and general welfare of the neighborhood, action of the city counsel in denying a permit was arbitrary and capricious.

Small & Werthimer, Redwood City, Hayden C. Covington, Brooklyn, N. Y., for appellants.

James T. O'Keefe, Jr., City Atty., City of Menlo Park, Redwood City, for respondents.

ST. CLAIR, J. pro tem.

This is an appeal from a final judgment discharging an alternative writ of mandate and denying the petition for writ of mandate. Petitioners sought by their petition to compel the issuance of a conditional use permit in order to build a church in the defendant city pursuant to the provisions of the city's zoning ordinances. An order directing the issuance of an alternative writ of mandate was issued. A motion to strike certain parts of the petition referring to the defendants in their individual capacities was granted limiting the case against defendants to their official capacities.

The defendant City of Menlo Park is a General Law City, duly organized and existing under the laws of the State of California. It has a Planning Commission composed of seven voting members, and a city council composed of five elected members.

Petitioners, the Redwood City Company of Jehovah's Witnesses, Inc., is a California non-profit corporation organized for religious purposes. It is the owner of a parcel of real property located near the Willow Road overpass between Bay Road and Exit Road in the City of Menlo Park. Title to the property was acquired on April 17, 1956. The property is located in the R-1-U (Urban Residential) zone classification of the city, as provided for in City Ordinance No. 228. The sections of the city zoning ordinance pertinent to this case read as follows:

"Section 9: * * *

"3. R-1-U: Single Family Urban Residential District.

"(a) Uses Permitted:

"(1) All uses permitted in the RE land use district, subject to review and approval by the Planning Commission and the obtaining of a use permit for any use for which such permit is required in RE district."

The ordinance provides with reference to RE districts:

"Section 9:

"E * * *

"1. * * *

"(a) Uses Permitted: * * *

"(2) * * * churches, * * * all subject to review and approval by the City Planning Commission and the obtaining of a use permit in each case. Said use permit, review and approval will take into consideration location and provision for adequate off-street parking, as such off-street parking is required by this ordinance in the C-3 Commercial Land Use District, architectural control review as provided in Section 9C of this ordinance, such review to be concerned particularly with tree, shrub planting and landscape treatment to preserve the beauty and charm of the City and the residential character of the land use district in which said use is located."

The applicable section pertaining to off-street parking provides,

"(2) Off-street parking: Off-street parking to be provided through public parking areas developed to serve district as a whole; where such public parking is not available, off-street parking as required in the C-2 land use district shall be provided by the developer. *Further, there shall be provided one parking space for each ten (10) seats in any* * * * church * * * provided that public off-street parking space located within 200 feet by the most direct route via public streets of any place of public assemblage may be included for the purpose of determining the adequacy of parking space in conformity with this provision, *providing further that such space is available and adequate to the activity in question.*" (Italics added.)

The ordinance's preamble sets forth the purposes for its adoption. These purposes include the desire to provide for ease of access as between land use areas; the designation, regulation and restriction of parking; the lessening of street congestion; the preservation and extension of the inherent residential character of the city and the promotion of health, safety, comfort, convenience and the general welfare of the city (Section 4).

Section 20 of the ordinance provides in part:

"In interpreting, applying and enforcing provisions of this ordinance, they shall be held to be the minimum requirements adopted for the promotion of the public health, safety, comfort, convenience and general welfare."

Section 13 provides in part:

"A. In granting any use permit, the Commission may require such conditions to use as may be deemed reasonable to preserve the health, safety, welfare, prosperity and inherent residential character and beauty of this City."

Section 14 provides for appeals:

"H. Appeal. The Commission shall have power to hear and decide appeals involving the enforcement of this ordinance by the Building Department when such appeals are based upon questions of the interpretation of said ordinance, and the Council shall have power to hear and decide appeals from the decision of said Commission on the same questions."

Petitioners requested a building permit to construct a church on the lot in question. The plot plan involved in this appeal shows that the church will have a total of 140 seats and 14 off-street parking places, each 17 feet by 8 feet, located at the rear of the property. An aisle to be used as a lane of approach is provided between each row of stalls. The exit from the parking area is 15 feet wide. By stacking cars in the aisle between the parking stalls a total of 24 cars could be parked on the lot.

Petitioners' first application for a use permit was heard on April 2, 1956, by the Planning Commission. The plan was submitted to the Traffic Safety Commission for a recommendation and the hearing was continued. On May 7, 1956, a further hearing was held at which time the Traffic Safety Commission's recommendation was received and the use permit denied.

Petitioners redrew their application, receiving some help from the commission and the staff in redesigning the church and the parking facilities.

On June 4 petitioners' second application for a use permit was set for hearing. On July 2 the Traffic Safety Commission's second recommendation was read and considered. The report stated: "2. The commission then viewed the site plan of the Jehovah's Witnesses Hall on Bay Road which will come before the Planning Commission for public hearing on July 2d. This is a new site plan submitted by the Congregation. The commission felt the parking layout was technically adequate and that having access only on the frontage road was far better than using Bay Road for automobile ingress and egress. Thus the commission could not find a hazardous condition resulting from the parking arrangement as shown. However, the commission felt that more land area would be extremely desirable for such a church site." One of the commissioners stated that he felt the area was too small but as petitioners had met the parking space and set-back requirements there was no option but to grant the permit.

The Planning Commission granted the use permit and architectural control approval was given.

On July 10 an appeal was taken from the Planning Commission's decision. A hearing before the city council was set for August 14 at which time it was continued to August 28 in order for the city engineer to study the plan and make a report. On August 28 the hearing was continued to September 11 for production of further evidence by the protestants.

At the September 11 hearing there was considerable evidence produced by those opposed to the granting of the permit. Most of it was aimed to show that 14 cars could not readily be parked in the proposed 14 stalls. Not much evidence was produced by the proponents at this meeting but the minutes thereof (in evidence) show that the city engineer of Menlo Park gave as his opinion that the parking stalls, and the spacing thereof, met the requirements of the ordinance.

Running through said minutes and through the record of the trial is an attitude that the ordinance itself is inadequate; that there should be a requirement of more than one stall to every 10 seats; that the ordinance, as written, is obsolete and should require many more stalls per unit of seats; that more cars should be restrained from on-street parking.

The minutes of the September 11 meeting read, in part:

"Councilman Burgess thought it difficult to say Yes or No. He feels as Mayor Ford does, that the lot is too small. The Traffic Safety Commission had misgivings as to the size of the lot and he feels the Ordinance does not quite meet the requirements, the Ordinance is inadequate. The parking spaces are at a minimum and he is fearful that many cars will not park there because of the difficulty in parking. He asked the City Attorney if the Council will have to adhere strictly to the present Ordinance.

"The City Attorney informed him that the zoning now permits churches, the Council is to determine what the Ordinance prescribes now. If the parking spaces are usable spaces, although minimum, this is a compliance with the Ordinance. If there is technical compliance the Council must act accordingly, it cannot take anticipation that the Ordinance is not now adequate.

"Councilman Bonde stated that his sentiments are with Councilman Ford. He thinks an additional parking problem will exist and will be detrimental to the neighborhood.

"Councilman Burgess remarked that although the usability of the space on parking meets the requirements, yet parking will be on the streets, and he feels that unless they can come up with additional parking space the Use Permit should be denied.

"Moved by Councilman Bonde, seconded by Councilman Burgess, 'that the application of Jehovah's Witnesses for a Use Permit to construct and maintain a church and/or a hall on Lot 9, Block 2, Newbridge

Park in the City of Menlo Park be denied and the action of the Planning Commission with respect to said application be overruled, in that the City Council hereby finds and determines that the off-street parking facilities are inadequate and will present a traffic problem, and in that said City Council hereby finds and determines that the establishment, maintenance and/or conducting of the use, on the premises above described, will under the circumstances of this particular case, be detrimental to the health, safety, comfort, convenience or welfare of persons residing or working in the neighborhood of such use and will, under the circumstances of this particular case, be detrimental to the public welfare or injurious to property or improvements in said neighborhood and will have an adverse effect on the inherent residential character and beauty of the City.'

"Roll call: Yes—Councilmen Bonde, Burgess, Ford.
Noes—Councilmen Andrus and Lawson."

As was proper, at the trial the evidence before the council was, in the main, reproduced. For reasons which will become apparent, we have carefully searched the record for any and all evidence, other than the size and the efficiency of the parking lot, that would or could bear on "the public health, safety, comfort, convenience and general welfare" or that would be "detrimental to the public welfare or injurious to property or improvement in said neighborhood," these being the alleged standards laid down by the ordinance, over and above the standard of one parking space per 10 seats.

The record shows that there were petitions circulated and signed protesting the granting of the use permit but such petitions are not a part of the record.

The petitioners put in evidence a traffic count of cars passing the plot in question at the hours and the day and week in which the church would be used. Presumably in answer thereto the protestants put in evidence that additional residential area, north or west of the proposed plot, would in the future be opened up, thus increasing the area which might feed traffic past the church. Against this petitioners put in an expert who counted the houses in the area that *now* or in the future might create traffic past the church. He came up with an opinion, "I do not believe that even in the next 20 years the volume of traffic on Exit Street will be any more than it is on a normal street; may be 1000, 1500". (He was referring to trips per day past the church property.) Exhibit 27 had shown a count of 2,265 cars on both Exit and Bay Roads.

There is much mention in the record of a traffic handbook and one councilman testified that they relied on the book. However, the reliance was apparently limited to matters concerning the make up of the parking lot itself.

There was evidence by the protestants of a check in a situation in the City of Los Altos that was alleged to be similar to the instant one. The check showed that there was a ratio of two cars per seat in church. "I felt that the parking ratio of one to 10 was not a realistic figure and that was my purpose in making this count."

Councilman Burgess testified:

"My action was based upon the belief that the parking space as laid out, while they would produce the 14 parking spaces required by the Ordinance, would, as a matter of practice, not be used by 14 cars because of a practical difficulty in parking in that—in this particular layout. To explain the background a little further, our Ordinance—the requirements of our Ordinace are certainly minimum. The new Church of the Latter Day Saints, for instance, complies with our off-street parking with much to spare, and yet we note that there are lots of cars parked along Valparaiso. And I had felt that the intent of the Ordinance is that there be a minimum of 14 cars, or one per ten cars parked in this off-street parking to reduce the on-street parking, and that if we had a situation

which was minimum in every respect, where people actually would not wish to park in it, or because of the great care and difficulty in parking, that we would not actually achieve the intent of the Ordinance, and that was the basis for my vote. I felt that the plan did not comply with the Ordinance because the parking spaces, while usable, as a practice might not be used, thereby throwing more cars on the on-street parking and resulting in traffic problems and a detriment to the neighborhood.

"Q. Well, then, I take it in addition to discussing and thinking on the question of the minimum of one to ten seats for parking, you also took into consideration the effect that that plot would have on forcing parking on the street? A. That is just part and parcel of the fact.

"Q. Yes. A. Every car that does not park in that parking space will be parked on the street at some point.

"Q. You took into consideration the effect this would have traffic-wise and otherwise on the conditions in the neighborhood, is that right? A. That is right, because the cars would be parked in the neighborhood if they could not be parked, or were not parked in the parking area.

"Q. Did you take into consideration, and I assume that you did, the peculiar shape of this property and the small size of it? A. That, of course, is the basic—the basic problem that causes the difficulty.

"Q. What, the size of it? The small size? A. The small size prevents the—prevents sufficient turning space in the parking lot to—to get the required number of cars in, on top of which, of course, the peculiar nature of that area, where you could park only on one side of the Access Road.—If you parked on both sides, it would block traffic—means that the cars would be parked away from this triangle—would be parked in one direction up into the neighborhood from which most of the protests came.

"Q. In other words, you took into consideration also, I take it, the Access Road; the location of it; the use of it; and the intersecting streets, all these residential streets going north? A. Yes.

"Q. Is that right? A. Yes.

"Q. You took into consideration, did you, the fact that once you leave this property, you turn right into the end of the triangle and up into the interchange where there couldn't be any parking? A. That is right. I felt that the requirements of the Ordinance were minimum, and, therefore, we should be sure that we got at least the minimum cars off of the street because of the nature of the surrounding area."

There is one other very pertinent fact. There are other churches in the same or similar residential districts in Menlo Park, built under use permits similar to the one herein sought by petitioners.

The trial court in denying petitioners' application for a writ of mandamus found that the action of the city council was not arbitrary, capricious or based upon whim or fancy and did not deny petitioners their constitutional rights to freedom of worship, nor was their action without sound and good reason in fact or in law but was based upon sound and good reason in fact and in law and said action was in good faith and based upon sound discretion.

Appeal from order granting motion to strike.

The notice of appeal states an appeal from the judgment and "from the motion to strike and from all adverse orders proceding said judgment or upon which said judgment is based."

The order in question struck all reference to the members of the city council in their individual capacity and certain portions of the petition, by page and line.

[1] No mention was made of this order, either in petitioners' brief or at oral argument. We assume petitioners have abandoned this portion of the appeal.

Is the constitutionality of the ordinance at issue, here?

[2] In their petition for writ of mandate, petitioners allege full compliance by them with the requirements of the ordinance to entitle petitioners to a use permit; that the decision of the city council denying them a use permit was arbitrary, capricious and without sound or good reason in fact or in law; that petitioners had been denied their constitutional rights and freedom of worship as guaranteed by the Constitution of the United States and of California; U.S.Const. Amend. 1; Const. art. 1, § 4.

In petitioners' opening brief, page 44, they say: "The appellants contend that it is the order of the Council that has deprived them of their constitutional rights. This contention is not that the ordinance is void or that any part of it is illegal on its face. The position of appellants is that the law is unconstitutional as construed, applied and enforced by the Council. The constitutionality of the law is to be determined according to the particular facts of the case."

Later on, at page 51, they say: "The only question involved is whether there has been an arbitrary and capricious denial of the permit."

Although the above would seem to make petitioners' position quite clear, at the oral argument, under questioning from the Bench, counsel for petitioners took the position that if they lost on the point of capricious action of the council, they should be permitted to attack the constitutionality of the ordinance.

As permitted by the court, both sides filed supplemental briefs. As we read petitioners' supplemental brief, they are still only contending that the *action of the council* raised a constitutional question. We agree that such a question is raised.

Defendants read petitioners' supplemental brief to raise the question of the constitutionality of the ordinance itself and defendants' supplemental brief addressed itself to that question.

In their letter transmitting their supplemental brief, petitioners concede that in California the rule is well established that the theory on which the case was tried is the theory in the appellate court, citing cases and 3 Witkin, California Procedure, page 2264.

We hold that the matter under review is the result of the impact of the action of the city council on the constitutional and statutory rights of petitioners and does not involve the constitutionality of the ordinance itself.

Did the petitioners comply with the off-street parking requirements?

The first matter to be determined is whether or not petitioners are correct in their assumption that they met the requirements of the ordinance as to off-street parking. Section 9–12, C-3 of the ordinance, supra, provided that "there shall be provided one parking space for each ten (10) seats in any * * * church * *." It is obvious that petitioners complied with the literal language; 14 parking stalls to serve 140 seats in the proposed church.

The protestants made a determined attack on the proposed parking space to show that it would not hold 14 cars. From the questions put by counsel at trial and from the briefs it would appear that defendants consider the last clause of said section 9–12, C–3, to wit, "providing further that such space is available and adequate to the activity in question" as referring back to phrase "there shall be provided one parking space for each ten (10) seats." However, when we parse the sentence, it is clear that the reference is to the "public off-street parking space located within 200 feet * * of any place of public assemblage * * *."

Without regard to the nonapplicability of the referred to clause, it would appear proper for the council to examine a pro-

posed parking space to see if it had what the ordinance called for. The relevancy of the grammatical problem is that, under our parsing, there is no standard laid down, whatsoever, to guide the council in determining what kind of parking space is required.

A fair résumé of the evidence as to the efficiency of the parking lot is that (1) 14 miscellaneous cars could be parked therein; (2) it would be difficult for 14 large cars (such as Cadillacs) to be parked therein; but (3) very easy for 14 small foreign cars so to do. In addition, it was uncontradicted that by "stacking," 24 cars could be parked in the area. There is no standard laid down that would stop an applicant from offering parking spaces that required "stacking."

[3] We believe, in all fairness, that it must be said that petitioners complied with section 9–12, C–3 of the ordinance. This holding is buttressed by the fact that both the city engineer and the City Planning Commission and the city attorney were all of the opinion that petitioners had technically complied with the off-street parking requirements of the ordinance.

Was the action of the city council arbitrary and capricious?

It is worth repeating, here, that the only standards set up in the ordinance, other than the ratio of off-street parking places to seats in the church, are contained in the general phrases "the public health, safety, comfort, convenience and general welfare" and "detrimental to the public welfare or injurious to the property or improvement in said neighborhood."

In Roman Catholic Welfare Corp. of San Francisco, v. City of Piedmont, 45 Cal. 2d 325, at page 332, 289 P.2d 438, at page 442, the court said: "While on the facts, many of the cases may be distinguishable, the reasoning which leads to the conclusion that an ordinance is invalid which excludes private schools from an area in which public schools are found is persuasive. It is difficult to make an argument that private schools are inimical to the public welfare while public schools are not."

In the instant case, it is difficult to make an argument that one church that complies with the ordinance assists the public welfare while another that likewise complies, is inimical thereto. It is also difficult to believe that a court would sustain a finding that a church would be detrimental to the morals of a community or, except as to the traffic problem, would be adverse to the community's health, safety or comfort.

As indicated above, the ratiocination of most of the witnesses seemed grounded in a belief that the ordinance in question was inadequate. One witness seemed to be arguing that a ratio of one parking space to two seats was proper.

[4] The difficulties, in which the defendants find themselves here, are based on the fact that there is no standard or rule to govern the issuance of use permits to churches that have complied with the off-street parking requirements other than general phrases. It is true that the modern trend is to give wide discertion to municipalities in zoning matters, but in this case the only definitive standard the ordinance laid down was the one with regard to traffic matters, to wit, one off-street parking space for each ten seats in the proposed church, with which the petitioners have complied. The "standards," over and beyond the last mentioned, are only the general phrases heretofore quoted from section 20 of the ordinance. McQuillin lays it down as a fundamental rule in zoning as well as other matters that an ordinance must establish a standard to operate uniformly and govern its administration and enforcement in all cases, and that an ordinance is invalid where it leaves its interpretation, administration or enforcement to the ungoverned discretion of the administrative agency. 8 McQuillin, Municipal Corporations, 3rd Revised Ed., page 137, section 25.62.

[5] Where an ordinance lays down certain standards or requirements, (in this case the requirement of one parking space for

each ten seats) the rule appears to be that in adopting zone classifications with terms, standards and requirements pertinent thereto, the city exhausted its discretion as to standards. State ex rel. Ogden v. City of Bellevue, 45 Wash.2d 492, 275 P.2d 899.

[6] It may well be, as argued, that the standards or requirements of off-street parking are inadequate but we are not concerned therewith. Furthermore, the city council of Menlo Park was acting in a nonlegislative capacity when acting on petitioners' application and was bound by the terms of the ordinance until it is amended by appropriate legislative action. Johnston v. Board of Supervisors, 31 Cal.2d 66, 187 P.2d 686.

The judgment is reversed with instructions to the trial court to issue the writ as prayed for.

PETERS, P. J., and BRAY, J., concur.



167 Cal.App.2d 655

Application of Mervin Bruce GILREATH.

Cr. 6537.

District Court of Appeal, Second District, Division 3, California.

Feb. 5, 1959.

Proceeding in habeas corpus to secure release from custody after commitment for contempt. The District Court of Appeal, Patrosso, J. pro tempore, held that where on the date when the court undertook to sentence a husband for contempt for failure to pay sums to wife for her support and that of the children the order adjudging the husband in contempt had not been filed and the record was devoid of any minute order to that effect, the order was void.

Petitioner ordered discharged from custody.

1. Motions ⇐56(1)

All orders of the court of record must be recorded in writing and an order is ineffective unless it is either filed with the clerk or entered in the minutes.

2. Divorce ⇐269(13), 311

Where on the date when the court undertook to sentence a husband for contempt for failure to pay sums to wife for her support and that of the children, the order adjudging the husband in contempt had not been filed and the record was devoid of any minute order to that effect, the order was void. West's Ann.Code Civ. Proc. § 259a.

3. Divorce ⇐269(12), 311

Where on date when court undertook to sentence husband for contempt for failure to make support payments, the order adjudging him in contempt had not been filed, the five-day period upon which the husband was entitled to file exceptions to the commissioner's findings and court approval thereof had not commenced to run, and approval of the commissioner's findings and recommendation by the judge did not have the effect of then disposing of the contempt proceedings. West's Ann.Code Civ.Proc. § 259a.

Bodkin, Breslin & Luddy, and Robert J. Sullivan, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel and Robert C. Lynch, Deputy County Counsel, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

Proceeding in habeas corpus to secure release from custody after commitment for contempt.

In a divorce proceeding between the petitioner and his wife an order had been entered directing the petitioner to pay to his wife certain monthly sums for her support and that of his children. On November 18, 1958, upon the application of petitioner's wife supported by an affidavit averring that the petitioner was in default in making the payments so ordered and that he had the ability to make the same,

an order was issued by the court directing the petitioner to show cause why he should not be punished for contempt in failing to comply with the court's prior order. The order to show cause was returnable December 3, 1958, and in response thereto the petitioner appeared in court on that date without counsel, at which time the hearing of the order to show cause was by the court referred to a commissioner. A hearing was had before the commissioner at the conclusion of which the petitioner was directed to appear before Judge Doyle who thereupon continued the matter to December 8, 1958. On the last named date petitioner appeared with counsel and the latter requested a continuance in order to enable him to investigate the matter. The request for continuance was denied and the court thereupon sentenced petitioner to five days in the county jail for contempt but, at the request of counsel for the petitioner, granted a stay of execution until the following day, December 9th, at which time it was again continued to December 11th when the court ordered the petitioner into custody.

Written findings of fact were made by the commissioner who heard the order to show cause to the effect that the petitioner willfully failed to make the payments ordered although having the ability to do so and was guilty of contempt and recommending that he should be committed to jail for a period of five days. While the findings and recommendation bear date of December 3, 1958, and also purport to have been approved by Judge Doyle upon the same date, the file stamp endorsed thereon discloses that the document was not filed until December 9, 1958, the day after the court sentenced petitioner to jail. Additionally, it appears that written notice of the commissioner's findings and recommendation and the court's action thereon required by section 259a of the Code of Civil Procedure was not served upon the petitioner until December 9, 1958, service thereof being made on that date by mail.

[1–3] Thus on December 8, 1958, when the court undertook to sentence the petitioner for contempt, the order adjudging him in contempt had not been filed and the record is devoid of any minute order to this effect. It has been said that it is fundamental that all orders of a court of record must be recorded in writing (Cox v. Tyrone Power Enterprises, 1942, 49 Cal. App.2d 383, 394, 121 P.2d 829) and an order is ineffective unless it is either filed with the clerk or entered in the minutes. Jablon v. Henneberger, 1949, 33 Cal.2d 773, 775, 205 P.2d 1. Therefore, the court was without power on December 8 to sentence the petitioner. Moreover, on that date the five-day period during which the petitioner was entitled under Code of Civil Procedure, section 259a, to file exceptions to the commissioner's findings and the court's approval thereof had not commenced to run. Goetz v. Superior Court, 1958, 49 Cal.2d 784, 322 P.2d 217. Under these circumstances the approval of the commissioner's findings and recommendation by Judge Doyle "did not have the effect * * * of *then* disposing of the contempt proceeding." McLaughlin v. Superior Court, 1954, 128 Cal.App.2d 62, 65, 274 P.2d 745, 748.

The petitioner is ordered discharged from custody.

SHINN, P. J., and WOOD, J., concur.



167 Cal.App.2d 803

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Francis Edgar BALLARD, Defendant and Appellant.

Cr. 6222.

District Court of Appeal, Second District, Division 1, California.

Feb. 13, 1959.

Rehearing Denied March 11, 1959.

Hearing Denied April 8, 1959.

Prosecution for two counts of abortion. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered Judgment of conviction and denied de-

fendant's motion for new trial, and defendant appealed. The District Court of Appeal, Fourt, J., held, inter alia, that in view of undisputed testimony of defendant, a medical doctor, that he removed remnants of products of conception from a witness for the state after she had lost the embryo, and that such course was necessary to the life and health of the witness, evidence was insufficient to sustain conviction, since circumstances relied upon to show general intent were not convincing failed to prove beyond a reasonable doubt that the curettement performed upon the witness was not necessary for preservation of her life.

Judgment and order denying defendant's motion for new trial reversed.

1. Abortion ⇐8

In an abortion prosecution, the burden is on the state to show that the use of an instrument was not necessary to preserve the life of the woman. West's Ann. Pen.Code, § 274.

2. Abortion ⇐1

Abortion statute does not mean by the words "unless the same is necessary to preserve her life" that the peril to life be imminent, but it ought to be enough so that no violation of such statute occurs if the operation is performed because a dangerous condition is potentially present, even though its full development might be delayed to a greater or less extent, and it is not essential for no violation of the statute to occur because of a curettement that the person performing the operation believe the death of the patient would be otherwise certain. West's Ann.Pen.Code, § 274.

See publication Words and Phrases, for other judicial constructions and definitions of "Necessary to Preserve Her Life".

3. Abortion ⇐11

In prosecution for two counts of abortion, in view of undisputed testimony of defendant, a medical doctor, that he removed remnants of products of conception from a witness for the state after she had lost the embryo, and that such course was necessary to the life and health of the witness, evidence was insufficient to sustain conviction, since circumstances relied upon to show general intent were not convincing and failed to prove beyond a reasonable doubt that the curettement performed upon the witness, was not necessary for preservation of her life. West's Ann.Pen.Code, § 274.

4. Abortion ⇐11

If it is necessary to the establishment of the corpus delicti in an abortion prosecution that it be shown that operation in question was not necessary to preserve the life of the woman, state would be deemed to have failed to effectively establish the corpus delicti where it failed to introduce any evidence to dispute testimony of defendant doctor that operation was medically necessary.

5. Criminal Law ⇐1137(3)

In a criminal prosecution, where defendant offered an instruction on general criminal intent, he could not complain on appeal of the giving of such instruction.

6. Criminal Law ⇐1178

Where no authority was cited for assertion that court in criminal prosecution erred in failing to give defendant's requested instruction on ignorance or mistake of fact, and defendant gave no argument in support of such assertion, District Court of Appeal was not required to consider the point.

7. Criminal Law ⇐1173(2)

In abortion prosecution, court's refusal to give defendant's requested instruction on proof of a corpus delicti, independently of his extrajudicial admissions and confessions, under the circumstances, was prejudicial error.

8. Abortion ⇐11

In abortion prosecution, where acts involved were consistent with an ordinary vaginal examination to determine condition of a woman, and where there was no evidence that defendant, who was a

medical doctor, was regularly engaged in performing abortions according to any prescribed pattern or procedure, under the peculiar facts and circumstances of the case, evidence was insufficient to sustain conviction. West's Ann.Pen.Code, § 274.

9. Criminal Law ⇐772(6)

In abortion prosecution, in view of evidence from which it could have been believed by the jury that criminal design was conceived in minds of state officers, and that a state employee was used as a decoy to ensnare defendant into the alleged crime, and that defendant never intended to abort the state employee, and that he was only examining her in a manner professionally proper, court would be deemed to have erred in failing to give defendant's requested instruction on defense of entrapment.

10. Criminal Law ⇐532

In abortion prosecution, in view of evidence that an investigator pulled out a gun from his pocket and dangled it in his left hand, and then instructed or directed defendant doctor to make a statement which was taken on a tape recorder, before admission of such statement as a confession, court was required to ascertain if the statement was freely and voluntarily made, or made so as to be admissible, since if the defendant, under the circumstances, did not exercise mental freedom in making the statement, or if the statement was not an expression of free choice, it was inadmissible.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Arthur C. de Goede, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment and order denying the defendant's motion for a new trial upon two counts of abortion.

In count II of an information filed by the district attorney of Los Angeles County the defendant was charged with performing an abortion upon Martha Frances Gresham on June 10, 1957, and in count III thereof he was charged with performing an abortion on Alice Hankerson Frank on July 12, 1957. A jury heard the evidence and found the defendant guilty on both counts. The defendant's motion for a new trial was denied. The defendant was sentenced to the state prison, the sentences to run concurrently. Sentence was then suspended and the defendant was granted probation for six years on condition, among others, that he pay a $1,000 fine.

It may be well to say at the outset in this case that a great deal of misunderstanding would be avoided in abortion matters if they were considered in the light of the fact that an abortion is not necessarily, in and of itself, an illegal procedure or act. In other words, not all abortions are illegal.

The defendant is a medical doctor practicing his profession in an office in Beverly Hills and at his home in Reseda. He received his bachelor's degree from the University of Washington, graduated from the medical school at Stanford University, worked for one and one-half years in the Department of Obstetrics and Gynecology at Stanford, went to Harvard University for a year on a scholarship and received a master's degree. He was appointed as a medical officer for the California State Department of Health. He has been employed as a Divisional Director of the Los Angeles City Health Department. During World War II he served as a doctor in Walter Reed Hospital and was in charge of a hospital in Africa. He taught at the University of California and also at the University of California at Los Angeles. He has delivered hundreds of babies and has written many articles for various magazines and newspapers.

The facts of this case are essentially as follows: Martha Gresham called and talked with the defendant on May 8, 1957, over the telephone. She said she had a problem, but did not elaborate upon what

the problem was. Mrs. Gresham, with her three-year-old boy, went to the doctor's home office in Reseda on May 10, 1957. She told the doctor that she thought she was pregnant and that she understood he could take care of her. The defendant took her blood pressure and pulse and got some history of her background. She told the doctor that she had been and was very nervous; that she had three children who lived with her; that she had had two miscarriages, and that she had considerable trouble throughout the years with her menstrual periods; that she had seen doctors from time to time about, and had received shots because of irregularity of her menstrual periods, and that her last menstrual period had been about March 18, 1957. He told her that he did not think she was pregnant and that her nervousness and other conditions might very well have caused the delay in her menstruating. The doctor gave her some pills for her nervous condition and an injection of some medicine.

She insisted that she wanted a laboratory test and indicated from her actions dissatisfaction with the diagnosis of the doctor. She was then sent by the doctor to an independent laboratory where a so-called rabbit test was made upon Mrs. Gresham on May 14, 1957. About three days later she called the doctor to ascertain the results of the rabbit test at the laboratory and was told by the doctor that the laboratory representative had advised him that the test was negative. He again told her that he did not think she was pregnant. She continued to believe that she was pregnant, and again went to see the doctor. Without informing the doctor, she went to the laboratory again on or about May 29, 1957, and had the technicians at the laboratory run another rabbit test. She then told the doctor about having the second laboratory test and wanted to know if he could get the results of such test. The doctor got the test result, which was positive, and told her of the laboratory's finding. The doctor, however, advised her that in his opinion, in spite of the report, she was not pregnant.

About June 3, 1957, she went to the doctor's office in Reseda and he examined her and then told her that it was his then belief that she was pregnant. She explained then that she was in trouble because her husband was in the City of Hope and had had no access to her, and that it was another man's child, namely a man by the name of Cayce. At first she had told the doctor that the child was her husband's child. She asked the doctor if he could help her, and she testified that he stated that he could and that the cost would be $300 to abort her. She further stated that she would try to get the money, and he said that he could not do it without the cash.

On about June 10, 1957, she again went to the doctor's home office accompanied by Patrick Cayce. She stated that the three of them then talked about the money, or lack of money. The doctor wanted cash. Cayce said that he could give the doctor a promissory note payable on an installment basis, to which the doctor finally agreed. A note was made out in the principal sum of $300 and signed by Cayce and returned to the doctor. Cayce then left the room which was used as the doctor's office and went to the front room of the house.

The defendant gave Mrs. Gresham an injection in the arm, which made her drowsy. She undressed and put on a hospital gown and then went to the bathroom. She returned, got on the examining table and was lying on her back with her legs spread apart. The doctor apparently cleansed her with some soap solution. She then felt something in her "privates" which she said felt as though she was being opened up with some sort of an instrument. She felt a pulling sensation up into her stomach. Later the doctor got up and told her to continue to lie upon the table. He asked Cayce to go to a store and get a sanitary belt. Cayce did so and gave it to the defendant. Mrs. Gresham never

saw any instrument in the hands of the doctor, and saw no blood at the time of the examination.

The doctor told her to call him later, and to make an appointment after she stopped flowing. Except as to her nervous condition, Mrs. Gresham, from a layman's point of view, appeared outwardly to be in good health when she went to see the doctor. She was not pregnant after June 10, 1957. She had cramps after she left the doctor's office and blood flowed for six weeks thereafter.

Mrs. Gresham did not see any other doctor between June 10th and July 30th, and was not examined by any doctor at the request of the prosecution. Cayce wrote a check on June 17, 1957, for $50 as a part payment on the promissory note, and mailed the check to the doctor. Cayce testified that he never received a letter from the doctor or the check back. However, the fact is that the check was received in evidence without objection, and shows on its face that it was written on "6–17–1957" and that it was cancelled as "Paid 6–19–57." In the latter part of July, Cayce talked with the doctor and inquired whether Mrs. Gresham was all right. The defendant told Cayce of his arrest and asked for the balance upon the promissory note.

Cayce testified, among other things, that he went with Mrs. Gresham to the office of the doctor on June 10, 1957, and that the three of them talked together. Cayce stated that the doctor said that he wanted cash for the abortion. He further testified, in effect, that Mrs. Gresham had said that he, Cayce, was "the father of any child that she expected." Cayce also stated, without reservation, that he had first met Mrs. Gresham some time in May of 1957. The court sustained the objections of the prosecution to any questioning of Cayce as to whether he was the father of the expected child. It is difficult for this court to understand just how Cayce could have admitted, in effect, to being the person who brought about the alleged pregnancy of Mrs. Gresham in March of 1957, as represented by the prosecution, when he, Cayce, apparently, by his own testimony, did not even know Mrs. Gresham until May of 1957.

Alice Hankerson Frank, referred to in the third count, was an "operator" for the State Board of Medical Examiners. She had been married on July 5, 1957. She attended school of some sort and at the time of trial apparently was teaching school in El Monte. She stated that on July 11, 1957, she called the defendant on the telephone supposedly from San Francisco, and made an appointment for the next evening. In that conversation she said that she told the doctor she was three weeks over her menstrual period and that she had been referred to him by a girl friend in San Francisco. Mrs. Frank's further testimony indicates that she made inquiries about how much money she would need, and that the doctor stated, in effect, that $300 would be all right. Mrs. Frank told the doctor that her boy friend had the money, and that he would bring her down from San Francisco.

Mrs. Frank first saw the doctor in the evening on July 12, 1957, at his home office. She went there with Robert Truitt, an investigator for the State Board of Medical Examiners. The defendant was in the yard when they approached and he invited them into the house upon their stating to him that she was the girl who had called him from San Francisco. Truitt testified that he asked if Mrs. Frank would be able to have any more children after the abortion, and the defendant replied that she would be all right and could have children; that he was a medical doctor, a professional man, not a quack, and that he was competent to operate. Mrs. Frank testified the doctor stated that he would curette her; that he would go into her womb and scrape the fetus loose, and that it would come out and that she would be all right. She said she also asked about whether it would be painful and whether there would be much bleeding: that the doctor told her that she would bleed a little, but not much, and that she would be troubled with cramps.

She said that she went into the office of the doctor where she and the doctor were alone, and that the doctor asked questions. Truitt, during that period of time, waited in the living room. She told the doctor her name was Alice Hanson, and that she was from San Francisco, and that her companion was named Bob Trout. The doctor wrote this information upon a piece of paper and put it into his pocket. Her testimony was that the doctor asked how long she had been pregnant and how she had been feeling. She stated that she had missed her period due about three weeks before. She further testified that the defendant then stated that he would abort her for $300, and that he would like to give her a tranquilizer shot. He said it was not a drug and that he wanted her relaxed when he performed the operation. That he gave her an injection of one c.c. of Demarol and one c.c. of Dramamine. That at the defendant's suggestion they then went into the living room where Truitt was seated. That she told Truitt of the injection in the arm, which the doctor verified, and that the doctor said it would relax her so that he could go ahead with the abortion.

Truitt testified that he inquired of the doctor whether he was a medical doctor, and that the defendant replied, "Yes, I am a qualified medical doctor. I know what I am doing, and she won't have any after-effects from this abortion." The doctor then told Mrs. Frank to empty her bladder and showed her to the lavatory. The doctor returned to the front room and inquired of Truitt, "Well, who is going to pay? Is she going to pay the $300 or are you going to pay?" Truitt asked if he couldn't abort her for $250, and the defendant replied, "No, I can get in a lot of trouble. I can lose my license and go to jail for doing abortions, and I have got to stick to $300 cash. Have you got it?" Truitt then took $300 from his pocket which he had obtained from State funds, and started to count it out. The money was on the settee when Mrs. Frank returned to the room. Truitt then gave the money to the defendant and said, "Here is the full $300 for the abortion, Doctor." The defendant left the room with the money and then returned and took Mrs. Frank into the operating room, told her to undress and put on a gown, and then he returned to the living room where he told Truitt not to be worried about her, that he knew what he was doing and that Truitt would not have the problem after the abortion. The doctor returned to the room where Mrs. Frank was and helped her onto the table where Mrs. Frank placed her legs in stirrups, with her legs spread apart. The doctor washed the vaginal area with some sterile solution and then inserted a vaginal speculum into her body, explaining that this was so that he could get in with other instruments to clean her out. She screamed for "Bob" and insisted that he be present. The defendant tried to quiet her, and then opened the door and called for Bob to come. The doctor explained that she was upset and had gotten scared and didn't want to go ahead with it. With the three of them present in the operating room, the doctor inserted the vaginal speculum into Mrs. Frank's body and made some adjustments. The doctor then picked up some sponge forceps, which contained some cotton in their grip, and started to enter the vaginal cavity. When Truitt heard the forceps (which were holding the small ball of cotton) strike against the speculum, he identified himself as a special investigator for the State Board of Medical Examiners and arrested the defendant.

Truitt, at the time of pulling out his identification card, which he held in his right hand, also pulled out a "snubnosed Smith and *Weston* .38 five shell revolver." Truitt said that although he had the gun in his hand, he did not point it at the defendant, that it was "dangling" in his left hand. That he told the doctor "just * * stand there and don't make any motions at all." The defendant replied, in answer to the request to be cooperative under the circumstances (that is, with the investigator standing with gun "dangling" in hand),

by saying, "Yes, I'll be glad to. You have caught me cold." Truitt, with the gun in his hand, though as he said, not pointed at the doctor, then had the doctor accompany him to the front door where Truitt gave a signal, and two Los Angeles police officers appeared. Truitt at the time of opening the door for the officers, according to one of the officers, had a ".38 revolver, with a two inch barrel in his left hand." The defendant was put into the care of the two police officers, and Truitt apparently ransacked the establishment for evidence. He stated that he located the $300 which had been paid to the doctor, and also some medical instruments and other matters. Pictures of Alice Frank were then posed for and taken in her semi-naked condition by another police officer. When the pictures of Alice Frank and the doctor were being taken, Truitt said, in answer to a question of the defendant as to whether he had to stay while such pictures were being taken, "Absolutely. You just do what I say." A statement was made by the doctor on a tape recording device, wherein the doctor said, among other things, that the woman had called him from San Francisco and implied that she was pregnant, that he assumed she was pregnant and that he was to interrupt such pregnancy. He also stated that he had aborted Mrs. Gresham in May of 1957 for a fee of $300, but that he had only received $50.

In passing, at this point it is interesting to note that, as heretofore indicated, the investigator testified in the first instance positively and without reservation that he paid $300 to the doctor. He was certain of the amount, and likewise Alice Frank was certain of the amount. The investigator stated that he had written down in advance the denominations and the serial numbers of the bills in question on a piece of paper which he had kept, and which paper was introduced into evidence. He said there were "ten five-dollar bills and ten ten-dollar bills and five twenty-dollar bills." Likewise, he said that later on he recovered the bills from the doctor and checked each one off from his previously prepared list. The only difficulty is that the figures, as written down and as testified to, did not total $300, but only $250. The matter was called to the attention of the investigator a few days after he had testified, by the district attorney who said the figures "didn't quite total $300," and he, the investigator, stated in effect that he would "clear that up and explain the numbers," which he proceeded to do by testifying that he had counted them again and had them with him and there were "seven twenties, eleven tens and five fives." This apparently satisfied everybody at the time, but by our calculations such amounts equal $275 and not $300.

The testimony with reference to the tape-recorded statement showed that Truitt asked the doctor if he could use the doctor's recorder for a statement. The recording machine was of a type which used a magnetized tape, which tape can be used over and over again. As one dictates onto the tape, what is then said automatically erases whatever is on the tape from any previous recording. The doctor testified that they conducted a "dress rehearsal" of the statement and that he was told by Truitt, "You are going to have to make a statement * * * the way I want it." A statement was made by question and answer and then, as the doctor testified, such statement apparently did not satisfy the investigator and another, second statement was made, erasing the first statement which had been made.

As might be expected, the doctor's version of what occurred is substantially different from what has heretofore been related. He testified that insofar as Mrs. Gresham was concerned, his examination disclosed that the cervix was a little dilated and that bits of tissue protruded, which he identified as placenta membrane. This condition indicated to him, as a doctor (who, by virtue of his background and training, was skilled and learned in the science of gynecology), that she had theretofore lost the embryo, and that a condition of inevitable abortion was present,

and that the only thing to do was to have a curettement; or as the testimony shows, the doctor said at the time to the people concerned, "* * * she was in the state where she had lost the embryo * * * that she had retained the placenta—it is a state known as inevitable abortion or missed abortion." He stated further that he then removed the remnants of the products of the conception.

As to Mrs. Frank's case, the doctor denied that he had used the word abortion, as claimed by the investigator and Mrs. Frank, and stated in effect that from the history she gave him he believed that she might be suffering from some female trouble and that he thought it might even be a venereal disease. Further, that all he did so far as Mrs. Frank was concerned was to start to examine her to ascertain what her trouble was, and that he had no intention of performing an abortion. The doctor also indicated that the investigator pointed the gun at him and suggested that he, the doctor, cooperate in the making of statements under such circumstances.

The defendant now contends that:

(1) The evidence is insufficient to support the verdicts, and each of them.

(2) The trial court erred in giving instructions on:

(a) the general criminal intent;

(b) manifestation of intent.

(3) The trial court erred in failing to give the defendant's requested instructions on:

(a) act committed or omission made under an ignorance or mistake of fact;

(b) defense of entrapment;

(c) specific intent;

(d) confession and prima facie proof of the corpus delicti; and

(e) validity of expert testimony.

[1] The defendant asserts that the burden is on the prosecution to show that the use of an instrument was not necessary to preserve the life of the woman. Such is a correct statement of the law. People v. Gallardo, 41 Cal.2d 57, 62, 257 P.2d 29.

The matter of the health of Mrs. Gresham was before the jury and the jurors had her story as to her condition of health, and also heard what the doctor had to say upon the subject matter. In short the issue, so far as the doctor was concerned, was whether in the exercise of his best skill and understanding in good faith, he believed that it was necessary to perform the work he did perform to save the life of Mrs. Gresham.

In this case it is admitted, at the very least, that Mrs. Gresham was *extremely nervous.* She apparently was *upset, had headaches,* was *unable to sleep,* and *thought that she was pregnant.* She was *agitated, disturbed* and *had many problems.* She knew her husband was in the hospital suffering from a severe ailment and that he had had no access to her, and that if she was pregnant it was because of her engagement in illicit intercourse with someone else. Such a showing would not seem to prove beyond a reasonable doubt and to a moral certainty that she was in good health and that treatment of some sort was not necessary.

Many people walk, without assistance, into hospitals and doctors' offices to have operations performed that are necessary to preserve and save life. Further, it is not a rare occurrence for a person who has gone to a doctor's office in apparently reasonably good health, only to learn from the doctor that he is afflicted with a fatal disease. Every presumption is in favor of the defendant's innocence.

It is uncontradicted that the doctor told Mrs. Gresham several times that in his opinion she was not pregnant—that the delay in her menstrual periods came about from other causes, and that he recommended treatment for such other conditions. No other doctor examined Mrs. Gresham or testified as to her condition. The testimony of the defendant is undisputed that he removed the remnants of the products of conception and nothing more, and that

such course was necessary to her life and health. The prosecution offered no testimony to show that such was not the case.

True it is that the doctor did not say in so many words that it was necessary to save her life, but he did say that it would have been almost malpractice if he had not removed the tissue; that it was standard procedure, and that complications might well have ensued unless there had been a complete medical abortion, and that otherwise pieces could have grown to become polyps and cause hemorrhages.

[2] Surely, the abortion statute (Penal Code, § 274) does not mean by the words "unless the same is necessary to preserve her life" that the peril to life be imminent. It ought to be enough that the dangerous condition "be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief." State v. Dunklebarger, 206 Iowa 971, 221 N.W. 592, 596; see also, Rex v. Bourne, [1939] 1 K.B. 687 (1938); Commonwealth v. Wheeler, 315 Mass. 394, 53 N.E. 2d 4; 23 S.Cal.L.Rev. 523.)

In State v. Powers, 1929, 155 Wash. 63, 67, 283 P. 439, 440, the court satisfied itself with an interpretation of "necessity to save life" by stating, "If the appellant in performing the operation did something which was recognized and approved by those reasonably skilled in his profession practicing in the same community * * * then it cannot be said that the operation was not necessary to preserve the life of the patient."

Mrs. Gresham did not testify as to the passing of anything prior to the time of the operation, however, the doctor stated that she told him, in answer to a question along such lines, that she had had a few mild cramps but she did not recall passing anything. In any event, our view is that such is not controlling here: "If the fetus was dead, as disclosed by the diagnosis, that fact became a controlling one; and this was equally so whether the result was brought about by acts of the prosecutrix or by natural or other causes." State v. Dunklebarger, supra, 221 N.W. at page 596. It is also stated in the Dunklebarger case, "*If the diagnosis of a regular physician discloses an internal condition of a patient which threatens his life, it may not be negatived by the mere fact that the patient is unconscious of it and feels well and is apparently well.* Fatal conditions are often found in patients who were wholly unsuspecting of their danger. If at the time of the examination * * * the fetus was dead, then danger to life was necessarily present even though the patient had not yet felt any discomfort therefrom." At page 596. (Emphasis added.)

The district attorney introduced no evidence whatever to establish or to prove that the diagnosis of the doctor was not correct. It must be kept in mind that the defendant in this case was a doctor with substantial experience and background, and an admitted expert in the particular field of gynecology.

It is set forth in 153 A.L.R. 1266, with reference to statutes having to do with abortions:

"By the weight of authority, the insertion of this exception in the body of the enacting clause [that is, "unless necessary to preserve the life of the mother"], requiring a denial of its saving facts in the indictment or information, makes the absence of those facts an ingredient of the corpus delicti, which the government must establish as part of its case, even in the absence of any evidence of their existence."

Also, in State v. Wells, 35 Utah 400, 100 P. 681, at pages 684, 685, the court said: "The state sufficiently proved that the woman was pregnant; that the defendant performed an operation on her, and that she, in consequence of such operation, had a miscarriage. But the proof of

such facts does not establish the crime of abortion as defined by the statute. Under such a statute it was also essential to prove that the miscarriage was not necessary to preserve the life of the woman. Until such fact was proven the body of the crime was not proven." The court therefore held that the alleged confession of the defendant was not sufficient to support the conviction, the corpus delicti not having been otherwise proved. The court further said, 100 P. at pages 686–687:

"If it was not necessary to produce the miscarriage to preserve the life of the woman, such fact could readily have been shown by the physician, who was a witness for the state, and who had examined the woman on the day that the alleged operation was performed, and by the woman herself, who was also a witness for the state. The observation made by the Ohio court that the circumstances attending the procurement of the abortion tending to prove that it was unnecessary to save the life of the woman *ordinarily can be shown quite as easily on the part of the state as by the defendant,* and that the rule as to the sufficiency of circumstantial evidence, as stated in Cyc., 'is strictly enforced where decisive, direct evidence is probably obtainable, but is not produced,' is here pertinent and applicable. When the physician and the woman, who were witnesses for the state, were not interrogated by it with respect to the health or physical condition of the woman, and the state failed to show by them, *or by other evidence,* that there was nothing in the condition of the woman to indicate any necessity for a procured miscarriage, it may be assumed that if the witnesses had been examined on such matters, the evidence elicited from them would have been against the state, or that the state overlooked the necessity of proving the negative in the statute, or else treated it as a matter of defense." (Emphasis added.)

The evidence of her health, under the circumstances, did not lie peculiarly within the knowledge of Mrs. Gresham. She could have been examined by doctors for the state, and independent information could have been secured which might have been helpful, had the state been so minded.

It is evident that the condition which she had, could have developed to a fatal stage before Mrs. Gresham became fully aware of it, or conversely, it might not have developed to the fatal stage. The condition nevertheless would be deemed dangerous to life.

In Illinois it has been held that there is a presumption of necessity in the case of an abortion *by a licensed physician* which cannot be overturned by a mere showing of prior good health. In People v. Davis, 362 Ill. 417, 200 N.E. 334, at page 336, the court said:

"The evidence discloses that although the deceased desired to have an abortion performed her husband opposed her wishes and urged the family physician to discourage her and that the latter strongly advised against an operation. While the defendant admitted that she performed a physiological curettement and that she used a curette instrument to perform the acts which she described with particularity, she denied performing an abortion for the purpose of relieving the pregnancy. *Proof of the use of an instrument, medicine, drug, or other means for the purpose of producing an abortion will not necessarily establish criminal intent.* The statute defining murder by abortion specifically excepts from the penalties which it prescribes any person who produces an abortion for the necessary purpose of saving the life of the mother. An indictment charging abortion must negative every exception specified by the statute. Beasley v. People, 89 Ill. 571. Since it is essential to negative the fact that the abortion was caused or performed for the purpose of saving the mother's life, competent proof to establish that fact is necessary. *The criminal intent necessary to be established to convict an accused charged with committing an abortion is the intent to commit a criminal abor-*

tion, that is, an abortion for a purpose other than to preserve the life of the mother. People v. Hobbs, 297 Ill. 399, 130 N.E. 779." (Emphasis added.)

[3] We are of the opinion that the circumstances in this case relied upon to show criminal intent are not convincing, and fail to prove beyond a reasonable doubt that the abortion or curettement performed upon Mrs. Gresham by the defendant was not necessary for the preservation of her life.

[4] We are also of the opinion that if it is necessary to the establishment of the corpus delicti that it be shown that an operation was not necessary to preserve the life of a woman, that then in this particular case there was no effectual establishment of the corpus delicti as to Mrs. Gresham.

[5] Defendant contends that the trial court erred in giving instructions on general criminal intent. Suffice it to say that the defendant offered the instruction and he may not now complain. People v. Williams, 128 Cal.App.2d 458, 463, 275 P.2d 513.

The next contention of the defendant is that the giving of the instruction with reference to the manner in which intent is manifested, was in error. No authority is cited by the defendant for his position, and in any event, section 21 of the Penal Code covers the matter.

[6] As to the assertion that the court erred in failing to give defendant's requested instruction on ignorance or mistake of fact, the defendant has cited no authority for his position and gives no argument in support of it. We therefore need not consider the point. People v. Foss, 7 Cal.2d 669, 671, 62 P.2d 372.

[7] As to the court's refusal to give the defendant's requested instruction on proof of a corpus delicti independently of his extrajudicial admissions and confessions being prejudicial, the attorney general, with commendable fairness, concedes that the trial court erred in this respect. People v. Holbrook, 45 Cal.2d 228, 234, 288 P.2d 1; People v. Tapia, 131 Cal. 647, 652, 63 P. 1001. However, the attorney general insists that the error was not prejudicial. We believe that such error, as heretofore set forth, under the facts and circumstances of this case, did constitute prejudicial error.

As to the contention of the defendant to the effect that the court erred in refusing to give his proposed instruction on expert testimony, suffice it to say that the court did instruct the jury in the language of Penal Code section 1127b, and that section provides "[n]o further instruction on the subject of opinion evidence need be given."

[8] Considering now more particularly the case involving Alice Hankerson Frank, with specific reference to the defendant's contention that the evidence is insufficient to support the verdict.

Mrs. Frank admittedly was not pregnant. She however told the defendant that she was pregnant; that she was suffering from some sort of female trouble; that she was about three weeks past her menstrual period. She stood by and heard Truitt represent, untruthfully, that she had had a baby or babies before. She was vague and indefinite about her physical history and purported to be very much afraid and frightened.

She herself testified that the doctor inserted the vaginal speculum and that he explained (at the time) that such was done so that he could get in with other instruments to *clean her out.* This conduct is consistent with an ordinary examination and, in and of itself, would not mean that she was to be aborted. Truitt stated that when the doctor made the adjustment with the speculum, and then reached out with the sponge forceps with the cotton on the end thereof that he "believed" the doctor had started to enter the cavity and then made the arrest.

This court, speaking through Mr. Presiding Justice White, said in People v. Murphy, 60 Cal.App.2d 762, 141 P.2d 755, which involved a licensed physician: "The

very gist of the offense charged against these defendants is that they used an instrument with intent thereby to procure the miscarriage of the woman named in the information. Therefore, unless there was actual knowledge on the part of defendant Murphy of the pregnancy of the woman, *or a belief upon his part that the woman was pregnant,* there could not exist the required and necessary intent upon his part to procure the miscarriage of such woman. The question therefore arises as to whether there was present in this case evidence, other than the testimony of the prosecutrix, of sufficient substantiality to warrant a conclusion by the jury of the requisite guilty intent upon the part of defendant Dr. Murphy (citing cases). In the legitimate exercise of his profession the defendant doctor was entitled to examine the prosecutrix to ascertain if she was pregnant, and if such examination established the existence of such a condition or gave rise to a belief upon the part of the doctor that she was pregnant, and he proceeded with the use of an instrument to produce or attempt to produce a miscarriage, then he was guilty of the offense charged against him. [60 Cal.App.2d at page 770, 141 P.2d at page 760.]

* * * * * *

"* * * As we view the testimony in this case, exclusive of that given by the prosecutrix, it is insufficient, as a matter of law, to establish the pregnancy of the prosecutrix or the fact that there existed in the mind of defendant Dr. Murphy a fully formed belief that pregnancy existed The evidence being insufficient, as a matter of law, to establish an intent upon the doctor's part to cause a miscarriage, which is the gist of the offense, his conviction cannot be sustained. People v. Richardson, supra [161 Cal. 552, 120 P. 20]." 60 Cal.App.2d at page 772, 141 P. 2d at page 761. (Emphasis added.)

Similarly, in People v. Gallardo, supra, 41 Cal.2d 57, at page 66, 257 P.2d 29, at page 35, it is stated, "In order to establish an attempt [to commit an abortion], it must appear that the defendant had a specific intent to commit a crime and did a direct, *unequivocal act toward that end; preparation alone is not enough, and some appreciable fragment of the crime must have been accomplished.*" (Emphasis added.) See also, People v. Holbrook, supra, 45 Cal.2d 228, 232, 288 P.2d 1.

The facts before us involve several questions: whether defendant's belief that Mrs. Frank was pregnant is established; whether defendant's intent to commit an abortion is sufficiently established; and whether what defendant had done was sufficient to establish that he was in the process of performing direct, unequivocal acts which he thought would result in a miscarriage.

In People v. Raffington, 98 Cal.App.2d 455, at page 460, 220 P.2d 967, at page 971, which did not involve a doctor but did involve some similar facts in other respects, it was stated: "Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of the design will constitute an attempt." In that case, however, by contrast to the one engaging our attention, the defendant by his own statements was habitually engaged in the unlawful enterprise and discussed the details of abortions performed on other women and the materials and instruments which he admittedly intended to use in producing the intended abortion.

In People v. Berger, 131 Cal.App.2d 127, at page 130, 280 P.2d 136, at page 138, it was stressed that the intent with which certain acts were done was established beyond any doubt with the result that the acts were held sufficient to constitute an attempt, the court stating *"the drawing of the line between mere preparation and attempt in close cases is not an easy task.* It may be drawn from the cases that where the intent to commit the substantive offense is as clearly established as it is here acts done toward the commission of the crime may constitute an attempt, where *the same acts would be held insufficient to constitute an attempt if the intent with*

which they were done is equivocal and not clearly proved." (Emphasis added.)

In People v. Bowlby, 135 Cal.App.2d 519, 287 P.2d 547, 53 A.L.R.2d 1147, the acts in question were held to be sufficient because the procedures followed a well-established pattern of conduct.

The particular acts involved in this case are, as heretofore said, consistent with an ordinary vaginal examination to determine the condition of Mrs. Frank. It is not established that defendant believed Mrs. Frank was pregnant. Nor is it established that the doctor relied upon what a prospective patient told him with reference to pregnancy. In fact, he repeatedly told Mrs. Gresham that she was not pregnant in spite of her protestations to the contrary. There is no evidence that defendant was regularly engaged in performing abortions according to any prescribed pattern or procedure. Under the peculiar facts and circumstances of this case, we cannot agree that each of the elements of the crime were established beyond a reasonable doubt.

[9] With respect to defendant's contention that the court erred in failing to give the defendant's requested instruction on the defense of entrapment, we think the issue should have been submitted to the jury. Such an instruction was refused in People v. Cummings, 141 Cal.App.2d 193, at page 201, 296 P.2d 610, at page 615, on the basis that no substantial evidence of entrapment had been presented, the court stating the rule to be as follows: "While it is well settled that a defendant is entitled to instructions based on the theory of his defense, the court may refuse proffered instructions on a theory that is not supported by substantial evidence."

The evidence before us insofar as the defense of entrapment is concerned is closely analogous to that presented in People v. Reed, 128 Cal.App.2d 499, at page 502, 275 P.2d 633, at page 635, wherein a conviction was reversed because no instruction on entrapment was given, the court stating, "it was the duty of the court to instruct the jury on the doctrine of entrapment. People v. Alamillo, 113 Cal.App.2d 617, 248 P.2d 421; People v. Gallagher, 107 Cal.App. 425, 290 P. 504. Entrapment was an issue as to that count. It was, of course, for the consideration and determination of the jury. But it was the right of defendant to have the jury so instructed."

From the evidence in this case it could easily be believed by the jury that the criminal design was hatched or conceived in the minds of the state officers, and that Alice Frank was used as the decoy to ensnare the doctor into the alleged crime; that the doctor never did intend to abort her and that he was only in the course of doing that which was professionally proper.

Admittedly, Mrs. Frank did not go to the doctor to have an abortion committed, she was not pregnant; she went there with the preconceived idea of telling admitted untruths, and then of decoying the doctor into examining her. It must be admitted that what the doctor did thereafter is entirely and wholly consistent with good medical practice, and but for some intent to commit a crime, would not in any sense be violative of any criminal abortion law. The overt acts, that is, what was actually done, seem to be admitted. The question is, for what purpose were the acts done? If the procedure was to the end that the doctor could determine what the condition of the woman was, and thereby make a diagnosis, a crime was not committed.

[10] Lastly, the matter of the so-called confession of the defendant should be considered. We realize that the defendant's counsel did little, if anything, about presenting the law of admissions and confessions to the court, and did practically nothing toward examining the witnesses on voir dire to ascertain if the statements were freely and voluntarily made, or made so as to be admissible. However,

this case may be retried and we believe comments thereon are presently proper. It is admitted that the investigator pulled out a gun from his pocket and "dangled" it in his left hand, and then instructed or directed the doctor what next to do. Presumably, the doctor thought of the possibilities of getting shot and then complied with the investigator's instructions. Shortly thereafter the "statement" was taken on a tape recorder. In fact, apparently two statements were taken, as heretofore indicated, the first of which was recorded, and then for some reason of the investigator's, was found not be to his full liking and a second statement was taken on the same machine, the second statement being such that it mechanically erased the first statement.

In other words, the question is presented: did the defendant, under the circumstances, exercise "mental freedom" in the making of his statements—was it an expression of free choice? It has been held that the "slightest pressure, whether by way of inducement to confess, or threat if confession is withheld, is sufficient to require the exclusion of the confession." See People v. Siemsen, 153 Cal. 387, 394, 95 P. 863, cited with approval in People v. Berve, 51 Cal.2d 286, 332 P.2d 97. The court in the Berve case said (51 Cal.2d at page 291, 332 P.2d at page 99): "The prosecution must show that such coercive conditions as once existed, no longer prevailed at the time the confession was uttered. (Citing cases.)"

Paraphrasing a statement in People v. Shaw, 111 Cal. 171, 174, 43 P. 593: Criminal cases too often are conducted upon the preconceived theory that the defendant is guilty, and that if given a fair trial, according to the established rules, the jury may not convict him. The purpose of a criminal trial is to discover and determine whether a defendant is guilty or not guilty; not merely to maintain at all hazards, a theory of guilt entertained beforehand by any one man or any group or community of men.

The judgment and the order denying defendant's motion for a new trial are, and each is reversed.

WHITE, P. J., and LILLIE, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.



Dorothy M. BURDETTE and P. T. Burdette, Plaintiffs and Appellants,

v.

ROLLEFSON CONSTRUCTION COMPANY, a corporation, Herbert Hischemoeller, et al., Defendants and Respondents,

Rollefson Construction Company, a corporation, and Herbert Hischemoeller, Respondents.*

Civ. 23286.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1959.

Rehearing Denied March 11, 1959.

Hearing Granted April 15, 1959.

Action for injuries sustained by a fall onto a public sidewalk from some point between the top of the first ten steps from the public sidewalk and the door of plaintiff's apartment. From a judgment of the Superior Court, Los Angeles County, McIntyre Faries, J., the plaintiffs appealed. The District Court of Appeal, White, P. J., held, inter alia, that where if traffic lane along edge of the very steep or precipitous slope 9 to 12 feet above sidewalk or ground level, which was the only means of access to apartment had been provided with guardrails as required by city ordinance, tenant could not have tumbled down the rough slope or landed upon sidewalk below, inference that tenant did so fall from walkway, steps or platform, across the line where guardrail should have been, down the precipitous slope was the only one which could reasonably be drawn from un-

* Opinion vacated 344 P.2d 307.

disputed facts, and hence question of proximate cause became one of law notwithstanding fact that no one actually saw tenant fall from walkway onto the rough terrain of slope across the line where guardrail should have been.

Reversed.

1. Appeal and Error ⇐654

Where agreed statement was obviously defective, appellate court would augment the record by including therein the original, first and second amended complaints, paragraphs of which were referred to by number in findings and conclusions, the exhibits, the pretrial statement and pretrial order, copies of which were appended to respondent's brief. Rules on Appeal, rule 12.

2. Municipal Corporations ⇐120

Words of an ordinance are used in their usual and generally understood meanings.

3. Evidence ⇐7

The courts have knowledge that a ground or other level has no noticeable slope or inclination and that the upper edge of a very steep or precipitous slope is not properly referred to as "the ground or sidewalk level".

4. Landlord and Tenant ⇐169(4, 6)

Where record disclosed that tenant in defendants' building landed on a public sidewalk directly across steep and precipitous "sloping front yard" from either the small platform adjacent to apartment, the four steps, or the 30 to 40 feet of private walkway and no one saw tenant fall or land, and tenant testified that she had no recollection of any occurrence between time when she was on small platform pulling her apartment door shut and later when she was again inside her apartment and had been injured, it would be presumed that tenant used due care for her own safety and that she did not jump or purposely step off into space, and such presumption supported court's finding that tenant was not negligent.

5. Landlord and Tenant ⇐169(6)

In action for injuries to tenant who landed on a public sidewalk directly across steep and precipitous "sloping front yard" from either the unguarded small platform adjoining apartment, the four steps leading thereto or 30 to 40 feet of private walkway, there was no evidence in record which would have supported a finding that tenant had assumed risk or that accident was unavoidable.

6. Negligence ⇐56(1.12)

Failure to perform a duty is the proximate cause of any injury which could not have happened if such duty had been performed.

7. Negligence ⇐136(25)

The issue of proximate cause is a question of fact to be decided by trier of the facts, rather than a conclusion of law to be made by court, either in a jury trial or on appeal, but line of demarcation between what are questions of fact and conclusions of law is not one easy to be drawn in all cases.

8. Negligence ⇐56(1.2)

Where negligence continues and exists up to time of injury and damage incurred is one of hazards against which it is defendant's duty to provide a safeguard, there is no room for difference of opinion and negligent failure to provide such safeguard is a cause of accident as a matter of law.

9. Evidence ⇐596(1)

The law does not require demonstration or absolute certainty, which is rarely found.

10. Landlord and Tenant ⇐169(11)

Where if traffic lane along edge of the very steep or precipitous slope 9 to 12 feet above sidewalk or ground level, which was the only means of access to apartment had been provided with guardrails as required by city ordinance, tenant could not have tumbled down the rough slope or landed upon sidewalk below, inference that tenant did so fall from walkway, steps or platform, across the line where guardrail should have been, down the precipitous slope was the only one which could reasonably be drawn

from undisputed facts, and hence question of proximate cause became one of law notwithstanding fact that no one actually saw tenant fall from walkway onto the rough terrain of slope across the line where guardrail should have been.

11. Evidence ⇐14

It is a matter of common knowledge that persons often fall to level of their own feet without being injured at all, and that almost never does a person fall to a point 9 to 12 feet lower without injury.

Joseph Schecter, Los Angeles, for appellants.

Milton M. Cohen, Patti Sacks Karger, Los Angeles, for respondent, Hischemoeller.

Crider, Tilson & Ruppe, Henry E. Kappler, Los Angeles, for respondent, Rollefson Construction Company, a corporation.

WHITE, Presiding Justice.

Plaintiffs, Dorothy Burdette and her husband, appeal from the judgment for defendants, Hischemoeller and Rollefson Construction Company, in their action seeking damages for injuries to the person of Dorothy, who fell onto the public sidewalk from some point between the top of the first ten steps from the public sidewalk and the door of her apartment.

The following is a fair epitome of the facts pertinent to the issues raised herein.

Defendant Hischemoeller was the owner of the lot in the city of Los Angeles designated as 11305 Biona Drive. He and defendant Rollefson Construction Company, hereinafter for convenience called Rollefson, agreed that Rollefson was to erect a six-unit apartment building on said property and that Rollefson was to participate either in the profit from a sale of the property or in the income from rentals. When the apartment building was nearing completion, "Apt. No. 2" was leased to plaintiffs for a year's occupancy beginning October 1, 1956, the date upon which plaintiffs moved in.

At the times mentioned, the following ordinances of the City of Los Angeles were in force:

"*Section 91.0315.* (a) Certificate Required. In order to safeguard life and limb, health, property, and public welfare, every building or structure shall conform to the construction requirements for the Subgroup Occupancy to be housed therein, or for the use to which the structure is to be put, as specified * * *.

"No building or structure or portion thereof shall be used or occupied until a Certificate of Occupancy has been issued therefor."

"*Section 91.3305,* Subsection (g). * * * Every exterior stairway shall have a handrail on the outer edge. Stairways more than four feet (4′) in width shall be provided with handrails on each side."

"*Section 91.4404.* (a) Guard Rails Required. Where a floor, roof or deck is accessible from a stairway or doorway and the floor, roof or deck is more than four feet (4′) above the adjoining ground or floor level, a protective guard rail shall be provided in such a manner as to separate completely the doorway from the edge of the floor, roof or deck and also enclose all traffic lanes and all equipment requiring periodic servicing."

Before October 1st, the City Building Department inspected the premises and required that "cement work" be "redone on the steps and platform". Up to October 10th, the date of plaintiff Dorothy's fall, no certificate of occupancy had been issued and no railing had been installed although one had been promised and contracted for.

The record on the instant appeal includes an agreed statement, in which it is said that "the manner in which the case was decided and determined is set forth fully in the Findings of Fact and Conclusions of Law of the Court".

A paragraph of the complaint found to be true states: "That the only means of access to, or egress from, said apartment dwelling for the guests and tenants therein

is by means of a flight of stairs leading from the ground in front of said building to a platform in front of said apartment dwelling."

The following is quoted from the Agreed Statement: "Apartment #2 was reached by a private sidewalk adjacent to the building, extending for some 30 to 40 feet to a set of 4 steps leading up to a platform, which platform was immediately outside the door of Apartment #2. This was the only means of ingress and egress to said apartment. The platform was approximately 32 inches above the ground or sidewalk level. The platform, the steps and the sidewalk, which extended 30 to 40 feet, all faced and were immediately contiguous to the front yard of the building, which front yard sloped down to the public sidewalk for a distance of approximately 15 to 18 feet."

The trial court found that defendants' failure to supply a guardrail in front of Apartment No. 2 was a violation of the Los Angeles City Building Code; that defendants knew or should have known that the guardrail was missing and "that the absence of such handrails was a dangerous and hazardous condition".

It was found untrue that the absence of such handrail caused plaintiff Dorothy "to be catapulted or thrown down the decline of rough terrain against the sidewalk; or to sustain serious injuries"; that it was untrue that "the presence of any dangerous or hazardous condition for which defendants, or either of them, were responsible or accountable, was the direct or proximate cause of any fall or other incident which caused injury to the plaintiff"; that it is untrue that plaintiff sustained personal injuries "as a direct or proximate result of any careless or reckless or negligent or other conduct of the defendants, or either of them, or of their agents or servants or employees"; that it is untrue that plaintiffs' damage was "a direct and proximate result of the violation of any Los Angeles Municipal Ordinance as pleaded * * *."

The court further found that while the absence of guardrails "was open, obvious and apparent to the plaintiff", she did not assume the risk, her injuries were not "directly or proximately caused or contributed to by any negligence on the part of the plaintiff", and that her injuries were not "the result of inevitable or unavoidable accident".

From the agreed statement it appears that plaintiff Dorothy testified that on the evening of October 10, 1956, her friend Louise Green visited her. She opened the only outside door of her apartment and held it for her friend to precede her. She followed her friend outside, turned and pulled the door shut, and the next thing she knew she had been badly injured and was back inside her apartment. Her friend Louise Green testified that she preceded Dorothy out the door, across the platform, down the four steps, and about 30 feet along the private walk; that she "heard someone crying, and then looked down and saw the plaintiff down on the public sidewalk" behind her; that she did not know how plaintiff Dorothy "got to the sidewalk".

The agreed statement is further quoted: "There is no testimony in the entire record showing how plaintiff, Dorothy Burdette, got to the public sidewalk; there is no testimony or evidence in the entire record to show from what point plaintiff, Dorothy Burdette, left the upper or ground level of the apartment house, i. e., whether she left the upper level from the platform, from the steps, or from the private sidewalk, all of which abutted the sloping front yard; there is no testimony or evidence in the entire record tending to show at what place on the lower or public sidewalk the plaintiff was found; plaintiff's friend, Louise Green, was the only party who testified that plaintiff was on the public sidewalk, and she stated that she did not observe or remember whether plaintiff was in line with the platform, the steps, or the private sidewalk which abutted the top of the slope, there is no evidence in the

entire record showing or tending to show the cause of plaintiff's injuries."

It is not questioned on appeal that plaintiff Dorothy was seriously injured, and that her injuries included not only broken bones but deep lacerations containing soil.

From appellants' opening brief, the following description of the "only means of ingress and egress to Apartment #2" is quoted: "A flight of about 10 conventional size steps ascended from the public sidewalk upon the face of the steep declivity atop which rested the apartment house, the stairway then making an exact right-angle turn and continuing adjacent to the apartment building with one long step about 30–40 feet in length, which said long step is referred to in the Agreed Statement as the private sidewalk, said stairway then ascending by four conventional steps up to the platform immediately outside the door of appellants' apartment."

A careful reading of the record and the briefs on appeal indicates that defendants' failure to provide a guardrail at the edge of the small platform just outside plaintiffs' door and along the outside edge of the four steps from the platform to the "private sidewalk" or "long step" (30 to 40 feet) adjacent to the wall of Apartment No. 2 was found by the court to have been a violation of the ordinance and negligence as a matter of law, and also to have created a hazardous and dangerous condition known to defendants; but, because from the evidence plaintiff Dorothy may have fallen from the 30 to 40 feet of private sidewalk, as to which there is no such finding, the court "found" that Dorothy's injuries were not a proximate result of any negligence on the part of defendants.

[1] As stated by respondent Rollefson, in its brief, the agreed statement is obviously defective. We have therefore augmented the record by including therein the original, first and second amended complaints, paragraphs of which are referred to by number in the Findings and Conclusions, the exhibits, the pretrial statement and the pretrial order, copies of which are appended to said respondent's brief. Rule 12; Alkus v. Johnson-Pacific Co., 80 Cal. App.2d 1, 9, 181 P.2d 72; Kuhn v. Ferry and Hensler, 87 Cal.App.2d 812, 815, 197 P.2d 792.

Respondent Hischemoeller, in his brief, states that since it is stipulated in the agreed statement that "there is no evidence in the entire record showing or tending to show the cause of plaintiff's injuries", appellants' claim that, as a matter of law, defendants' negligence was the proximate cause of plaintiff Dorothy's injuries has been settled by agreement and the instant appeal is frivolous. This court is not convinced that it was the intention of the parties, by such Agreed Statement, to settle the question raised on appeal.

Said respondent Hischemoeller quotes from the agreed statement the description of the premises where the "front yard sloped down to the public sidewalk for a distance of approximately 15 to 18 feet", and "comments" that appellants have changed their theory of the case on appeal and are for the first time contending that the 30 to 40 foot "private sidewalk" is a part of the stairway and required by said ordinances to have a guardrail along its outside edge. This "comment" of said respondent is not borne out by the record, wherein as heretofore stated the agreed statement refers to the Findings of Fact, in which plaintiffs' allegation that the only means of access to said apartment is a "flight of stairs leading from the ground in front of said building to a platform in front of said apartment dwelling" is found to be true.

The photographic exhibits show, from various angles, said stairway, or two stairways and private sidewalk, and the "sloping front yard". Webster's New International Dictionary states that slopes may be and are of differing degrees as follows: gentle 3 to 8 degrees; moderate 8 to 16 degrees; steep 16 to 26 degrees; very steep 26 to 45 degrees; and precipitous over 45 degrees. The photographic exhibits in the instant

action show the passage way between the public sidewalk and the door of Apartment #2 consists of ten steps leaving the public sidewalk at right angles, a walkway, four more steps and a small platform leaving the top of said ten steps at right angles and continuing along the edge of the "sloping front yard". The walkway is narrow and abuts the apartment house wall on the other side. The slope of said "front yard" varies only from "very steep" to "precipitous".

[2] We are not impressed by plaintiff-appellants' claim on appeal that said 30 to 40 foot walkway is one step between the ten steps and the four steps herein described binding them together into one long stairway requiring a protective guardrail. That would be contrary to the rule that words of an ordinance are used in their usual and generally understood meanings.

[3] Nor, considering the findings and the photographic evidence in the record on the instant appeal, can we accept as controlling the respondent's quotation from the agreed statement that "The platform was approximately 32 inches above the ground or sidewalk level". The courts have knowledge that a ground or other *level* has no noticeable slope or inclination and that the upper edge of a very steep or precipitous slope is not properly referred to as "the ground or sidewalk *level*".

The nearest level ground in front of said Apartment No. 2 is the public sidewalk, which can be reached, according to all briefs on appeal, by descending two flights of stairs numbering 14 steps in all. The narrow 30 to 40 foot private walkway abutting the apartment house wall on one side and abutting or overhanging the very steep or precipitous slope on the other side, for all practical purposes is a "floor" or "deck" more than four feet (and about 9 to 12 feet) above the ground level. It is accessible from the doorway of said Apartment No. 2. Section 91.4404(a) of the Los Angeles Building Code requires that as to such a floor "a protective guard rail shall be provided in such a manner as to * * * enclose all traffic lanes".

The trial court found that the ordinances pleaded and received in evidence were in force, and that defendants' failure to provide a protective guardrail along the outside of the small platform and the four steps was negligence which caused a dangerous and hazardous condition to exist just outside plaintiffs' door. There is no finding with respect to the presence or absence of negligence or danger or hazard because of defendants' failure to provide a handrail along the edge of said 30 to 40 foot narrow walkway, or "floor", 9 to 12 feet above ground level and necessarily traversed by plaintiffs between the door of Apartment No. 2 and the public sidewalk. The record contains no fact which would justify its exclusion from the findings of such negligence and the resulting hazardous condition.

[4, 5] The record in the instant appeal is without conflict to the effect that plaintiff landed on a spot on the public sidewalk directly across said steep and precipitous "sloping front yard" from either the small platform, the four steps, or the 30 to 40 feet of private walkway. No one saw her fall and no one saw her land. Her friend saw her at her own doorway and a few seconds later on the public sidewalk badly injured. There being no evidence as to the cause of plaintiff's fall, and plaintiff having testified that she has no recollection of any occurrence between the time when she was on the small platform pulling her apartment door shut, and the later time when she was again inside her apartment and had been injured, it must be presumed that she used due care for her own safety and that she did not jump or purposely step off into space. That presumption supports the court's finding that plaintiff Dorothy was not negligent. There is no evidence in the record which would have supported a finding that plaintiff had assumed the risk or that the accident was unavoidable.

There is no evidence that defendants' negligent failure to provide a guardrail as required by the Los Angeles Building Code caused plaintiff to fall. The absence of the guardrail could not have caused her to fall. Plaintiff's fall might have been occasioned by her fainting, falling in a fit, or even stepping on a banana peel thrown upon the walkway by some unknown third party. Nevertheless, if defendants had complied with the requirements of the Los Angeles Building Code enacted to safeguard plaintiff's life and limb, plaintiff's fall would have been shorter by from 9 to 12 feet and she would have contacted only a smooth cement surface instead of the rough terrain of the very steep and precipitous slope from the private walkway to the public sidewalk.

In Williams v. San Francisco & N. W. R. Co., 6 Cal.App. 715, 93 P. 122, decedent's horse was frightened by an engine operated without negligence. About a mile down the road and while the horse was still frightened and running the buggy collided with a wood pile negligently and unlawfully kept by defendant in the roadway. The collision killed the driver. Judgment for plaintiff was affirmed for the reason that the negligence in connection with the woodpile was the proximate cause of the collision, injuries and death.

Respondents cite and rely upon Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 P. 480, where judgment for plaintiff was reversed. There plaintiffs sought damages for the death of their son, whose body was found near defendant's sidetrack. The facts of the cited case are in no way similar to those being considered on the instant appeal. At page 365 of 132 Cal., at page 480 of 64 P., of the cited case, the court said: "While, as before suggested, it may not be presumed against deceased that he became drunken and slept upon the track, or deliberately stood upon the track in front of the backing engine, the laws of self-preservation denying any inference of such conduct upon his part, still, as is said in some of the cases, the deceased may have fallen insensible upon the track in a fit, and thus have been killed without fault upon his part * * *" At page 366, of 132 Cal., at page 481 of 64 P., it is said: "In this case the jury were permitted to presume negligence on the part of the defendant, then to presume that deceased was lawfully on the railroad track, and then to still further presume that defendant's negligence caused his death * * * A presumption must be based on a fact or facts, not on a presumption."

Respondent Rollefson, in its brief, states that "proximate cause may be established by substantial evidence and cannot rest on guess, surmise or conjecture", citing the following cases in support of that position.

Chapman v. Title Ins. & Trust Co., 68 Cal.App.2d 745, at page 748, 158 P.2d 42, at page 43, wherein, it is said: "The entire evidence leaves no doubt that plaintiff's own negligence caused or contributed to cause her injuries".

Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801, which also turned upon plaintiff's contributory negligence.

McKellar v. Pendergast, 68 Cal.App.2d 485, 156 P.2d 950; Delk v. Mobilhomes, Inc., 118 Cal.App.2d 529, 258 P.2d 75; Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933; and Greene v. A. T. & S. F. Ry. Co., 120 Cal.App.2d 135, 260 P.2d 834, 40 A.L.R.2d 873, in none of which was there any evidence of negligence on the part of the defendant.

Holmes v. Moesser, 120 Cal.App.2d 612, 262 P.2d 27, 29, wherein judgment for defendant upon a directed verdict was affirmed. Plaintiff fell "when her left foot slipped" from the second step above the landing. At page 615, of 120 Cal.App.2d, at page 29 of 262 P.2d, the court quotes the following from the Blodgett case, supra: "The evidence shows that the lack of the handrail was neither the proximate nor any cause of plaintiff's fall. Any violation of the ordinance by the defendant would therefore be immaterial."

Respondent Rollefson further relies upon the rule stated in its brief as follows: "* * * Whether the violation of an ordi-

nance is the proximate cause of an injury is a question of fact for the trier of facts". In this connection, he cites:

Nunneley v. Edgar Hotel, 36 Cal.2d 493, 498, 225 P.2d 497, wherein judgment for plaintiff was affirmed. Plaintiff was a visitor in a hotel; she accompanied her friend, who was a guest of the hotel, onto the roof and attempted to sit on a mattress which had been placed across the entire top opening of a vent. The parapet of the vent was four inches lower than required by the State Housing Act. At page 498, of 36 Cal.2d, at page 500 of 225 P.2d, Mr. Justice Edmonds, speaking for the court, said: "The manifest intention of the Legislature in specifying a minimum height of 30 inches for the parapet of every vent shaft in the roof of an apartment house or hotel was to protect a person lawfully upon the premises from walking or stumbling into the opening". It was held that plaintiff's accident was not of the type to prevent which the statute had been enacted. The judgment in her favor was affirmed because of other general negligence.

In the instant action, plaintiff's accident was just the kind of mishap, from which the Los Angeles Building Code sought to protect the tenants of apartment houses.

[6] Failure to perform a duty is the proximate cause of any injury which could not have happened if such duty had been performed. (38 Am.Jur. 701.)

In Hale v. Depaoli, 33 Cal.2d 228, 231, 201 P.2d 1, 3, 13 A.L.R.2d 183, a child fell through a rotten railing and judgment for defendant after nonsuit was reversed. The court said: "The purpose of the railing was to prevent one using the porch from stepping or falling from it. A structural defect in this protection would be 'reasonably certain to place life and limb in peril' * * *"

[7, 8] It has been repeatedly held that the issue of proximate cause is a question of fact to be decided by the trier of the facts, rather than a conclusion of law to be made by the court, either in a jury trial or on appeal. However, "the line of demarkation between what are questions of fact and conclusions of law is not one easy to be drawn in all cases * * *" Levins v. Rovegno, 71 Cal. 273, 275, 278, 12 P. 161, 162; Robinson v. Raquet, 1 Cal.App.2d 533, 541, 36 P.2d 821. Where the negligence continues and exists up to the time of the injury and the damage incurred is one of the hazards against which it is defendant's duty to provide a safeguard, there is no room for a difference of opinion and the negligent failure to provide such safeguard is a cause of the accident as a matter of law. Hession v. City & County of San Francisco, 122 Cal.App.2d 592, 603, 265 P. 2d 542.

[9, 10] In the instant action, if the traffic lane along the edge of the very steep or precipitous slope 9 to 12 feet above sidewalk or ground level, which was the only means of access to Apartment No. 2, had been provided with guardrails as required by the Los Angeles Building Code, Dorothy could not have tumbled down the rough slope or landed upon the sidewalk below. It is true that no one actually saw her fall from the walkway onto the rough terrain of the slope across a line where the guardrail should have been. The law does not require demonstration or absolute certainty, which is rarely found. The inference that plaintiff Dorothy did so fall from the walkway, steps, or platform, across the line where the guardrail should have been, down the precipitous slope is the only one which could reasonably be drawn from the undisputed facts. Thus the question of proximate cause becomes one of law. Gallichotte v. California Mut. Building & Loan Ass'n, 4 Cal.App.2d 503, 508, 41 P.2d 349; Traylen v. Citraro, 112 Cal.App. 172, 175, 297 P. 649; Stasulat v. Pacific Gas & Elec. Co., 8 Cal.2d 631, 638, 67 P.2d 678.

[11] Spencer v. Beatty Safway Scaffold Co., 141 Cal.App.2d 875, 297 P.2d 746, is cited and relied upon by all parties to the instant appeal. There judgment for defendant, notwithstanding the verdict for plaintiff, was affirmed on appeal. The instant action is distinguishable from the Spencer case, supra, in which the injured

plaintiff, a gymnasium instructor, climbed onto an apparatus not intended to hold his weight and fell from it. In the instant action, there is no evidence that plaintiff Dorothy did anything except to start along the traffic lane provided by her landlords, the defendants, as the only means of exit to be used from Apartment No. 2. Had there been handrails as required along the edge of the very steep and precipitous slope, plaintiff Dorothy, regardless of the cause of her fall, could not have landed on the public sidewalk below. It is a matter of common knowledge that persons often fall to the level of their own feet without being injured at all, and that almost never does a person fall to a point 9 to 12 feet lower without injury.

The judgment is reversed.

FOURT and LILLIE, JJ., concur.



UNION INTERCHANGE, INC., a California Corporation; Universal Interchange, Inc., a California Corporation, Plaintiffs and Respondents,

v.

F. W. GRIESINGER, Individually and as Commissioner of the Division of Real Estate of the Department of Investment of the State of California, and Edmund G. Brown, Individually and as Attorney General of the State of California, Defendants and Appellants.*

Civ. 23141.

District Court of Appeal, Second District, Division 1, California.

Feb. 11, 1959.

Rehearing Denied March 11, 1959.

Hearing Granted April 8, 1959.

Action for declaratory relief and injunction to declare plaintiffs' business operations to be outside Advance Fee Amendments or that they were unconstitutional, and to enjoin defendants from enforcing the law against plaintiffs, wherein defendants filed a cross complaint for accounting, injunction and the appointment of a receiver. From an order of the Superior Court, Los Angeles County denying their motion to dissolve and vacate a preliminary injunction, Bayard Rhone, J., defendants appealed. The District Court of Appeal, Lillie, J., held, inter alia, that where preliminary injunction restraining enforcement of Advance Fee Amendments as applied to plaintiffs engaged solely in soliciting and publishing advertisements for sale and exchange of businesses and properties was issued upon notice to defendants and after an adversary hearing at which all counsel were present, the court did not reserve any power to terminate, dissolve or vacate the preliminary injunction prior to trial on the merits, and such order had not been appealed from, refusal to grant defendants' motion to dissolve such preliminary injunction was not an abuse of discretion.

Affirmed.

1. Injunction ⇐135, 161

The granting, denying, dissolving or refusing to dissolve a preliminary injunction rests in sound discretion of trial court, and whether there was an abuse of discretion depends upon consideration of all particular circumstances of each individual case.

2. Injunction ⇐161

On motion to dissolve preliminary injunction, trial court's discretion should be exercised in favor of party most likely to be injured.

3. Injunction ⇐175

On motion to dissolve preliminary injunction, trial court is the judge of credibility of affidavits since it is its province to resolve all conflicts.

4. Appeal and Error ⇐920(3)

On appeal from order denying motion to dissolve preliminary injunction, appellate court would view affidavits and verified

* Opinion vacated 342 P.2d 249.

pleadings before the trial judge in light most favorable to respondents.

5. Appeal and Error ⇐870(4)

No appeal having been taken from order granting preliminary injunction, order became final.

6. Injunction ⇐175

Trial court in determining motion to dissolve preliminary injunction was not precluded from considering all matters relied upon by trial court in granting it in the first instance notwithstanding order granting preliminary injunction had not been appealed from.

7. Evidence ⇐318(7)

Where defendants' cross complaint simply incorporated by reference admissions, denials and allegations contained in answer and supplemental answer, but almost every allegation therein was made on information and belief, such document, for purposes of motion for injunction was similar to an affidavit on information and belief, which is hearsay and incompetent evidence.

8. Injunction ⇐174

The refusal to dissolve temporary injunction restraining enforcement of Advance Fee Amendments as applied to plaintiffs who were engaged solely in soliciting and publishing advertisements for sale and exchange of businesses and properties whose operations were claimed not to be compatible with a brokerage business affected by the amendment was not an abuse of discretion in view of conflicting affidavits as to possible injury to public and irreparable injury which would be sustained by plaintiffs if preliminary injunction were not issued. St.1955, p. 3013; West's Ann. Code Civ.Proc. §§ 532, 533.

9. Appeal and Error ⇐920(3)

In determining whether trial court abused its discretion in refusing to dissolve temporary injunction restraining enforcefent of Advance Fee Amendments as applied to plaintiffs and engaged solely in soliciting and publishing advertisements for sale and exchange of businesses and properties, who claimed that amendments were unconstitutional, where trial judge in denying motion did not state his reasons therefor, appellate court would, under record, assume that trial court determined that there existed a constitutional question, sufficiently serious, along with other considerations to justify suspension of the law's enforcement against plaintiffs until issue could be determined on trial of the cause. St.1955, p. 3013; West's Ann.Code Civ. Proc. §§ 532, 533; West's Ann.Const. art. 1, §§ 9, 11, 13, 16, 21; U.S.C.A.Const. art. 1, § 10, cl. 1; Amends. 1, 14, § 1.

10. Appeal and Error ⇐843(1)

An appellate court will not review questions unnecessary to its decision.

11. Injunction ⇐163(1)

Under statute providing that if injunction is granted without notice to person enjoined he may apply upon reasonable notice to dissolve or modify the same, the court's power extends only to a preliminary injunction issued without notice to person restrained. West's Ann.Code Civ.Proc. § 532.

12. Injunction ⇐163(1)

The right to move for dissolution of preliminary injunction is limited to cases where injunction was granted without notice, and Superior Court cannot suspend or vacate a preliminary injunction granted upon notice and hearing until final determination of the cause except where preliminary injunction itself contains a clause in which the court reserved the court's power to modify or dissolve it. West's Ann.Code Civ.Proc. §§ 532, 533.

13. Injunction ⇐163(7)

If by its terms, preliminary injunction is to continue "until further order of this court", or if it is made "without prejudice to the right of the defendant, at any time thereafter to move to vacate the injunction whenever so advised", it may be modified or dissolved. West's Ann.Code Civ.Proc. §§ 532, 533.

14. Injunction ⇐163(1)

Unless the right to move for dissolution is expressly reserved, a defend-

ant's remedy, when a preliminary injunction is granted after notice and hearing, is by appeal, the privilege of moving for dissolution being otherwise limited to cases wherein injunction is granted without notice. West's Ann.Code Civ.Proc. §§ 532, 533.

15. Injunction ⇐161

Where preliminary injunction restraining enforcement of Advance Fee Amendments as applied to plaintiffs engaged solely in soliciting and publishing advertisements for sale and exchange of businesses and properties was issued upon notice to defendants and after an adversary hearing at which all counsel were present, the court did not reserve any power to terminate, dissolve or vacate the preliminary injunction prior to trial on the merits, and such order had not been appealed from, refusal to grant defendants' motion to dissolve such preliminary injunction was not an abuse of discretion. St.1955, p. 3013; West's Ann.Code Civ.Proc. §§ 532, 533.

16. Appeal and Error ⇐1108

Where matter of change of circumstances was not before the lower court when it refused to dissolve preliminary injunction defendants who sought dissolution could not claim on appeal that trial court had become "a handmaiden to inequity," in that there was a clear change of circumstances and that court should be permitted to modify its decree to meet unforeseen changes in circumstances and to thus maintain the status quo. West's Ann.Code Civ.Proc. §§ 532, 533.

17. Injunction ⇐174

Where trial court on October 24, 1955 issued preliminary injunction restraining enforcement of Advance Fee Amendments as applied to plaintiffs engaged solely in soliciting and publishing advertisements for sale and exchange of businesses and properties, and a motion to dissolve such preliminary injunction was denied by the court on October 17, 1957, record failed to show such change of circumstances as to justify holding that a change of condition existed on the latter date so as to require dissolution, even if change of circumstances was relied upon as ground for dissolving such preliminary injunction. St.1955, p. 3013; West's Ann.Code Civ.Proc. §§ 532, 533.

18. Injunction ⇐164

The factor which warrants resort to inherent power of court to modify or dissolve permanent injunction does not exist in a preliminary order. West's Ann.Code Civ.Proc. §§ 532, 533.

19. Injunction ⇐164

Although dilatory, cumbersome and circuitous remedies by way of contempt, certiorari, habeas corpus or an independent action in equity are available, no direct method of vacating or modifying a permanent injunction is provided, and that justifies use of inherent power of court to terminate it when continuance of restraint is no longer warranted, but since a preliminary injunction pends only until cause is determined on its merits, at which time after hearing it may be vacated, modified or continued in force, no justification arises for resort to court's power outside of statutory authority. West's Ann.Code Civ.Proc. §§ 532, 533.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Neal J. Gobar, Deputy Attys. Gen., for appellants.

Alvin G. Greenwald, Los Angeles, for respondents.

LILLIE, Justice.

A history of the instant litigation discloses that on September 2, 1955, plaintiffs filed a verified complaint for declaratory relief and injunction asking the court to declare their business operations to be outside certain amendments to Chapter 4, Real Estate Law (Stats.1955, Chapter 1678), hereinafter referred to as the Advance Fee Amendments, or said Amendments unconstitutional; and to enjoin defendants from enforcing the law against them. Plaintiffs therein detailed the general character, extent and operations of the two

corporations, alleging the sole business of Universal Interchange, Inc. to be that of publishing and advertising properties for sale in its publications, Broker's Bulletin and Buyer's Digest; and that of Union Interchange, Inc. to be the solicitation and sale of advertising space in Universal's publications. They further declared that defendants intend to enforce the Advance Fee Amendments against them when the law becomes effective September 7, 1955, require their employees to secure licenses as real estate and/or business opportunity brokers and salesmen, and upon their failure to do so, file criminal complaints against them; that said law is unconstitutional and if defendants are not restrained from enforcing it against them, plaintiffs will suffer irreparable injury. Plaintiffs also sought a temporary restraining order and preliminary injunction pending final determination of the cause.

After service of the complaint defendants, in opposition to a temporary restraining order, filed points and authorities, copy of Decision of Real Estate Commissioner, and Affidavit of Herman F. Roth. Thereupon, a Temporary Restraining Order was issued, as well as an Order to Show Cause re Preliminary Injunction, directing defendants to appear on September 22, 1955, to show cause why they should not be restrained from enforcing the Amendments against plaintiffs pending the determination of the action, a copy of which was personally served on each defendant September 13, 1955.

A contested hearing on the Order to Show Cause re Preliminary Injunction was held on September 22, 1955, at which all counsel were present; and on October 24, 1955, the court issued a preliminary injunction wherein defendants were "enjoined and restrained, *pending the determination of this cause,* from interfering with the plaintiffs * * * by instituting any criminal complaint, action or proceeding against them for a violation of * * * the Advance Fee Amendments." (Emphasis added.) It was personally served on each defendant November 2, 1955. No appeal was taken therefrom.

On June 12, 1956, defendants filed their Answer and Cross-Complaint for accounting, injunction and appointment of a receiver. Based on these pleadings, their Supplemental Answer, and Affidavit of Winston D. Lawson, defendants sought a preliminary injunction to prevent plaintiffs from continuting their business operations, which application was denied December 13, 1956.

In August, 1957, defendants filed a second Supplemental Answer attaching a Memorandum Decision, Superior Court, Hartford County, Connecticut, dated October 19, 1956 (United Interchange, Inc. v. Spellacy, [since reversed by the Connecticut Supreme Court, 144 Conn. 647, 136 A. 2d 801, declaring the Connecticut Advance Fee Amendments unconstitutional]), Affidavits of five of plaintiffs' former customers and Affidavit of Lee B. Stanton, Deputy Attorney General. Based thereon, defendants again applied for a preliminary injunction against plaintiffs and, in addition, sought to have the lower court vacate and dissolve plaintiffs' preliminary injunction of October 24, 1955.

Defendants filed their Notice of Motion to Dissolve and Vacate Preliminary Injunction on October 1, 1957. The motion was specifically based on Sections 532 and 533, Code of Civil Procedure, and made on the sole ground of two decisions (Hamilton v. Treadwell, No. Civil A. 9242, California Superior Court, and United Interchange, Inc. v. Spellacy, supra, (Connecticut Superior Court). In opposition to defendants' motion, plaintiffs filed certain affidavits and points and authorities, claiming that the preliminary injunction of October 24, 1955, was issued on notice to defendants, that no facts have been presented warranting dissolution thereof, that Hamilton v. Treadwell is not applicable to the instant case, that similar or identical statutes in other jurisdictions have been declared unconstitutional, and that if the preliminary injunction is dissolved, plaintiffs

will suffer irreparable injury. After hearing, both motions were denied. Defendants appeal only from the order denying their motion to dissolve plaintiffs' preliminary injunction.

Appellants contend that the Advance Fee Amendments are constitutional and that the lower court abused its discretion in refusing to dissolve the preliminary injunction, in that plaintiffs are operating without licenses and the public is being substantially injured thereby.

[1] The granting, denying, dissolving, or refusing to dissolve a preliminary injunction rests in the sound discretion of the trial court (Kendall v. Foulks, 180 Cal. 171, 179 P. 886; McCoy v. Matich, 128 Cal. App.2d 50, 274 P.2d 714) and whether there was an abuse thereof depends upon a consideration of all the particular circumstances of each individual case (Daniels v. Williams, 125 Cal.App.2d 310, 270 P.2d 556).

The record shows that the preliminary injunction of October 24, 1955, was issued only after notice and an adversary hearing upon a verified complaint, defendants' opposing points and authorities, a Decision of the Real Estate Commissioner and an Affidavit of Herman F. Roth. The Notice of Motion to Dissolve was based "upon all documents, records and pleadings on file," defendants having filed no affidavit in support thereof, the sole ground for the motion being the decisions of Hamilton v. Treadwell, supra, and United Interchange, Inc. v. Spellacy, supra. No change of circumstances was alleged. In opposition to defendants' motion, plaintiffs filed the affidavits of Paul M. Guyer and Neal Fisher and points and authorities. Presented for the trial court's determination were considerations relating to irreparable injury to plaintiffs' property rights by the dissolution of the preliminary injunction, as compared with the resulting prejudice to the public; the constitutionality of the Advanced Fee Amendments; and the power of the court to order dissolution of a preliminary injunction issued upon notice.

[2-4] As to the first consideration, which is primarily factual, we are bound by the rule that the trial court's discretion should be exercised in favor of the party most likely to be injured (McCoy v. Matich, 128 Cal.App.2d 50, 274 P.2d 714; Riviello v. Journeyman Barbers etc., Union, 88 Cal.App.2d 499, 199 P.2d 400), and that the trial court is the judge of the credibility of the affidavits for it is its province to resolve all conflicts (Voeltz v. Bakery, etc., Union, 40 Cal.2d 382, 254 P.2d 553). Therefore, we will view the affidavits and verified pleadings before the trial judge in the light most favorable to respondents. Northwestern Pac. R. R. Co. v. Lumber & S. W. Union, 31 Cal.2d 441, 443, 189 P.2d 277.

In its determination on October 24, 1955, that the preliminary injunction should issue, and on October 14, 1957, that the same should not be dissolved, the trial court had before it, among other documents, the verified complaint, which presented in detail plaintiffs' business operations and the injury which would result thereto if the Amendments were enforced before their constitutionality, or their applicability to plaintiffs, could be determined on the trial on the merits. The following is a short summary of plaintiffs' activities as alleged in their complaint. Universal, a California corporation engaged in interstate commerce, publishes the Broker's Bulletin and Buyer's Digest containing advertisements of business opportunities and real estate for sale or exchange. Its only business is that of publishing and advertising property for sale. Union, a California corporation, is engaged in soliciting and selling advertising space in Universal publications. It handles in each issue of the Digest upwards of 2,000 ads representing a monthly contract value in excess of $200,000. Its salesmen operate in 16 states and has a monthly payroll in excess of $20,000. Union employs approximately 125 persons, most of whom are nonresidents and not qualified to meet the licensing provisions under California law. Its agents and rep

resentatives do not engage in any activities to bring them within the purview of the law, and even if the Amendments are constitutional, they do not apply to plaintiffs. If plaintiffs' representatives are required to obtain licenses, most of them will be forced to leave their employ. Since they are highly skilled and irreplaceable, Union's entire sales organization will be disrupted which, in turn, will jeopardize the entire publishing and advertising business of Universal in which plaintiffs have valuable good will, substantial interests, investments, and property rights. Neither Union nor Universal, nor any of its employees, is engaged in the brokerage business, but are engaged solely in soliciting and publishing advertisements for the sale and exchange of businesses and properties. Their operations, the amount and kind of advertising fee charged, the nature of their ads, the terms of their advertising contracts and the extent of their participation between prospective buyers and their advertisers, are not compatible with a brokerage business, and they do not enter into any fee or commission agreement between advertisers, brokers, and buyers, or act as brokers or agents, or engage in any activities sufficient to bring them within the Amendments. They allege that as applied to plaintiffs, the Amendments are unconstitutional in that they are arbitrary, unreasonable, capricious, discriminatory and in violation of Article 1, Sec. 9; Art. 1, Sec. 11; Art. 1, Sec. 13; Art. 1, Sec. 16; and Art. 1, Sec. 21, of the State Constitution, and Amendment 1; Amendment 14, Sec. 1; and Art. 1, Sec. 10, Clause 1, of the United States Constitution.

In opposition to the preliminary injunction, defendants placed directly in issue the constitutionality of the law, asserting it constitutes a reasonable and valid exercise of the police power of the State to regulate the business of selling real estate and business opportunities, and applies to plaintiffs' operations. Before the court also was a Decision of the Real Estate Commission, January 1, 1951, to show that the present manager of plaintiffs' Hollywood office once had his license as a business opportunity and real estate broker revoked because of misrepresentations made in procuring listings and advertising contracts for a business known as Central Listing Plan; and the involvement of others associated with plaintiffs in similar activities. On the factual issue of whether the public was being injured by permitting plaintiffs to operate pending determination of the cause, defendants further presented through the Affidavit of Herman F. Roth that during the two preceding years the Division of Real Estate had received numerous complaints from prospective sellers of properties and businesses who had entered into contracts with plaintiffs, and who were led to believe by them that they were in the business of selling properties and businesses, and that in some instances, they need not pay the fee until their properties were sold. In support of the alleged fraudulent and misleading representations, copy of a letter received from each of eight persons was attached.

On these pleadings, affidavits and points and authorities, including decisions of courts in various jurisdictions relating to statutes and business activities similar or identical to the California law and plaintiffs' operations (National Business and Property Exchange, Inc. v. Oklahoma Real Est. Comm., D.C.Okl., 1955, 170 F.Supp. 904, the trial court on October 24, 1955, issued the preliminary injunction. At that time two considerations were before the court, the irreparable injury to plaintiffs' extensive business activities and valuable property interests, if the Amendments are enforced pending final determination of the cause, as compared to the injury resulting to the public if plaintiffs are permitted to operate; and the constitutionality of the Amendments.

[5–7] No appeal having been taken from the order granting the preliminary injunction, it became final (Woodbine v. Van Horn, 29 Cal.2d 95, 173 P.2d 17). Even so, the trial court in its determination on the motion to dissolve was not precluded from considering all matters relied

upon by the lower court in granting it in the first instance. However, since October 24, 1955, other verified documents of a probative nature have become part of the record. Among them is the Affidavit of Edgar R. Carver, filed in support of plaintiffs' good faith in proceeding by way of an action for declaratory relief, wherein he alleged that prior to the effective date of the Amendments, September 7, 1955, he, as plaintiffs' attorney, unsuccessfully sought an opinion from the Division of Real Estate relative to their applicability to plaintiffs' business activities which he set out in detail. Also before the court were answers of defendants and cross-complaint, together with several affidavits in support of their first unsuccessful application for a preliminary injunction, setting forth the organization and activities of plaintiffs, the danger to the public if they are permitted to operate and the complaints of five of plaintiffs' dissatisfied customers. The answers appear to be unverified. Defendant's cross-complaint simply incorporates by reference admissions, denials and allegations contained in the answer and supplemental answer. However, almost every allegation therein is made on information and belief and such a document for purposes of the motion is similar to an affidavit on information and belief, which is hearsay and incompetent evidence (Bank of America Nat. Trust & Savings Ass'n v. Williams, 89 Cal.App.2d 21, 200 P.2d 151). Defendant's Affidavit of Winston D. Lawson, former sales manager of Union, gave names of its employees, their duties and salaries, and a description of its sales operations. The affidavits of Joseph D. Trambly, Leno Rovazzini, Shee Ah Lor, K. Okamoto, and Charles W. Lower, alleged they were former customers of plaintiffs, had been misled by their representatives as to the contents of advertising contracts, and misinformed that they were business opportunity brokers. The Affidavit of Lee B. Stanton alleged generally that similar misrepresentations by plaintiffs' agents are continuing and that the five persons were defrauded by plaintiffs.

In opposition to defendants' motion to dissolve, the affidavits of Paul M. Guyer, president of Union, and Neal Fisher, tell quite another story of plaintiffs' activities and their dealings with the five customers. Guyer declared the satisfaction and praise of brokers, advertisers and customers who have dealt, and who are dealing, with plaintiffs, with the services rendered by them; and included letters from Lynn Barr, a subscribing broker; Leonard A. Malone, advertiser; Mrs. H. W. Bowers, buyer; and R. I. Low, subscribing broker. This placed in direct conflict the factual issue concerning injury to the public. To meet the claims of Trambly, Rovazzini, Ah Lor, Okamoto and Lower that they were defrauded, Neal Fisher alleged he talked to counsel for one of them and investigated the records relating to all, and presented copies of correspondence with them. The statements of the five were controverted by Neal Fisher's affidavit, creating another factual dispute.

[8] The trial judge, in denying the motion, did not state his reasons therefor, but in resolving the conflicts in the affidavits, the lower court in deciding the preliminary injunction should continue, could well have found on the record before us that the alleged misdealing, misrepresentations and fraud of plaintiffs' representatives, in connection with the five dissatisfied customers were untrue; that their only real complaint was that they did not make sales through the advertising services of plaintiffs and to avoid paying their bills for services rendered, made the objections; and that no substantial damage was suffered by them, two having paid nothing to plaintiffs, and three having paid a total of $435. In answer to the claim of Lee B. Stanton that the public is being injured by plaintiffs' continued operations based upon complaints received from the public, the trial judge could have found this to be untrue, or, if true, not sufficiently substantial, since other advertisers and users of Buyer's Digest hold a different opinion of the Digest as demonstrated by the Affidavit of Paul M. Guyer. Also justified is the trial court's implied

finding that if the Amendments are enforced against plaintiffs prior to a determination of the cause, in jeopardy of irreparable injury is the employment of a substantial number of persons; a lucrative business in advertising, good will, extensive business interests, and the entire business operations of Universal, dependent upon the sales organization of Union.

[9, 10] We do not know the trial court's disposition on the issue of constitutionality. We cannot assume it determined the law constitutional or unconstitutional, but we can assume from the extensive points and authorities presented, particularly the varied opinions of courts of different jurisdictions including Oklahoma, Connecticut and Maine, relative to the unconstitutionality of similar or identical statutes, that it considered and weighed the issue and determined that there existed a constitutional question, sufficiently serious, along with other considerations, to justify a suspension of the law's enforcement against plaintiffs until the issue could be determined on the trial of the cause (Wade v. City and County of San Francisco, 82 Cal.App.2d 337, 186 P.2d 181; Brock v. Superior Court, 12 Cal. 2d 605, 86 P.2d 805). Aside from commenting that the constitutional question appears to be a substantial one and was undoubtedly one of the factors considered by the trial court in the exercise of its discretion, in accordance with the familiar principle that an appellate court will not review questions unnecessary to its decision, we will not further discuss the issue of constitutionality.

Also before the trial court was the matter relating to its power to dissolve a preliminary injunction issued on notice and not reserving the power to dissolve it prior to a determination of the cause. Although, as suggested by appellants, the legal issue may not have been argued, plaintiffs nevertheless laid the matter before the trial court by way of their points and authorities.

[11–13] Sections 532 and 533, Code of Civil Procedure, the basis of defendants' motion, relate to the modification and dissolution of preliminary injunctions. Briefly, the applicable section 532 provides in pertinent part that "if an injunction is granted *without notice to a person enjoined,* he may apply, upon reasonable notice * * * to dissolve or modify the same." (Emphasis added.) This is the only statutory authority for dissolution (Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617), and thereunder the court's power extends only to a preliminary injunction issued without notice to the person restrained. For over half a century the courts of this state have so held. Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617; Natoma Water & Mining Co. v. Parker, 16 Cal. 83; Natoma Water & Mining Co. v. Clarkin, 14 Cal. 544; Ots v. Superior Court, 10 Cal. App. 168, 101 P. 431; Humphrey v. Buena Vista Water Co., 2 Cal.App. 540, 84 P. 296. A review of these decisions and a full discussion of the rule appears in United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, 132. Citing Holtum v. Greif, 144 Cal. 521, 525, 78 P. 11, that "(T)he decision of the trial court having been once made after regular submission of the motion its power is exhausted, it is functus officio," and recognizing that sections 525–533, Code of Civil Procedure, provide a complete system of law and procedure refusing, modifying and dissolving preliminary injunctions, the court held the right to move for dissolution of a preliminary injunction is limited to cases where the injunction was granted without notice; and the superior court is without power to suspend or vacate a preliminary injunction granted upon notice and hearing until final determination of the cause.

Excepted from this rule is the situation in which the preliminary injunction itself contains a clause in which the court reserves the court's power to modify or dissolve it. Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617. If by its terms, the preliminary injunction is to continue "until further order of this court," it may be modified or dissolved (Wolf v. Board of Supervisors, 150 Cal. 285, 89 P. 85, 86; State Comp. Ins. Fund v. Maloney, 121 Cal. App.2d 33, 262 P.2d 662); as where it is

made "without prejudice to the right of the defendant, at any time hereafter, to move to vacate the injunction * * * whenever so advised." Wheeler v. Superior Court, 82 Cal.App. 202, 255 P. 275, 276.

[14] Therefore, unless the right to move for dissolution is expressly reserved, a defendant's remedy, when a preliminary injunction is granted after notice and hearing, is by appeal, the privilege of moving for dissolution being otherwise limited to cases wherein the injunction is granted without notice (27 Cal.Jur.2d, Sec. 90, page 216, Injunctions).

[15] The record before us disclaims any right of defendants to apply to the lower court for a dissolution of the preliminary injunction, and the power of the lower court to dissolve the same. They have at no time claimed that the preliminary injunction was issued without notice to them or that the court reserved power therein to dissolve it before the trial on the merits. Actually it was issued upon notice to defendants and after an adversary hearing, at which all counsel were present. Nor did the court reserve any power to terminate, dissolve or vacate the preliminary injunction prior to the trial on the merits, for the order itself unreservedly and specifically enjoins defendants from enforcing the Amendments "pending the determination of this cause."

Appellants claim that notwithstanding the clear language of section 532, the United Railroad case, and the lack of reservation of power to dissolve, the inherent power of the court and considerations of fairness and equity require the determination that the lower court was justified in entertaining the motion to dissolve a preliminary injunction issued on notice pending a determination of the cause. Defendants cite numerous authorities justifying modification of provisional injunctions on the ground of maintaining the status quo. Three relate to the power of the trial court to grant a preliminary injunction pending appeal from an order denying a preliminary injunction; two deal with permanent injunctions not involving Sections 532 and 533; one relates to a preliminary injunction in which the court reserved the power to modify it, and in six, all over sixty years old, it could not be ascertained if the preliminary injunctions had been issued without notice. We find none of these cases to be controlling in the situation at bar.

[16, 17] Appellants further claim that the trial court has become "a handmaiden to inequity" in that there is a clear change of circumstances, and the court should be permitted to "modify its decree to meet unforeseen changes in circumstances and to thus maintain the status quo." Until now defendants have never relied upon a change of circumstances. Their sole ground for dissolution in the trial court was the two court decisions. In support of their motion they filed no affidavits setting forth any change in factual situation, relying entirely upon those already in the record, particularly the affidavits filed in support of their first unsuccessful application for preliminary injunction. It is obvious from the record that the matter of change of circumstances was not before the lower court. Furthermore, in reviewing that before the trial court when the preliminary injunction was issued, October 24, 1955, and that before the court on October 17, 1957, when the motion to dissolve was denied, we find no circumstances sufficient to justify the holding that a change of condition existed on the latter date.

[18] Appellants cite as determinative of this issue Branker v. Superior Court, 165 Cal.App.2d 816, 332 P.2d 711, wherein the court held the superior court has power to hear and determine on its merits a motion to dissolve an injunction pendente lite, which was issued on notice, and restrained defendants pending the trial of the action on its merits. Relying upon Sontag Chain Stores Co. v. Superior Court, 18 Cal.2d 92, 113 P.2d 689, and Woods v. Corsey, 89 Cal. App.2d 105, 200 P.2d 208, involving permanent injunctions wherein the court resorted to its inherent power to modify or vacate, it held that the trial court has jurisdiction on a motion to determine whether there had

been a change in the controlling factors upon which the injunction rested, or whether the end of justice would be served by a modification of the order. Appellants therein argued that Sontag Chain Stores Co. v. Superior Court, 18 Cal.2d 92, 113 P. 2d 689, overruled United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, relied upon by respondents. The court apparently accepted this position. However, we find difficulty in subscribing to this view due to the basic difference between preliminary and permanent injunctions. The factor which warrants resort to the inherent power of the court to modify or dissolve a permanent injunction does not exist in a preliminary order. As pointed out by the Supreme Court in the Sontag case, a permanent injunction is of a continuous, endless nature and has always been "subject, upon a proper showing, to modification or dissolution by the court which rendered it. The court's power in this respect is an inherent one." 18 Cal.2d 92, 94–95, 113 P.2d 689, 690.

[19] Although dilatory, cumbersome and circuitous remedies by way of contempt, certiorari, habeas corpus, or an independent action in equity are available, no direct method of vacating or modifying a permanent injunction is provided. This justifies the use of the inherent power of the court to terminate it when continuance of the restraint is no longer warranted. Since a preliminary injunction pends only until the cause is determined on its merits, at which time after hearing it may be vacated, modified or continued in force, no justification arises for resort to the court's power outside of the statutory authority provided in sections 532, 533, Code of Civil Procedure.

The Supreme Court in the Sontag case recognized the distinction between a permanent and a preliminary injunction by referring to Ots v. Superior Court, 10 Cal. App. 168, 101 P. 431, United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, and other cases, in this way: "A review of these authorities reveals that, in many instances, the decree under consideration was not of the nature or classification of the one here in question, and also that earlier pronouncements have been modified or distinguished by later rulings," citing Wheeler v. Superior Court, 82 Cal.App. 202, 255 P. 275 (involving a preliminary injunction in which power was reserved) and other cases not here in point. That the Supreme Court therein did not overrule the United Railroads case is obvious from its language 18 Cal.2d at page 96, 113 P.2d at page 691: "for present purposes it is sufficient to state that no California case is cited which touches the precise point here under discussion, or which is here controlling."

For the foregoing reasons the order is affirmed.

WHITE, P. J., and FOURT, J., concur.



167 Cal.App.2d 698

Floy M. MIDDLECOFF, Plaintiff, Cross-Defendant and Respondent,

v.

Robert F. MIDDLECOFF, Defendant, Cross-Complainant and Appellant.

Civ. 17864.

District Court of Appeal, First District, Division 1, California.

Feb. 9, 1959.

Hearing Denied April 8, 1959.

Annulment proceedings in which husband appealed that portion of annulment decree which made awards of money and property to wife. During pendency of appeal wife applied for and secured by order of the Superior Court, City and County of San Francisco, Orla St. Clair, J., order for cost and attorney's fees to defend that appeal and husband appealed from such order. The District Court of Appeal, Peters, P. J., held that where court had

before it affidavits of parties as well as finding of trial court in annulment proceedings that wife had acted in good faith in contracting marriage, court had authority to enter award of attorney's fees and cost for defending appeal, notwithstanding that finding of good faith was later set aside on appeal.

Affirmed.

1. Marriage ⇐62

Where annulment decree was entered which in addition to granting husband annulment made award of money and property to wife and husband appealed from that portion of decree making award of property and money to wife, husband by appealing from only portion of decree could not claim that annulment of marriage was final and that court had no jurisdiction to enter award of attorney's fees and cost to enable wife to defend appeal. West's Ann.Civ.Code, §§ 87, 137, 137.3.

2. Marriage ⇐62

Under statutes providing for award of suit money in annulment proceedings, cost and fees may be awarded after entry of annulment decree and before such decree becomes final in order to permit wife to defend or prosecute an appeal involving validity of decree, even though effect of decree may have been to declare marriage non-existent ab initio. West's Ann.Civ. Code, §§ 87, 137, 137.3.

3. Marriage ⇐62

Where decree was entered in favor of husband annulling marriage and wife moved for attorney's fees and costs to enable her to defend husband's appeal from portion of that decree, and parties submitted affidavits on merits of motion, parties' action waived right to produce evidence and constituted stipulation that motion could be submitted on affidavits.

4. Marriage ⇐62

Where decree had already been entered granting husband an annulment and making an award of money and property to wife and husband appealed from portion of decree and submitted affidavits in opposition to wife's motion for allowance of attorney's fees and costs to defend appeal and in hearing motion court had before it in addition to the affidavits the records and files in annulment proceedings where judge had found that wife had entered into marriage in good faith, court had sufficient evidence before it to authorize award of suit money, notwithstanding fact that on appeal finding of good faith was set aside. West's Ann.Civ.Code, §§ 87, 137, 137.3.

5. Marriage ⇐7

Having been judicially declared incompetent and not restored to competency is not a bar to contracting of a valid marriage, since incompetent may contract a marriage and such marriage is not void but valid for all purposes until set aside.

6. Marriage ⇐62, 66

Award of attorney's fees and costs to wife to enable her to defend husband's appeal in annulment proceedings was within the sound discretion of the trial court and could be set aside for only an abuse thereof.

7. Marriage ⇐62

In appeal by husband from order of trial court awarding $1,500 attorney's fees and $300 costs to wife to enable her to defend appeal from judgment awarding husband annulment and awarding wife money and property, evidence failed to disclose that there was abuse of discretion in awarding fee to wife who was in necessitous circumstances.

8. Mental Health ⇐512

Where action for annulment was brought on behalf of incompetent husband by his guardian, the award of suit money and attorney's fees to wife and against the guardian not as an individual but solely in his capacity as guardian, was proper.

9. Mental Health ⇐220

Guardian is vested with legal title to incompetent's estate which he holds in trust for benefit of incompetent.

Tudor Gairdner, Los Angeles, for appellant.

Molly H. Minudri, San Francisco, for respondent.

PETERS, Presiding Justice.

A husband, through his guardian, secured an annulment decree, which also made awards of money and property to the wife. The husband appealed, challenging these awards. While that appeal was pending, the wife applied for and secured an order for costs and attorney's fees to defend that appeal. The husband appeals from that order.

Floy and Robert Middlecoff were married on February 25, 1939. In 1934 Robert Middlecoff had been adjudged to be an incompetent. He has never been restored to competency. The trial court found that prior to and all during the marriage, and up to the present time, Robert has been and still is incompetent. The record also shows that Robert is not only the beneficiary of a substantial trust fund, but that upon the death of his mother he will succeed to a substantial estate as remainderman.

In November, 1954, the wife sued for separate maintenance. The husband, through his guardian, answered, and cross-complained for an annulment. The cause came on for trial in July, 1956. The trial court, presided over by the late Judge Sapiro, dismissed the separate maintenance complaint, granted the husband an annulment, awarded the wife title to certain real property and awarded her $7,500 compensation for her services rendered during the 15½ years of the marriage. The husband successfully appealed from those portions of the judgment awarding the wife money and property. Middlecoff v. Middlecoff, 160 Cal.App.2d 22, 324 P.2d 669; see that case for a more detailed statement of facts of the above-described proceedings.

In order to defend that appeal the wife noticed a motion for attorney's fees and costs. The supporting affidavit averred that the wife was elderly, ill, and unemployable; that since the separation of the parties she has received no support or maintenance from her husband and has had to rely on the charity of friends; that she has no funds to retain counsel, or to pay the costs, for the defense of the husband's appeal. In some detail the affidavit sets forth the financial status of the husband, showing him to be a man of substance. The husband, through his guardian, filed a counter-affidavit, challenging the averments as to his financial status, and averring that his assets consist of being a beneficiary of a trust fund and being the remainderman of an estate of which his mother is life tenant. The husband avers that his only income is a monthly "gift" from the trustee paid to his guardian to defray his living expenses, and denied that he has "ample funds" to prosecute or defend the appeal.

The motion came on for hearing before Judge St. Clair in March of 1957, both parties being represented by counsel. The formal order granting the motion recites that "the matter * * * [is] submitted to the Court on the affidavits on file in behalf of both parties." No other evidence was introduced. The order awards the wife $1,500 attorney's fees and $300 costs to defend the appeal. The husband appeals from the order so providing.

[1] The first contention of the husband is that on the appeal that was then pending, he had appealed only from those portions of the decree awarding the wife money and property and did not challenge the annulment. The wife did not appeal. He therefore seems to contend that when the wife moved for costs and attorney's fees to defend that appeal, the annulment had become final and the parties were no longer husband and wife. Therefore, so it is contended, the trial court had no jurisdiction to award the wife suit money. This contention is unsound. It may be assumed that in a case where the parties are finally divorced, or where the marriage has been annulled and the annulment has become final, the trial court has no power to grant suit money on appeal, even if the appeal grows out of the prior marital relationship, but that assumed rule has no application to the prob-

lems here presented. By appealing from only a portion of the decree, and by not challenging the annulment, the annulment did not become final. The annulment decree was not divisible into two separate decrees, one for annulment and the other awarding the wife money and property. The money and property awards were an indivisible part of the single judgment, so that an appeal from any part of it necessarily was an appeal from the total judgment. The husband and the wife, as they did, could elect not to challenge a portion of the decree, but that did not result in the unchallenged portion becoming final while the other portion was on appeal. If authority were necessary to support this proposition it is to be found in Rediker v. Rediker, 35 Cal.2d 796, 221 P.2d 1, 20 A.L.R.2d 1152. There the wife attempted to abandon her appeal from the portion of an annulment decree awarding her $15,000, and to appeal only from the annulment. The court disposed of this contention with the following statement (35 Cal.2d at page 798, 221 P.2d at page 2): "She seeks to abandon her appeal from the award of $15,000, but that award is based on the decree of annulment and is inseparable therefrom. The appeal must therefore be taken from the entire judgment." See also Bailey v. Bailey, 60 Cal.App.2d 291, 140 P.2d 693; Cline v. Cline, 132 Cal.App. 713, 23 P.2d 431. Conversely, in the instant case, the money and property awards were an integral part of the annulment proceedings. The validity of the annulment was necessarily involved on the appeal, and so the annulment had not become final when the award of suit money was made. That being so, the court, under section 87 of the Civil Code, had jurisdiction to make the award.

The next contention of the husband is that, for several reasons, under the facts of this case, the evidence does not support the granting of the award. This contention requires the discussion of the code sections involved. The basic one is section 87 of the Civil Code. That section, in authorizing the awarding of suit money in annulment proceedings, provides: "The court shall have the power to grant attorneys fees and costs as provided by Section 137 in those annulment cases in which the party applying for such attorney's fees and costs shall, upon hearing, be found to be innocent of fraud or wrongdoing in inducing or entering into the marriage, and free from knowledge of the then existence of any prior marriage or other impediment to the contracting of the marriage sought to be annulled."

The pertinent portions of section 137 of the Civil Code are now to be found in section 137.3. It provides, in part:

"During the pendency of any action for annulment in which costs and attorney's fees are authorized by Section 87 of this code * * * the court may order the husband or wife * * * to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees if such relief is requested in the complaint, cross-complaint or answer; * * * In respect to services rendered or costs incurred after the entry of judgment, the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, whether or not such relief was requested * * *

"An application for any order making, * * * an award of attorney's fees or costs or both shall be made by motion on notice or by an order to show cause, * *"

[2] Under these sections costs and fees may be awarded, after the entry of the annulment decree and before such decree becomes final, in order to permit the wife to defend or prosecute an appeal involving the validity of the decree, even though the effect of the decree may have been to declare the marriage non-existent *ab initio*. Dunphy v. Dunphy, 161 Cal. 87, 118 P. 445; Sefton v. Sefton, 45 Cal.2d 872, 291 P.2d 439. The fact that the court on the appeal in Middlecoff v. Middlecoff, 160 Cal.App.2d 22, 324 P.2d 669, reversed in favor of the husband did not prevent the court from

awarding suit money on appeal to the wife while that appeal was pending. Weil v. Weil, 37 Cal.2d 770, 236 P.2d 159.

The husband contends that before the trial court could properly award suit money to defend an appeal in an annulment case there must be a hearing upon, and a finding on, the issue as to whether the wife is "innocent of fraud or wrongdoing in inducing or entering into the marriage, and free from knowledge of the then existence of any prior marriage or other impediment to the contracting of the marriage sought to be annulled," as provided in section 87 of the Civil Code.

[3] In the instant case there was no "hearing" of the motion for suit money in the sense of taking oral evidence. Both parties filed affidavits. The order of the court recites that when the matter was called for hearing, counsel for both parties being present, the motion was "submitted to the Court on the affidavits on file." The parties could, of course, waive their right to produce evidence at the hearing and stipulate that the motion could be submitted on affidavits. This the parties did. But, as the husband correctly points out, neither the motion nor the affidavits alleges compliance or non-compliance with the last quoted portion of section 87 of the Civil Code. This, the husband contends, prevented the court from making an award.

What this contention overlooks is that in addition to the motion and the affidavits, there was, of course, before Judge St. Clair when the motion was submitted to him, the record and files in the annulment proceeding. In that case Judge Sapiro had expressly found that the wife had entered into the marriage with the husband "in good faith." That finding was before Judge St. Clair. He was entitled to presume, at that stage of the proceedings, that Judge Sapiro had held a hearing on compliance or non-compliance with the requirements of section 87, and had found that the wife had acted in "good faith." A further hearing on that issue would have been superfluous. If the finding of "good faith" amounted to a finding of compliance with the conditions imposed by section 87, then Judge St. Clair was not required to hold a further hearing on that issue.

[4] The finding of "good faith" certainly is tantamount to a finding that the wife was "innocent of fraud or wrongdoing." In fact, this very finding was so interpreted in Middlecoff v. Middlecoff, 160 Cal.App.2d 22, 324 P.2d 669. In addition, it seems clear that the finding of "good faith" also amounted to a finding that the wife was "free from knowledge of the then existence of any prior marriage or other impediment to the contracting of the marriage." Judge Sapiro had allowed trial suit money in the annulment proceedings. Judge St. Clair was entitled to presume, on the hearing of the motion for suit money on appeal, that the finding of "good faith" was intended by Judge Sapiro to be a finding of complete compliance with section 87, including the freedom of knowledge of any "impediment" to the marriage. The husband, on the motion, made no showing to the contrary.

[5] The husband correctly points out that the record in the annulment proceedings contains evidence to the effect that the wife knew that her husband, before the marriage, had been judicially declared incompetent and had not been restored to competency. But such incompetency is not a bar to the contracting of a valid marriage. An incompetent may contract a marriage and such marriage is not void, but is valid for all purposes until it is set aside. In re Estate of Gregorson, 160 Cal. 21, 116 P. 60, L.R.A.1916C, 697; Wolf v. Gall, 32 Cal. App. 286, 163 P. 346, 350; In re Estate of Karau, 26 Cal.App.2d 606, 80 P.2d 108.

There is another phase of this problem that should be mentioned. As already pointed out, Judge Sapiro found that the wife acted "in good faith." This very finding, on the very appeal for which the wife in the present proceeding was allowed suit money to defend, was subsequently set aside by this court as being totally unsupported by any evidence. Middlecoff v. Mid-

dlecoff, 160 Cal.App.2d 22, 324 P.2d 669. Thus, the husband properly points out that, during the entire course of this litigation, there has never been a valid finding of compliance with the conditions of section 87. But this is not fatal to the award made by Judge St. Clair. When the motion for costs and fees came before him, he was required to determine whether the wife was entitled to defend the appeal taken by the husband challenging an award of money and property made by Judge Sapiro after trial. As already pointed out, Judge St. Clair knew judicially that Judge Sapiro had made a finding of "good faith" on the part of the wife. At that stage of the proceedings he was entitled to presume that that finding was supported. Judge St. Clair was certainly not required to peruse the reporter's transcript in that case to determine whether the finding was supported and then try to guess what the decision of the appellate court would be. One of the points being raised on that appeal was that that finding was not supported. Judge St. Clair was not required or permitted to place himself in the position of an appellate court and pass on this issue. As already pointed out, he was entitled to presume that a hearing on compliance with section 87 had been held before Judge Sapiro, that in finding "good faith" Judge Sapiro had found such compliance, and that such finding was supported.

If this were not the law it would defeat the basic purpose of the statutes allowing awards of suit money to permit a spouse to protect her rights on an appeal by the other spouse. Here the wife had a judgment for property and money. The husband appealed, challenging those awards. The wife wanted to defend the awards. Judge St. Clair was entitled to believe that all the requirements of section 87 had been met. Thus, the precise situation envisaged by the statutes allowing awards of suit money to defend an appeal appeared to be present. The fact that the appellate court later reversed the awards to the wife and held that the finding of "good faith" was unsupported is not relevant to the question as to whether Judge St. Clair was entitled to award suit money at the time when he did. The question of the power of Judge St. Clair must be determined by the situation as it existed when he made the award, not by what happened later.

[6, 7] The husband next attacks the award of $1,500 attorney's fees and $300 costs as being excessive. Such awards, generally, rest in the sound discretion of the trial court and may be set aside only for an abuse of discretion. Pope v. Pope, 107 Cal.App.2d 537, 237 P.2d 312; Dietrich v. Dietrich, 41 Cal.2d 497, 261 P.2d 269. No such abuse here appears. The wife was seeking costs and fees to defend on appeal a judgment awarding her a residence of undisclosed value, $7,500 in cash, and a substantial amount in trial suit money. The evidence shows that the husband either has in possession or has access to substantial financial resources, and that the wife is in necessitous circumstances. Obviously, the award here attacked was a reasonable one.

[8, 9] The husband also objects to the fact that the trial court in its order here under attack directed not only the husband but also his guardian to pay the fees and costs awarded. The award was not directed against the guardian as an individual but solely against him in his capacity as guardian. Such an award was proper. The guardian is vested with the legal title to the incompetent's estate which he holds in trust for the benefit of the incompetent. Doran v. Hibernia Savings & Loan Soc., 80 Cal.App.2d 790, 182 P.2d 630. Thus, the court committed no error in this respect.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; PETERS, J., not participating.

168 Cal.App.2d 74

FLORENCE NIGHTINGALE SCHOOL OF NURSING, INC., an Illinois corporation, Petitioner,

v.

SUPERIOR COURT of California FOR THE COUNTY OF LOS ANGELES and Leon Wolff, doing business as The Lincoln Institute of Practical Nursing, Respondents.

Civ. 23589.

District Court of Appeal, Second District, Division 3, California.

Feb. 17, 1959.

Hearing Denied April 15, 1959.

Proceeding in mandamus to compel Superior Court of County of Los Angeles to enter order quashing service of summons upon foreign corporation operating correspondence nursing school. The District Court of Appeal, Vallée, J., held that where correspondence nursing school carried on regular and systematic activity in California in solicitation of pupils by advertising in national magazines and in arranging for and carrying on courses of instruction with view of increasing sale of its courses in California, corporation was doing business within California and was amenable to service of process and to jurisdiction of California Superior Court for alleged unfair competition with California correspondence nursing school.

Alternative writ discharged and peremptory writ denied.

1. Corporations ⇐642(1)

"Doing business" in state so as to be amenable to civil process is synonymous with those business activities required by due process clause as basis for jurisdiction. West's Ann.Code Civ.Proc. § 411, subd. 2; West's Ann.Corp.Code, § 6501.

See publication Words and Phrases, for other judicial constructions and definitions of "Doing Business".

2. Courts ⇐12(2)

An act done by a nonresident in state of forum may be sufficient basis of forum's jurisdiction in an action arising out of that act.

3. Corporations ⇐642(1)

Under statute to effect that jurisdiction of foreign corporation may be obtained if it is doing business in state, concept of doing business is applied whether action is in tort or in contract. West's Ann.Code Civ.Proc. § 411, subd. 2; West's Ann. Corp.Code, § 6501.

4. Corporations ⇐642(4½)

Where correspondence nursing school carried on regular and systematic activity in California in solicitation of pupils by advertising in national magazines and in arranging for and carrying on courses of instruction with view of increasing sale of its courses in California, corporation was "doing business" within California and was amenable to service of process and to jurisdiction of California Superior Court for alleged unfair competition with California correspondence nursing school. West's Ann.Code Civ.Proc. § 411, subd. 2; West's Ann.Corp.Code, § 6501.

5. Commerce ⇐46

A state may not exclude a corporation engaged in interstate commerce yet it may subject it to jurisdiction of the state and in absence of serious inconvenience to foreign corporation or other equitable considerations, there is no constitutional limitation precluding assumption of jurisdiction over transitory causes of action by courts of state in which a foreign corporation is doing business. West's Ann.Code Civ.Proc. § 411, subd. 2; West's Ann.Corp.Code, § 6501.

6. Commerce ⇐46

Subjecting of foreign corporation which did business in California to suit in California did not constitute an undue burden on interstate commerce. West's Ann.Code Civ.Proc. § 411, subd. 2; West's Ann.Corp.Code, § 6501.

Isaac E. Ferguson, Beverly Hills, for petitioner.

Harold W. Kennedy, County Counsel and Edward A. Nugent, Deputy County

Counsel, Los Angeles, for respondent Superior Court.

Ralph B. Herzog and Marvin G. Burns, Beverly Hills, for real party in interest.

VALLÉE, Justice.

Petitioner, Florence Nightingale School of Nursing, Inc., an Illinois corporation, seeks a writ of mandate to compel the superior court of the County of Los Angeles to enter its order quashing service of summons in an action brought by Leon Wolff, doing business as The Lincoln Institute of Practical Nursing, the real party in interest in this proceeding, for an injunction and damages for alleged unfair competition. Petitioner was served by personal delivery to the Secretary of State and by mail to its secretary in Chicago, Illinois, pursuant to order of the superior court. It appeared specially and moved to quash service of summons. The motion was denied.

Petitioner contends it was not, and is not, doing business in this state within the meaning of section 411, subd. 2 of the Code of Civil Procedure and is therefore not subject to service of process pursuant to section 6501 of the Corporations Code.

Petitioner's principal place of business is in Chicago, Illinois. It gives instruction in nursing by correspondence conducted from its office in Chicago to persons in Illinois and other states. It has advertised and currently advertises in more than 25 magazines with circulation in California.[1]

1. Some of the magazines in which advertisements appear in California are: "True Romance," "Movie Life," "True Love," "True Experience," "Secrets," "Revealing Romances," "Daring Romance," "Confidential Confessions," "Photoplay," "Romance Time," and "True Crime."

Examples of the advertising are:

"Enjoy Security

[Photo of nurse]

And Steady Pay
As A Graduate
Practical
Nurse

Learn At Home In 10 Weeks

Earn to $65.00 a week in good times or bad. Enjoy security. High School not needed. No age limit. Mature and older women also needed desperately. Doctors endorse this simple lowest-cost course. Diploma awarded. No Obligation

Average Cost Per
Lesson $1.25
Only

Send Today For
Free
16 Page Nurses Book

Florence Nightingale School Of Nursing
Room 81T118, S. Wabash Avenue, Chicago 5, Illinois
Name ———
Address ———
City ——— State ———"

"Steady Pay Every Day As A
Practical Nurse

[Photo of nurse]

Average Cost Per Lesson Only $1.25

Enjoy security, no recession for Nurses.
Earn to $65.00 a week, good times or bad.
Age, Education, Not important. Earn while learning. Send for Free 16 page book Florence Nightingale School of Nursing Room 7R128, 131 S. Wabash Avenue Chicago 3, Ill."

Learn At
Home In
Only 10
Weeks

The relationship between petitioner and students is initiated through an inquiry made in response to an advertisement by the prospective California student by mail directed to petitioner's Chicago office. In response to the inquiry, petitioner mails to the California prospect a form letter, a brochure containing material descriptive of the courses offered, an application, and a self-addressed envelope. A California resident who enrolls for a course of instruction signs and mails an application to petitioner together with payment in whole or in part, receives lessons by mail, submits his work by mail, and receives criticism and comment from petitioner by mail. In substantially all cases when a California resident enrolls, each lesson thereafter is sent in the mail by petitioner from Chicago to the California resident, accompanied by an examination. The student writes out the answers to the examination and returns them by mail to petitioner in Chicago. Petitioner corrects the examination and returns it with comments through the mail to the California student together with the next lesson.

A course consists of about 40 lessons. The lessons and examinations are sent to the California students in groups of four. This is repeated until completion of the entire course. There are about ten mutual exchanges of correspondence between petitioner and each California student. The average time for completion of a course is six months. The cost of a course is $27.50, $39.50, or $47.50, depending on the plan of instruction chosen and the method of payment. On completion of the course the student is notified by mail of success or failure.

All contact between petitioner and its students is by mail only. Petitioner has never had any office, postal address, telephone listing, bank account, property, agents, solicitors, or other representatives in California. The number of petitioner's students in California is less than one per cent of its entire enrollment.

"The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case." Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 72 S.Ct. 413, 418, 96 L.Ed. 485, 492; Boote's Hatcheries & Packing Co. v. Superior Court, 91 Cal.App.2d 526, 205 P.2d 31; Jeter v. Austin Trailer Equipment Co., 122 Cal.App.2d 376, 265 P.2d 130.

[1] The later decisions in California construe the phrase "doing business in this State" as synonymous with those business activities required by the due process clause as the basis for jurisdiction. Sales Affiliates, Inc., v. Superior Court, 96 Cal.App. 2d 134, 137, 214 P.2d 541; Kneeland v. Ethicon Suture Laboratories, 118 Cal.App. 2d 211, 220–221, 257 P.2d 727. The Supreme Court in Borgward v. Superior Court, 51 Cal.2d 72, 330 P.2d 789, 791, stated:

> "In Henry R. Jahn & Son v. Superior Court, 49 Cal.2d 855, 858–859, 323 P.2d 437, 439, we stated: 'The statute authorizes service of process on foreign corporations that are "doing business in this State." That term is a descriptive one that the courts have equated with such minimum contacts with the state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. State of Washington [etc.], 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95, (161 A.L.R. 1057). Whatever limitation it imposes is equivalent to that of the due process clause. "'(D)oing business' within the meaning of section 411 of the Code of Civil Procedure is synonymous with the power of the state to subject foreign corporations to local process." Eclipse Fuel Engineering Co. v. Superior Court, 148 Cal. App.2d 736, 738, 307 P.2d 739, 741, * * *.'" Also see Traveler's Health Ass'n v. Com. of Virginia ex rel. State Corp. Commission, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154; Perkins v. Benquet Consol. Min. Co., 342 U.S.

437, 72 S.Ct. 413, 96 L.Ed. 485; McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223; Parmelee v. Iowa State Traveling Men's Ass'n, 5 Cir., 206 F.2d 518, 44 A.L.R.2d 410; 5 U.C.L.A.Law Rev. 198, 214.

Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1298, states:

> "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

International Text-Book Co. v. Pigg, 217 U.S. 91, 30 S.Ct. 481, 54 L.Ed. 678, held that a Pennsylvania corporation conducting a correspondence school whose business involved the solicitation of students in Kansas by local agents, who also collected and forwarded to the home office in Pennsylvania the tuition fees, and the systematic intercourse by correspondence between the company and agents, and the transportation of the needful books, apparatus, and papers, was doing business in Kansas. There is no essential difference in the activity or in the results between solicitation by agents in the state and solicitation by advertising in magazines circulated in the state. Solicitation by advertising may be more productive of business than by agents. These days it would seem that there is much more solicitation by advertising in newspapers, magazines, and over radio and television than by any other method.

International Text-Book Co. v. Mueller, 149 Ill.App. 509, held that a Pennsylvania corporation which conducted a school by correspondence was doing business in Illinois. The court stated (at page 511):

> "In the performance of its corporate functions it [the Pennsylvania corporation] examined and corrected, from time to time by correspondence the papers submitted to it by its students in the several courses of study pursued by them and in like manner informed the students as to the character of the work done by them. The insistence by appellant that in so conducting a school it was not transacting business in Illinois, because its buildings, instructors and executive officers were all located in Scranton, Pennsylvania, is not tenable in view of the fact that a school cannot exist without pupils, and necessarily where the pupils and instructors are located in different states, the school cannot properly be said to have an exclusive *situs* in one state."

To the same effect, Air Conditioning Training Corp. v. Majer, 324 Ill.App. 387, 58 N.E.2d 294; International Text-Book Co. v. Gillespie, 229 Mo. 397, 129 S.W. 922; annotation, 38 A.L.R.2d 760.

Petitioner asserts that since it has no place of business, no agents, employees, or representatives, and no records of its business, in California; and since its activity is confined to solicitation by advertisements in nationally circulated magazines with almost negligible contacts with persons in California, it is not doing business in the state. Early cases holding that personal jurisdiction could not be obtained when the sole basis thereof consisted in mere solicitation within the state seem to be no longer authoritative. "Under the minimum contacts test of the International Shoe case *regular sales solicitation* alone can constitute doing business rendering the foreign corporation amenable to process in actions engendered by such activities." Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 859, 323 P.2d 437, 440. Emphasis ours. "In the more recent decisions, solicitation, without more, constitutes doing business within a state when the solicitation is a regular, continuous and substantial course of business." Koninklijke Luchtvaart Maatschappij v. Superior Court, 107 Cal.App.2d 495, 500, 237 P.2d 297, 300. "The principles announced in the International Shoe case have had a most telling and devastating effect on the venerable rule laid down in Green v. Chicago, B. & Q. R. Co., 205 U.S. 530, 27 S.Ct. 595, 51 L.Ed. [915], 916, that personal jurisdiction cannot be obtained over a foreign corporation

when the sole basis thereof consists of 'mere solicitation' within the area of the forum's sovereignty. Dissatisfaction and disagreement with the so-called 'mere solicitation' rule antedated the opinions expressed in the International Shoe case." Jeter v. Austin Trailer Equipment Co., 122 Cal.App. 2d 376, 382, 265 P.2d 130, 134. "A number of recent decisions applying the International Shoe doctrine, have treated solicitation, plus very little else, as a sufficient business activity to satisfy the requirements of due process." Kneeland v. Ethicon Suture Laboratories, 118 Cal.App.2d 211, 225, 257 P.2d 727, 736.

Frene v. Louisville Cement Co., 77 U.S. App.D.C. 129, 134 F.2d 511, at page 516, 146 A.L.R. 926, states:

> "But when jurisdiction has been extended to include some types or kinds of occasional acts and nearly all kinds of continuous operations, the rule which nullifies judicial power when a foreign corporation engages continuously and regularly in 'mere solicitation' is, to say the least, anomalous. Solicitation plus maintaining an office is sufficient. Solicitation plus maintaining a warehouse likewise sustains jurisdiction. Solicitation plus making deliveries, collections and handling claims, has like effect. Solicitation without these additional activities, or any of them, may be more sustained, more insistent, more productive of business than it is with them. Solicitation is the foundation of sales. Completing the contract often is a mere formality when the stage of 'selling' the customer has been passed. No business man would regard 'selling,' the 'taking of orders,' 'solicitation' as not 'doing business.' The merchant or manufacturer considers these things the heart of business. * * *
>
> "It would seem, therefore, that the 'mere solicitation' rule should be abandoned when the soliciting activity is a regular, continuous and sustained course of business, as it is in this case. It constitutes, in the practical sense, both 'doing business' and 'transacting business,' and should do so in the legal sense. Although the rule has not been clearly and expressly repudiated by the Supreme Court, its integrity has been much impaired by the decisions which sustain jurisdiction when very little more than 'mere solicitation' is done."

Also see Boyd v. Warren Paint & Color Co., 254 Ala. 687, 49 So.2d 559, 561.

There is no substantial difference between the facts at bar and those in Travelers Health Ass'n v. Com. of Virginia ex rel. State Corp. Commission, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154. There a Nebraska corporation carried on a mail-order insurance business in Virginia. Its only office was in Nebraska. It did not have any agents in Virginia but instead relied upon solicitations by its Virginia policyholders. Holding that the Nebraska corporation was doing business in Virginia, the court stated (339 U.S. 643, 70 S.Ct. 929, 94 L.Ed. 1160):

> "Appellants' chief reliance for the due process contention is on Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140, 43 S.Ct. 293, 67 L.Ed. 573. There a Minnesota association obtained members in Montana by the same mail solicitation process used by Travelers to get Virginia members. The certificates issued to Montana members also reserved the right to investigate claims, although the Court pointed out that Benn's claim had not been investigated. This Court held that since the contracts were 'executed and to be performed' in Minnesota, the Association was not 'doing business' in Montana and therefore could not be sued in Montana courts unless 'consent' to Montana suits could be implied. The Court found the circumstances under which the insurance transactions took place insufficient to support such an implication.
>
> "But where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state. And in considering what constitutes 'doing business' sufficiently to justify

regulation in the state where the effects of the 'business' are felt, the narrow grounds relied on by the Court in the Benn Case cannot be deemed controlling."

It has been held that there is jurisdiction where the cause of action arose out of a mere isolated act committed in the state by the defendant. It is also held that a foreign corporation should be subject to suit for acts within the forum which give rise to liability, i. e., that commission of a tort within the jurisdiction is sufficient to confer power on the court to render a valid in personam judgment.[2]

[2] The cause of action alleged by Wolff, the real party in interest, arises in part from and is directly related to petitioner's activities in California. It is predicated on these facts: Wolff for more than 11 years has been and is now conducting a correspondence course in practical nursing, and during that period has advertised in magazines circulating throughout the United States and has thereby built up a valuable and lucrative business; more than 30,000 have enrolled in his courses; in his advertising Wolff has used his true name as "Leon Wolff, Director," and "L. Wolff"; about July 1958 petitioner commenced a competitive business unfairly using advertising substantially similar to that used by Wolff; it has sent brochures copied from Wolff's brochures to prospective students in California and other states; and it has used the name "J. Lou Wolf, Nursing Director," and "J. Lou Wolf, Superintendent of Training," when no such person is connected with petitioner. Petitioner's activities, under the allegations of the compaint, constitute continuing acts of unfair competition occurring in California and adversely affecting the business of the real party in interest. In Hanson v. Denckla, supra, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283, 1296, the court pointed out that an act done by a nonresident in the state of the forum may be a sufficient basis of the forum's jurisdiction in an action arising out of that act.

[3] The concept of "doing business" is applied whether the action is in tort or in contract.[3] Under section 411, subd. 2 of the Code of Civil Procedure jurisdiction of a foreign corporation may be obtained if it is doing business in this state. "The general principles upon which corporations are held liable for their tortious acts and those of their agents and representatives apply to foreign corporations. A foreign corporation is not emancipated from liability for its wrongs because it is foreign. Like any foreigner, it is liable under the laws of the local state for torts committed there, and is amenable to proceedings in a court of equity having jurisdiction, for relief against its fraudulent or illegal acts." 23 Am.Jur. 125, § 122.

[4] It is not necessary at bar to say that the mere solicitation rule has been

2. See Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091; Smyth v. Twin State Improvement Corp, 116 Vt. 569, 80 A.2d 664, 25 A.L.R.2d 1193; Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673; Painter v. Home Finance Co., 245 N.C. 576, 96 S.E.2d 731; Johns v. Bay State Abrasive Products Co., D.C., 89 F.Supp. 654; 22 Cal.Jur.2d 454, § 38; 34 Cal.L. Rev. 331, 337–40; 5 Stan.L.Rev. 505; 50 Mich.L.Rev. 763, 765; 100 U. of Pa.L. Rev. 598, 600; 26 N.Y.U.L.Rev. 713; 36 Minn.L.Rev. 264, 265; 21 Univ. of Cin.L.Rev. 71, 72; 56 Dickinson L.Rev. 257, 260.

3. See Sales Affiliates, Inc. v. Superior Court, 96 Cal.App.2d 134, 214 P.2d 541; Koninklijke Luchtvaart Maatschappij v. Superior Court, 107 Cal.App.2d 495, 237 P.2d 297; Gordon Armstrong Co. v. Superior Court, 160 Cal.App.2d 211, 325 P. 2d 21; Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664, 25 A.L.R.2d 1193; Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673, 676; Chapman Chemical Co. v. Taylor, 215 Ark. 630, 222 S.W.2d 820; Painter v. Home Finance Co., 245 N.C. 576, 96 S.E.2d 731; Woodworkers Tool Works v. Byrne, 9 Cir., 191 F.2d 667; WSAZ, Inc. v. Lyons, 6 Cir., 254 F.2d 242; Green v. Equitable Powder Mfg. Co., D.C., 99 F. Supp. 237; Perkins v. Louisville & N. R. Co., D.C., 94 F.Supp. 946; Johns v. Bay State Abrasive Products Co., D.C., 89 F.Supp. 654, 658; 50 Mich.L.Rev. 763, 764; 100 U. of Pa.L.Rev. 598, 600; 36 Minn.L.Rev. 264, 266; 56 Dickinson L. Rev. 257, 261.

repudiated *in toto*. The facts show solicitation plus continuous, regular, systematic activity in the state not only in solicitation but also in arranging for and carrying on the courses of instruction; there is "solicitation plus" as distinguished from casual, isolated contacts or transactions. Petitioner has actively undertaken to promote the market for its courses in California. Its solicitation is carried on with one end in view: the promotion and increase of the sales of its courses to persons in California. Its activities in California create obligations therein. International Text-Book Co. v. Pigg, 217 U.S. 91, 30 S.Ct. 481, 54 L.Ed. 678; International Text-Book Co. v. Mueller, 149 Ill.App. 509; Air Conditioning Training Corp. v. Majer, 324 Ill.App. 387, 58 N.E.2d 294; International Text-Book Co. v. Gillespie, 229 Mo. 397, 129 S.W. 922. It reaps the benefits from the courses given to students in California and has access to our courts to enforce any rights arising out of its transactions here. Borgward v. Superior Court, 51 Cal.2d 72, 330 P.2d 789. Its solicitation was, and is, systematic and continuous in numerous magazines. There is a continuous shipment of material into and from California. Its regular and systematic solicitation produces a flow of business in California. Its contracts with its students, whether originating in California or not, are performed here for a money consideration derived from residents of California. Moreover, it is allegedly conducting its operations by methods which are calculated and intended to infringe on the rights of Wolff and injure his business by deceptive and unfair competition. The facts meet the test of doing business laid down by the Supreme Court of the United States and followed by the Supreme Court of California, i. e., petitioner has such minimum contacts in California that the maintenance of the action does not offend "traditional notions of fair play and substantial justice."

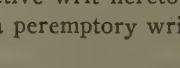
[5, 6] The petition alleges petitioner is engaged in interstate commerce and that to subject it to suit in California would result in an undue burden on interstate commerce. The point is devoid of merit. West Publishing Co. v. Superior Court, 20 Cal.2d 720, 727, 128 P.2d 777; Winfield v. United Fruit Co., 135 Cal.App.Supp. 791, 796–799, 24 P.2d 247. A state may not exclude a corporation engaged in interstate commerce yet it may subject it to the jurisdiction of the state. International Harvester Co. of America v. Commonwealth of Kentucky, 234 U.S. 579, 34 S.Ct. 944, 58 L.Ed. 1479, 1483. In the absence of serious inconvenience to the defendant or other equitable considerations, there is no constitutional limitation precluding assumption of jurisdiction over transitory causes of action by courts of a state in which a foreign corporation is doing business. Jeter v. Austin Trailer Equipment Co., 122 Cal.App.2d 376, 389, 265 P.2d 130.

We hold that petitioner was doing business in this state in such a manner and to such an extent as to make it amenable to service of process and to the jurisdiction of the superior court, and that assumption of jurisdiction over it is consistent with due process.

The alternative writ heretofore issued is discharged; a peremptory writ is denied.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; SCHAUER and McCOMB, JJ., dissenting.



168 Cal.App.2d 34

PEOPLE of the State of California, Respondent,

v.

John C. KALUNA, Appellant.

Cr. 3578.

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1959.

Prosecution for possession of narcotic. The Superior Court, City and County of San Francisco, Gerald S. Levin, J., entered judgment of conviction and defendant appealed. The District Court of Appeal held that dihydrohydroxycodeinone is not in-

cluded within narcotics statute allowing the dispensing, without prescription, of certain preparations containing less than a certain amount of codeine.

Affirmed.

Dooling, J., dissented.

Poisons ⇐4, 9

Statute exempting from requirement of dispensing by prescription certain preparations containing less than a certain amount of codeine is not applicable to preparations containing codeine derivatives such as dihydrohydrosycodeinone, and hence in prosecution for possession of such narcotic derivative it was not necessary for State to establish that preparation contained more than a certain minimum amount of the derivative. West's Ann.Health & Safety Code, §§ 11001, 11002, 11166.12, 11200, 11225, 11500.

Edward T. Mancuso, Public Defender, San Francisco, Waldo F. Postel, Jr., Deputy Public Defender, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., Preble Stolz, Deputy Atty. Gen., San Francisco, for respondent.

KAUFMAN, Presiding Justice.

Appellant, John C. Kaluna, was convicted of possessing a substance known as "Percodan" in violation of section 11500 of the Health & Safety Code. Percodan contains dihydrohydroxycodeinone, a synthetic narcotic with a natural base, derived directly from codeine. At the trial, no proof was made as to the amount of this derivative present in the Percodan pills found in the possession of the appellant. The only contention on appeal is that the State failed to establish a prima facie case, as preparations containing less than a certain amount of dihydrohydroxycodeinone can be dispensed without a prescription under section 11200 of the Health & Safety Code. Respondent concedes the validity of appellant's argument if that statute is construed to include preparations containing codeine derivatives. Respondent, however, argues that Health & Safety Code, section 11200 applies only to preparations containing less than a certain amount of codeine, and not to preparations containing less than a certain amount of codeine derivatives.

Appellant was convicted of violating Health & Safety Code, section 11500 which reads as follows:

> "Except as otherwise provided in this division, no person shall possess, transport, import into this State, sell, furnish, administer, or give away, or offer to transport, import into this State, sell, furnish, administer, or give away, or attempt to import into this State or transport a narcotic except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State."

Codeine is defined as a narcotic under Health & Safety Code, section 11001. Section 11002 further defines narcotics to mean "any of the salts, derivatives, or compounds * * * containing a narcotic or its salts, derivatives, or compounds." Appellant concedes that dihydrohydroxycodeinone is a narcotic within the above quoted statutory definitions.

The sole question presented by this appeal is whether Health & Safety Code, section 11200 includes preparations containing less than a certain amount of codeine derivatives, such as dihydrohydroxycodeinone. The statute reads as follows:

> "The provisions of this division requiring prescriptions and physicians' reports do not apply to preparations containing not more than one grain of codeine in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce, without additional narcotics, or to mistura glycyrrhiza compound, N. F. However, the exemptions herein provided do not exempt any person from the provisions of

Section 11225 of this division." (Section 11225 Provides that every person who issues a prescription or dispenses or administers a narcotic shall make a detailed record thereof.)

Health & Safety Code, section 11166.12 provides that the specific drugs named therein, one of which is dihydrohydroxycodeinone, are excepted from the requirement of writing narcotic prescriptions on official triplicate blanks. Appellant argues that this section and section 11200 indicate that the Legislature intended that certain quantities of codeine as well as certain compounds were not as dangerous as to require the same extent of regulation as the other narcotics enumerated in sections 11001 and 11002. The record does not indicate whether Percodan can be obtained without a prescription. However, there is uncontroverted evidence that the pills found in the possession of the appellant were dispensed by a licensed pharmacist to one Blumquist, who was arrested with the appellant. RT 36–38. It was stipulated that the prescription was issued to Blumquist by a physician. Appellant further argues that under the rule of statutory construction that special statutes govern general statutes (Code of Civil Proc. § 1859; Cohn v. Isensee, 45 Cal.App. 531, 188 P. 279; Division of Labor Law Enforcement v. Moroney, 28 Cal.2d 344, 170 P. 2d 3), the prohibitive provisions of the general statute (§ 11500) do not control the special provision of sections 11166.12 and 11200.

Even if this argument were accepted, the special provision here in issue, refers only to preparations containing less than a certain amount of codeine, not dihydrohydroxycodeinone, a codeine *derivative*. It is also a general rule of law that in the construction of a statute, the function of the court is "* * * simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Code of Civ.Proc. § 1858. Admittedly, it is no great burden on the prosecution to require that in cases like this one, the quantitative amount of the narcotic substance present be proved. While such a requirement is desirable, the Legislature did not see fit to include it in the statutory scheme, and it is not the function of this court to do so. The legislative history indicates that the Legislature was aware of the existence of codeine derivatives. In 1951, dihydrohydroxycodeinone was added to the provisions of section 11166.12. Section 11200 was amended in 1953 and no mention was made of codeine derivatives. Even if the omission of codeine derivatives from the language of section 11200 was due to legislative error or oversight as appellant contends, it is not within the power of this court to correct such an error.

In view of the foregoing, the judgment of conviction must be affirmed.

Judgment affirmed.

DRAPER, Justice.

I concur.

I concur in the judgment. The only question is whether the exemption of specified preparations of codeine (Health & Saf.Code, § 11200) also exempts the preparation of dihydrohydroxycodeinone. Since the latter is a derivative of codeine, this view would not be unreasonable if only Sections 11200 and 11002 were to be considered. But the Legislature has recognized the existence of dihydrohydroxycodeinone, and the need to specify both this drug and codeine when it means to include both. Health & Saf.Code, § 11166.12. Sections 11200 and 11166.12 were both before the Legislature for amendment in 1953. In view of the clear recognition of the two drugs as separate subjects of legislation, I cannot construe section 11200 as impliedly including dihydrohydroxycodeinone.

DOOLING, Justice.

I dissent.

Section 11500 Health and Safety Code provides, so far as here material:

"Except as otherwise provided in this division, no person shall possess * * * a narcotic except upon the written prescription of a physician * * *."

"Narcotic" within the meaning of this section includes "codeine" (§ 11001(d), Health & Saf.Code) and "any of the salts, derivatives, or compounds of" codeine (§ 11002, Health & Saf.Code).

Section 11200 Health and Safety Code provides: "The provisions of this division requiring prescriptions * * * do not apply to preparations containing not more than one grain of codeine * * * if a solid * * * preparation, in one avoirdupois ounce, without additional narcotics * * *."

If the codeine derivative included in percodan is covered by this latter provision then the possession of percodan *without a prescription* can only be a violation of section 11500 if percodan contains more than one grain of the codeine derivative in each avoirdupois ounce. The people made no proof of the proportionate amount of this codeine derivative in the percodan possessed by appellant.

The meaning of the word "codeine" as used in section 11200 is the crucial question. Appellant argues that it should be construed to include the derivatives of codeine. The people argue that it should be strictly construed to include codeine alone and to exclude its derivatives. At first blush it strikes a reader as very doubtful that the Legislature would intend to require a prescription for derivatives of codeine in those cases where it requires no prescription for the primary drug, codeine, from which the derivatives are created.

In cases of doubt as to the proper construction of a penal statute the cases hold that the statute should be construed against extending criminality. "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." People v. Smith, 44 Cal.2d 77, 79, 279 P.2d 33, 34; DeMille v. American Federation of Radio Artists, 31 Cal.2d 139, 156, 187 P.2d 769, 175 A.L.R. 382; People v. Valentine, 28 Cal.2d 121, 143, 169 P.2d 1; People v. Ralph, 24 Cal.2d 575, 581, 150 P.2d 401.

Following this rule I believe that section 11200 should be construed to include codeine derivatives. An avoirdupois ounce contains 437½ grains. If more than 1/437½ part of the substance possessed by appellant was a codeine derivative the people can readily prove it. I would reverse.



167 Cal.App.2d 727

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edward M. THOMPSON, Defendant and Appellant.

Cr. 6219, 6218.

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1959.

Defendant was convicted of a lewd and lascivious act upon bodies of seven-year-old girls, but sentence was suspended, and defendant was granted probation. Thereafter defendant was convicted of molesting a five-year-old girl, and his probation was revoked. The Superior Court, Los Angeles County, Lewis Drucker, J., entered judgments, and defendant appealed. The District Court of Appeal, Fourt, J., held that evidence was sufficient to sustain conviction for molesting five-year-old girl, that Superior Court was not partial, and that it was not error to permit five-year-old girl to testify.

Judgments affirmed.

1. Infants ⇐20

Evidence sustained conviction for molesting five-year-old girl. West's Ann. Pen.Code, § 647a(1).

2. Infants ⇐20

In order to justify conviction under statute making it an offense to annoy or molest any child under 18, it is not necessary to show that defendant touched the body of the child. West's Ann.Pen.Code, § 647a(1).

3. Criminal Law ⇐655(1)

Statement by trial judge in prosecution for molesting five-year-old girl, after both prosecution and defense had rested their cases and after defense counsel had stated that there was no defense, that if girl's mother had not interceded when she did, trial judge did not know how far defendant would have gone, did not show that trial judge was partial or prejudged the case. West's Ann.Pen.Code, § 647a(1).

4. Witnesses ⇐79(2)

In prosecution for molesting five-year-old girl, trial judge properly ruled that girl was competent as a witness, where trial judge found that the girl was exceptionally bright and intelligent for her age. West's Ann.Pen.Code, § 647a(1).

5. Criminal Law ⇐1170½(1)

Where testimony of mother of five-year-old girl and confession of defendant were enough, in and of themselves, to convict defendant of molesting the girl, alleged error in admission of testimony of girl was not prejudicial error. West's Ann.Pen. Code, § 647a(1).

Robert P. Dockeray, Los Angeles, for appellant.

Edward G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

FOURT, Justice.

Two appeals are consolidated in this cause. The first, hereinafter referred to as cause one, involved the defendant in two charges of violating the provisions of section 288, Penal Code, in that he did, on June 26, 1949, commit a lewd and lascivious act upon the bodies of two sisters (twins) aged seven years. He was, in that case, charged with three prior convictions, as follows: (1) that in the state of Maine he was convicted of the crime of indecent liberties, and on September 10, 1936, was sentenced to serve a term of imprisonment in the state prison therefor; (2) that in the state of Montana he was convicted of the crime of lewd and lascivious acts upon a child, and was, on April 3, 1940, sentenced to a term in the state prison; (3) that in the State of Washington he was convicted of the crime of indecent liberties with a female child, and on June 1, 1942, was sentenced to a term in the state prison. The defendant pleaded guilty to count I of the charges in that information, and admitted all three prior convictions. Count II was subsequently ordered off calendar.

The court, after a hearing, found the defendant to be a sexual psychopath and ordered him committed as such to a state hospital. In the latter part of the same year the judge who committed the defendant received a letter from the superintendent of the state hospital where the defendant was confined. The essence of that communication was that the defendant was on parole from the Washington state prison and the Washington state authorities would take the defendant back if he could be released, and further that the defendant would not benefit by further care at the Patton hospital. The defendant was returned to court and the proceedings which followed (sentencing the defendant to the California state prison at San Quentin) were not (according to this court) in conformity with the law and the judgment was reversed and further proceedings were ordered. People v. Thompson, 1951, 102 Cal.App.2d 183, 227 P.2d 272. The reversal had nothing to do with the matter of his guilty plea and the admission of the priors.

The defendant was thereafter ordered recommitted to Patton state hospital, where he apparently was confined as a sexual psychopath. The minutes of the court of September 20, 1954, recite that on that day in open court, the judge found the defendant to be no longer a sexual psychopath, all of the prior convictions were stricken in the interest of justice, and the criminal proceedings were reinstated. The defend-

ant was then sentenced to the state prison on count I, and the execution of the sentence was suspended and probation was granted. Count II was then dismissed. The defendant was thereupon released into society.

The judgment in the record before us does not conform to the minutes above mentioned, but sets forth that the defendant pleaded guilty to the charge as set forth in count I, that he admitted the prior convictions and served terms therefor in the state prison mentioned in each instance. Nothing is set forth in regard to the striking of any prior convictions.

If the defendant was cured of his sex psychopathy, as the judge apparently believed he was, it was not for long, because on November 13, 1954, the defendant committed the offense which will hereafter be referred to as cause II.

In cause II, the defendant was charged in an information with a violation of section 647a, subdivision 1, Penal Code, in that he did annoy and molest a female child of the age of five years, and that before the commission of such offense he had been convicted of the crime of violating section 288, Penal Code, and judgment was pronounced thereon on about August 27, 1949, and further, he was charged with the other prior convictions heretofore mentioned. The defendant entered his plea of not guilty and denied the prior convictions. By stipulation, the prosecution's case was submitted on the transcript of the testimony taken at the preliminary hearing. Complete and proper certified copies of the former prison records, together with pictures and the fingerprints of the defendant, were submitted. The defendant was found guilty as charged, and each prior conviction was found to be true. Sexual psychopathy proceedings were then instituted and the defendant was found to be a probable sex psychopath. Criminal proceedings were adjourned and the defendant was sent to Atascadero state hospital for a period of ninety days' observation and diagnosis. Within the ninety-day period the court received reports from the superintendent of the Atascadero state hospital to the effect that the defendant was "a sexual psychopath who could benefit from treatment." The defendant was then found to be a sexual psychopath and was committed to such facility for an indeterminate period.

In December, 1957, a printed form report of the Superintendent and Medical Director of Atascadero state hospital was filed in court wherein it was set forth that the defendant would not benefit by further care and treatment in the hospital, and that he was not a menace to the health and safety of others. Attached to the report and made a part of it is the statement that, out of the last thirty-seven years the defendant had spent about twenty years in prisons and hospitals, and that the diagnosis was, among other things, "sociopathic personality disturbance."

On January 16, 1958, the defendant's application for probation was denied, the prior convictions were stricken "in the interests of justice" and he was sentenced to the state prison.

At the same time, in cause one, the judge ordered the probation theretofore granted revoked, and sentenced the defendant to the state prison, striking the prior convictions "in the interests of justice." The two terms were to run concurrently.

These appeals followed. The defendant concedes that if the appeal from cause two fails, there is no ground for reversal of the judgment in cause one.

A résumé of the facts in cause two follows: On November 13, 1954, Mrs. Mary L. Silva and her five-year-old daughter, Nancy, went to a motion picture theatre located on Hill Street in Los Angeles. The mother was seated next to the aisle and her daughter was seated next to her to her left. The theatre was nearly empty. About one-half hour after the mother and daughter were seated, the defendant sat down in the seat next to the child. The child was sitting with her hands placed on the seat next to her body. The defendant was sitting with his right arm on the arm rest that was between his chair and

the child's chair, and he was raising and lowering his arm from the elbow while it was on the arm rest. While so moving his arm the defendant looked at the child's face. Also, while moving his arm, he more than once touched the child's hand though her hand was resting as heretofore stated. Mrs. Silva, the mother, then observed the defendant lift up the child's dress and expose a part of the child's leg, and the mother struck the defendant's arm and said, "You stop that right now." The defendant replied, "Give me a break, lady," and some other woman in the theatre said, "Call the cops." The defendant then ran out and was caught by two sailors. Later at the police station, the defendant, in the presence of two officers, freely and voluntarily stated that he went into the theatre and that "he knew when he saw her he was going to sit down next to her." He also said, "there was some inner impulse that made him do it." Also that, "he put his hand just below her knee," that he "held her hand for a few minutes and that he put his hand above her knee." He then told the officers of some of his previous troubles. The defendant wrote out, in his own handwriting, a statement wherein he stated, in effect, that he had "molested" the child in the theatre, that he had "fondled" her "hand and her leg."

The defendant did not introduce any evidence by way of defense or otherwise.

The then attorney for the defendant announced at the conclusion of the prosecution's case, "Your Honor, there is no defense to this * * *." The court found the defendant guilty as charged and found all three prior convictions to be true.

The defendant was permitted to make an application for probation. The court appointed two psychiatrists to examine the defendant. The court also ordered that the violation of probation in cause one would be heard at the time of hearing the application for probation in cause two. At the time of the sentencing of the defendant, his counsel argued to the court that because of his (counsel's) faith in psychiatrists and his faith in Thompson, probation should be granted; that if the defendant went to the penitentiary "the Board's (Adult Authority) hands are completely tied for years because of the prior felony convictions." The judge then expressed the view, which was correct, that the defendant was ineligible for probation because of the prior convictions. The court also pointed out that the defendant had served three terms in three separate prisons for sex offenses, and that he had a number of other sex charges against him going back almost thirty years. The court then, at the request of counsel for the defendant, struck the prior convictions to the end that the Adult Authority "will have ample latitude to determine the length of stay." In other words, the judge sentenced the defendant as a first offender, with the result that he will be required to serve "not less than one year" (Penal Code, § 647a, subd. (1)), instead of being required to spend the minimum time in prison as required by statute for those who repeatedly commit sex offenses against small children.

The defendant now contends, with reference to cause two, that (1) the evidence was insufficient; (2) the court indicated a lack of impartiality, and (3) it was error to hold that the child in question was a competent witness. He further states that if he fails in his claims as to count two, that then and in such event cause one necessarily falls.

Section 647a, subdivision (1) provides as follows:

> "(1) Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable upon first conviction by a fine not exceeding five hundred dollars ($500) or by imprisonment in the county jail for not exceeding six months or by both such fine and imprisonment and is punishable upon the second and each subsequent conviction or upon the first conviction after a previous conviction under Section 288 of this code by imprisonment in the state prison for not less than one year."

A careful reading of the entire transcripts in these cases leads us to the conclusion that the contentions of the defendant are devoid of merit.

In People v. Pallares, 112 Cal.App.2d Supp. 895, at page 900, 246 P.2d 173, 176, in speaking of the statute in question, it was said:

> "The object of the enactment of the code section was the protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter. It is common knowledge that the subject of sex offenders, and particularly the protection of the young from improper advances, has in recent years engaged the close attention of the legislature and of the general body of the citizens of this State. The purpose of the legislation is indicated clearly by reference in the section to Section 288 of the Penal Code, by the increase of penalties for second offenders, * * *."

And, with reference to the same statute, the Pallares case further states (112 Cal. App.2d Supp. at pages 901–902, 246 P.2d at page 177):

> "When the words annoy or molest are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender. Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in the light of the evident purpose of this and similar legislation enacted in this State indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children. It should be noted further that the section must be construed reasonably as setting up an objective test for annoyance or molestation; a childish and wholly unreasonable subjective annoyance, arising, for example, from a child's dislike for proper correction by a teacher, is not covered by the section. The annoyance or molestation which is forbidden is in no sense a purely subjective state on the part of the child. The objectionable acts of a defendant constitute the annoyance or molestation contemplated by the statute. See State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754."

It is our belief that the acts performed by the defendant were lewd and obscene under the circumstances and would irritate, disturb and annoy a normal person. In People v. McNair, 130 Cal.App.2d 696, at page 698, 279 P.2d 800, 801, the court set forth as follows: "If the conduct of a defendant is so lewd or obscene that the normal person would unhesitantly be irritated by it, such conduct would 'annoy or molest' within the purview of section 647a, [subdivision] (1), Penal Code."

The acts were obviously not accidental, otherwise the defendant would have taken the witness stand and so testified, or his counsel would have appropriately argued the matter.

[1, 2] The defendant now argues that there was no actual touching of the child's body, and therefore the conduct was not sufficient to constitute the offense under the section in question. First, the evidence does not sustain the defendant's position, and secondly, even if it did, the touching of the body is not necessarily required. See People v. McNair, supra.

The defendant relies heavily upon the case of People v. Carskaddon, 49 Cal.2d 423, 318 P.2d 4. However, the facts of that case are far from similar to the facts of the present case.

Considering next the defendant's contention that the trial judge was not impartial, and had prejudged the case. Defendant states that the judge said:

> "The Court: If the mother hadn't interceded when she did, I don't know how far he would have gone. That was about as much as she could stand, and she hauled off and hit him, which I can understand."

The defendant rested his case and the defendant's counsel said, "there is no additional evidence," and then later said in an

swer to the comment of the judge above set forth, "That is probably true, your Honor, * * *." The statement of the judge was made *after* both parties had rested their case, and *after* the defendant's counsel had said, "Your Honor there is no defense to this * * *."

The case of People v. Barquera, 154 Cal.App.2d 513, 316 P.2d 641, cited by the defendant, is not in point, as in that case the trial judge expressed the belief that the defendant had no defense *before* the defense was presented.

[3] We find no evidence of the trial judge's being partial or prejudging this case.

Considering the defendant's last contention that the court erred in holding that the child of five years was a competent witness. The trial judge did say, "I have a serious question as to her competency to testify," but that statement, in and of itself, does not mean that the judge had any doubt of the guilt of the defendant. On stipulation, the case was submitted on the transcript of the testimony taken at the preliminary hearing. The child testified at the preliminary hearing. The judge at that time had an opportunity to observe the child, and he questioned her and permitted her to testify, and he determined that she was a competent witness. He also said of her: "I think this little girl is exceptionally bright and intelligent for her age. She doesn't come forth with the usual answers as to what happens when you tell stories, but her answers indicated, I would say, a better than average comprehension of what she is asked for her age. I believe she is qualified to tell what may have occurred."

[4] We believe the trial judge was proper in his rulings to the effect that the testimony of the child was competent. See People v. Trolinder, 121 Cal.App.2d 819, 264 P.2d 601.

[5] Even if we were to assume that the child was incompetent to testify, the admission of such testimony under the circumstances did not constitute prejudicial error and there was sufficient other evidence to uphold the judgment. The mother's testimony and the defendant's confession were enough, in and of themselves, to convict the defendant.

The defendant has not raised the question, but we presume that when the judge, at the time of sentencing, said, "The Court will strike the priors in the interest of justice," that he meant all of the prior convictions excepting the prior conviction charged in the information referred to herein as cause one. Otherwise the anomolous situation presents itself of having the defendant guilty of only a misdemeanor, as the section (647a, subd. (1)) itself provides, in effect, that the annoying and molesting of a child is a misdemeanor, excepting upon the second conviction and subsequent convictions thereof, or upon the first conviction after a previous conviction under section 288 of the Penal Code.

We assume that what the court meant by striking the priors was to strike only the Maine, Montana and Washington convictions, to the end that the defendant could serve the sentences imposed in cause one and cause two in this state concurrently.

The judgment in case Criminal No. 6218, referred to herein as cause one, is affirmed.

The judgment in case Criminal No. 6219, referred to herein as cause two, is affirmed.

WHITE, P. J., and LILLIE, J., concur.

51 Cal.2d 610

Thelma E. BAUM, Appellant,
v.
Ernest M. BAUM, Respondent.
L. A. 24936.

Supreme Court of California,
In Bank.
Feb. 18, 1959.

Former wife sought an order charging former husband's interest in partnership with payment of the alimony and child support which was owing from husband to wife and the appointment of a receiver as provided in the Uniform Partnership Act. The Superior Court, Los Angeles County, Elmer D. Doyle, J., denied the relief sought, and the wife appealed. The Supreme Court, Schauer, J., held that wife's appeal was not merely from order denying appointment of receiver, but was appeal from denial of her motion for a charging order, and consequently the order related to enforcement of judgment and was appealable as "special order made after final judgment".

Defendant's motion to dismiss appeal denied.

Opinion, 328 P.2d 211, vacated.

1. Appeal and Error ⇐82(1)

Where former wife sought an order charging former husband's interest in partnership with payment of alimony and child support which was owing from husband to wife and appointment of receiver as provided in Uniform Partnership Act and trial court's order denied the relief sought, wife's appeal was not merely from order denying appointment of receiver but was appeal from denial of her motion for charging order, and consequently order related to enforcement of judgment and was appealable as "special order made after final judgment", and this was so even though trial court, in exercise of its general power to make a support allowance a lien on property, had ordered husband's interest in partnership impressed with the sums owing to wife. West's Ann.Corp.Code, § 15028; West's Ann.Code Civ.Proc. § 963.

See publication Words and Phrases, for other judicial constructions and definitions of "Special Order Made after Final Judgment".

2. Divorce ⇐308

The court has general power to make a support allowance to divorced wife a lien on property of divorced husband.

3. Divorce ⇐308
Partnership ⇐220(4)

An order making payments for support of divorced wife a lien upon property of divorced husband does not constitute either the equivalent of a writ of "execution", or of a "charging order" against husband's interest in partnership. West's Ann.Corp.Code, § 15028.

See publication Words and Phrases, for other judicial constructions and definitions of "Charging Order" and "Execution".

4. Partnership ⇐220(1)

Under the statute, charging orders on partnership interests have replaced levies of execution as the remedy for reaching such interests. West's Ann.Corp.Code, § 15028.

5. Appeal and Error ⇐82(1)

An order made after final judgment which affects enforcement of judgment, whether such order favors the judgment creditor or the judgment debtor, is appealable. West's Ann.Code Civ.Proc. § 963.

6. Appeal and Error ⇐780(1)

Where former husband moved to dismiss former wife's appeal from order denying her motion seeking order charging his interest in partnership with payment of the alimony and child support which he owed her on ground that no relief could be given to the wife on the appeal and that the questions presented were so unsubstantial as not to require printing of briefs, and that there was no showing that there had been an abuse of discretion in denying motion for appointment of receiver, such arguments required determination of the

matter on its merits and did not constitute proper grounds for dismissal. West's Ann. Corp.Code, § 15028.

Ray Howard, Los Angeles, for appellant.

Benjamin P. Riskin, Los Angeles, for respondent.

SCHAUER, Justice.

[1] This is a motion by defendant to dismiss plaintiff's appeal on the ground that "the order appealed from i. e. the denial of the motion by the appellant for the appointment of a receiver is not an appealable order." On inspection of the record it appears that the order in question did not merely refuse appointment of a receiver but, rather, denied plaintiff's motion seeking a charging order under the provisions of section 15028 [1] of the Corporations Code. Consequently it related to enforcement of the judgment and was appealable as a "special order made after final judgment." (Code Civ.Proc., § 963.)

Defendant and plaintiff were formerly husband and wife. Plaintiff moved in the trial court "That an order be made charging defendant's interest in the partnership of J. H. Baum & Sons, as provided in Section 15028 [1] of the Corporations Code, with the sum of $1,055 [as accrued alimony] * * * and with the sum of $515 [as accrued child support] * * *, said sums being those with which said partnership interest was ordered impressed by order of December 7, 1956 * * *; and so charging said interest with a reasonable attorney's fee for services performed in this proceeding * * *; and so directing that a receiver be appointed, and that such lien be foreclosed, and that a sale of said interest be had, all as provided in said Section 15028 of the Corporations Code, and that such other orders be made with respect to said partnership interest as may be proper * * *." In plaintiff's written notice of motion the above motion for a charging order under section 15028 of the Corporations Code was entitled as being one "To Appoint a Receiver of, and/or Order a Sale of Defendant's Partnership Interest, etc. * * *"

By minute order entered September 5, 1957, the court, following argument, denied "plaintiff's motion to appoint a Receiver and/or order a sale of defendant's partnership interest, etc. * * *" Plaintiff's notice of appeal recites that she appeals from the September 5 minute order denying her motion "to appoint a receiver of, and/or order a sale of defendant's interest in the partnership of J. H. Baum & Sons, charging said interest under Section 15028 of the Corporations Code * * *."

[2–4] It is thus plain from the record that plaintiff's appeal is from a denial of her motion seeking a charging order and not merely from an order denying the appointment of a receiver. Defendant's suggestion that from the fact that, as recited in plaintiff's motion for a charging order, etc., the court had already ordered defendant's partnership interest "impressed" with the sums owing to plaintiff, it follows that a charging order had already been granted and that therefore this appeal is only from an order refusing to appoint a receiver, is without merit. The court has general power to make a support allowance a lien on property (see Gaston v. Gaston (1896), 114 Cal. 542, 546, 46 P. 609; 16 Cal.Jur.2d 527, § 237, and cases there cited), and no showing has been made that it was not merely

1. Section 15028: "(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts, and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

"(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased * * *."

in the exercise of such general power that the order was made "impressing" defendant's partnership interest in this case. Further, it appears that an order making support payments a lien upon property does not constitute either the equivalent of a writ of execution (see Anderson v. Anderson (1899), 123 Cal. 445, 56 P. 61; Wellborn v. Wellborn (1942), 55 Cal.App.2d 516, 523, 131 P.2d 48) or of a charging order. As hereinafter shown charging orders on partnership interests have replaced levies of execution as the remedy for reaching such interests.

Section 15028 of the Corporations Code [1] (formerly Civ.Code, § 2422) is a part of the Uniform Partnership Act. (See Corp. Code, § 15001.) As declared in Crane on Partnership (1938), pages 162–164, "The Uniform Partnership Act provides, as a remedy for the separate creditor,[2] a charging order, an institution which was derived from the English Partnership Act. * * *" And from Lindley on Partnership, 10th edition, page 431, it appears that "Before the [English] Partnership Act, 1890, came into operation, a separate judgment creditor of a partner was entitled to levy execution not only against his debtor's separate property, but also against the property of any firm in which the debtor was a partner * * * This procedure has been abolished by the Partnership Act, 1890, and a new procedure [viz., a charging order, on application to the court by a judgment creditor of a partner, charging that partner's interest in the partnership property and profits with payment of the judgment] * * * has been introduced."

In Sherwood v. Jackson (1932), 121 Cal. App. 354, 8 P.2d 943, in which a separate judgment creditor had levied execution on defendant's interest in a partnership and purchased the interest at the execution sale, defendant's motion to recall the execution and to quash the sale was granted by the trial court. On appeal by plaintiff the order granting the motion was affirmed, with the holding that a separate creditor may no longer levy attachment or execution on a partner's right in specific partnership property (Corp.Code, § 15025, subd. (2) (c), formerly Civ.Code, § 2419) or on his interest in the partnership (see Corp. Code, § 15024, formerly Civ.Code, § 2418), but may only, after first obtaining judgment, pursue the statutory remedy of seeking a charging order under section 15028 of the Corporations Code (formerly Civ. Code, § 2422).

In the Sherwood case no question appears to have been raised as to the appealability of the order from which plaintiff appealed (recalling execution and quashing execution sale); it presumably was assumed, without discussion, to be a "special order made after final judgment" within the meaning of section 963 of the Code of Civil Procedure, which lists the cases in which an appeal may be taken from a superior court.

[5] However, the order in the Sherwood case would appear to meet the requirement that to be appealable a "special order made after final judgment" must affect the judgment in some manner or relate to its enforcement. (See Imperial Beverage Co. v. Superior Court (1944), 24 Cal. 2d 627, 632[3], 150 P.2d 881; Williams v. Superior Court (1939), 14 Cal.2d 656, 666 [9], 96 P.2d 334; Lake v. Harris (1926), 198 Cal. 85, 89[3], 243 P. 417; McCullough v. Clark (1871), 41 Cal. 298, 303; 3 Cal.Jur. 2d 497–499, and cases there cited.) Thus, an order under section 685 of the Code of Civil Procedure granting or denying leave to enforce a judgment or to carry it into execution after the lapse of five years (now ten years; stats.1955, chap. 754, p. 1248, § 2) from the date of its entry is appealable as a special order made after judgment (see Faias v. Superior Court (1933), 133 Cal. App. 525, 529–530[6, 8], 24 P.2d 567; Belt Casualty Co. v. Superior Court (1933), 129 Cal.App. 642, 644, 19 P.2d 25; see also the following cases, where no question ap-

1. See Note 1 on page 482.

2. That is, a creditor of an individual partner as distinguished from a creditor of the partnership.

pears to have been raised as to appealability, Georgison v. Georgison (1954), 43 Cal.2d 550, 275 P.2d 3; Di Corpo v. Di Corpo (1948), 33 Cal.2d 195, 197, 200 P.2d 529; John P. Mills Organization v. Shawmut Corp. (1947), 29 Cal.2d 863, 179 P.2d 570; Lohman v. Lohman (1946), 29 Cal.2d 144, 146, 173 P.2d 657), as is an order vacating an order that the execution issue and recalling it. (See Demens v. Huene (1928), 89 Cal.App. 748, 751–752[2], 265 P. 389.) Appeals have also been entertained from orders granting or denying motions to recall or quash a writ of execution (see Di Corpo v. Di Corpo (1948), supra, 33 Cal. 2d 195, 197, 200 P.2d 529; Cozad v. Raisch Improvement Co. (1929), 208 Cal. 496, 281 P. 1017; Hulse v. Davis (1927), 200 Cal. 316, 253 P. 136; Montgomery v. Meyerstein (1924), 195 Cal. 37, 39, 231 P. 730; Smith v. Smith (1940), 42 Cal.App.2d 19, 108 P.2d 47; 19 Cal.Jur.2d 377–378, § 39), as well as from orders staying the enforcement of judgments, or orders vacating orders staying such enforcement. (See Macario v. Macario (1929), 208 Cal. 601, 603, 283 P. 291; Duke v. Levy (1929), 208 Cal. 376, 377, 281 P. 496; Livermore v. Hodgkins (1880), 54 Cal. 637; Gray v. Bybee (1943), 60 Cal.App.2d 564, 567, 141 P.2d 32; 19 Cal.Jur.2d 386–387, § 44; 3 Cal.Jur.2d 497–499, § 61; and cases there cited.) Thus, it appears that an order made after final judgment which affects enforcement of the judgment, whether such order favors the judgment creditor or the judgment debtor, is appealable. Therefore an order either granting or denying a judgment creditor's motion for a charging order under the provisions of section 15028 of the Corporations Code would fall within this class of appealable orders. It follows that insofar as the ground of nonappealability is concerned defendant's motion to dismiss the appeal of plaintiff from the order denying her motion for a charging order, should be denied.

[6] Defendant further urges as grounds of his motion to dismiss the appeal "That from an inspection of the record without extensive study it is clear that no relief can be given to the appellant on this Appeal," that the "questions so presented" are "so unsubstantial as not to require the printing of briefs," that "No substantial questions of law have been presented upon the record," and that "There is no showing upon this record * * * that there has been an abuse of discretion by the Trial Court in denying the motion made for the appointment of a receiver." These arguments appear to require determination of the matter on its merits rather than to constitute proper grounds for dismissal. We have made "an inspection of the record without extensive study," and have not been convinced that no "substantial questions" are presented thereby.

The motion to dismiss is denied.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE and McCOMB, JJ., concur.



51 Cal.2d 616

John R. BRUNNER, Petitioner,

v.

SUPERIOR COURT OF ORANGE COUNTY, Respondent; Wilshire Oil Company of California (a Corporation), Real Party in Interest.

L. A. 25193.

Supreme Court of California.

Feb. 18, 1959.

Proceeding by attorney to secure writ of mandate requiring court to vacate order directing him to answer certain questions propounded upon taking of his deposition in a taxpayer's action instituted by his client. The Supreme Court, McComb, J., held that an attorney could not refuse to identify party who had consulted him relative to possible employment, and fact that person is a taxpayer in a class similarly situated with attorney's client who instituted taxpayer's action did not allow attorney to raise a

claim of privilege relating to any communication made by such party who was not otherwise a client of attorney.

Alternative writ discharged and peremptory writ denied.

1. Witnesses ⇐199(1)

Attorney, representing client in taxpayer's action, was not entitled to withhold, on ground of privilege, the name of another person who had consulted him relative to possible employment of attorney. West's Ann.Code Civ.Proc. § 1881, subd. 2.

2. Witnesses ⇐199(1)

Generally, an attorney is not privileged to withhold name of person by whom he has been employed. West's Ann.Code Civ. Proc. § 1881, subd. 2.

3. Witnesses ⇐198(1)

Rule excluding testimony of an attorney as to confidential communications made to him by his client must be strictly construed as it has a tendency to suppress relevant facts that may be necessary for a just decision.

4. Witnesses ⇐199(2)

Attorney representing client in a taxpayer's action could not claim privilege with respect to communications made to him by another similarly situated taxpayer who was not otherwise a client of attorney. West's Ann.Code Civ.Proc. § 1881, subd. 2.

5. Attorney and Client ⇐64

Merely because an attorney represents a client in a taxpayer's action does not give rise to attorney-client relationship between attorney and another person who was a taxpayer similarly situated with attorney's client.

Wirin, Rissman & Okrand, A. L. Wirin and Paul M. Posner, Los Angeles, for petitioner.

Joel E. Ogle, County Counsel, and Stephen K. Tamura, Asst. County Counsel, Santa Ana, for respondent.

Rutan, Lindsay, Dahl, Smedegaard, Howell & Tucker, Milford W. Dahl, Santa Ana, Richard W. Curtis and James G. Degnan, Los Angeles, for real party in interest.

McCOMB, Justice.

Petitioner seeks a writ of mandate requiring respondent court to vacate its order directing him to answer certain questions propounded upon the taking of his deposition.

Facts: Petitioner, a duly licensed attorney at law, filed an action in the Superior Court of Orange County on behalf of Fred C. Hermann. This was a taxpayer's action for the benefit of the city of Huntington Beach against the Wilshire Oil Company to invalidate an easement granted to the company by the city.

On July 16, 1958, a deposition proceeding was held, at which petitioner, while being questioned, stated that after the action had been commenced a person other than Fred C. Hermann consulted him for the purpose of obtaining legal advice, with a view to retaining him in his professional capacity.[1] Counsel for the real party in interest, Wilshire Oil Company, asked peti-

1. The following excerpts from the transcript of the deposition are the only references to the question of the attorney-client relationship:

"Q. You are the attorney for the Plaintiff in this action? A. I am.

"Q. And you have been his attorney ever since the beginning of the action; is that right? A. Yes.

"Q. And are you the only attorney? A. Yes.

"Q. And he is the only client that you have in this connection? A. No. We have 10,000 clients. This is a representative derivative action of every taxpayer of Huntington Beach, including Mr. Bauer is a client. (Indicating.)

"Q. Have you ever conferred with any of your other clients about this matter? A. Yes.

"Q. And would you give me the names of the clients that you have conferred with, please? A. No.

"Q. Why not? A. You are asking me to reveal the identity of clients who haven't given me the authority to do that, and—

"Q. Do you claim this matter is privileged? A. I claim it is privileged.

"Q. Well now, I don't want to take unfair advantage of you, Mr. Brunner, but any time I cite you to court I am going to at the same time move for reasonable attorneys' fees and costs,

tioner to name this party and to disclose the matters communicated to him. Petitioner refused to answer upon the ground that the answers were privileged under section 1881, subdivision 2, of the Code of Civil Procedure.[2]

Questions: First. *Did the trial court err in directing petitioner to reveal the name of a person who consulted him relative to possible employment?*

[1,2] *No.* Petitioner does not claim that the privilege would exist if the person who consulted him was not a client of his. However, it is the general rule that an attorney is not privileged to withhold disclosing by whom he has been employed. (Satterlee v. Bliss, 36 Cal. 489, 507; Tomlinson v. United States, 68 App.D.C. 106, 93 F.2d 652, 655, 114 A.L.R. 1315 [8–10]; see Annotation, 114 A.L.R. 1321 et seq. (1938); cf. Ex parte McDonough, 170 Cal. 230, 238, 149 P. 566, L.R.A.1916C, 593.) Therefore, even if the person who consulted petitioner were his client, petitioner can still be required to reveal the person's name.

Second. *Does the fact that a person is a taxpayer in a class similarly situated with petitioner's client give rise to a claim of privilege relating to any communication made by such person who is not otherwise a client of petitioner?*

[3,4] *No.* The following rule is here applicable: The rule excluding the testimony of an attorney as to confidential communications made to him by his client must be strictly construed, as it has a tendency to suppress relevant facts that may be necessary for a just decision. (Satterlee v. Bliss, supra, 36 Cal. at page 508; City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 234 [10], 231 P.2d 26, 25 A.L.R.2d 1418.)

Petitioner claims that all the taxpayers in the city of Huntington Beach became his clients by reason of their being in the status of taxpayers of Huntington Beach and therefore discussions which he had with any of them became entitled to the attorney-client privilege.

Petitioner was asked this question: "So the only respect with which they are clients is the fact that they are taxpayers similarly situated with Mr. Herman as far as you are concerned; is that right?" to which he answered, "Yes." The following questions asked petitioner and his answers thereto also appear in the record:

"Q. And you have never discussed with these other clients that you have whether or not you actually represent them, have you? A. Discussed whether I actually represent them?

and I would like to call your attention to certain cases in the State of California, which require that an attorney disclose by whom he was employed. A. By whom I was employed?

"Q. That's right. A. I have already said. I was employed by Mr. Fred Herman.

"Q. Have you been employed by anyone else in connection with this case? A. In connection with this case, no.

"Q. All right. And you have no agreements with any of these other clients, do you? A. No.

"Q. So the only respect with which they are clients is the fact that they are taxpayers similarly situated with Mr. Herman as far as you are concerned; is that right? A. Yes.

"Q. And you have never discussed with these other clients that you have whether or not you actually represent them, have you? A. Discussed whether I actually represent them?

"Q. Yes. A. Well, I tried to make it clear to every resident of Huntington Beach that I represent them in this action.

"Q. I see, but that's the only communication that you have had with them as your client; is that right, to try to tell them that you are representing them as taxpayers and you are their attorney; is that right? A. Yes."

2. Section 1881, subdivision 2, of the Code of Civil Procedure reads: "An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity."

"Q. Yes. A. Well, I tried to make it clear to every resident of Huntington Beach that I represent them in this action.

"Q. I see, but that's the only communication that you have had with them as your client; is that right, to try to tell them that you are representing them as taxpayers and you are their attorney; is that right? A. Yes."

[5] It is apparent that the attorney-client relationship does not arise merely because an attorney says to a taxpayer, "You are my client because you are a taxpayer." Neither does the fact that a person is a taxpayer similarly situated with a client of an attorney, by reason of that fact alone, become a client of such attorney with the result that the attorney-client privilege may be claimed by the attorney.

The alternative writ is discharged, and the peremptory writ is denied.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



168 Cal.App.2d 182

Grace SCHWARTZ, Plaintiff and Appellant,

v.

MAGYAR HOUSE, INC., a California corporation, et al., Defendants,

Magyar Athletic Club, a California corporation, and American-Hungarian Pioneer Families of California, a California corporation, Respondents.

Civ. 23439.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1959.

Rehearing Denied March 23, 1959.

Hearing Denied April 22, 1959.

Personal injury action. From a judgment of the Superior Court of Los Angeles County, Arthur Crum, J., in favor of defendants, an appeal was taken. The District Court of Appeal, Fox, P. J., held that a corporation not permitted to defend action may make a motion for continuance so that it may be reinstated and thereafter participate in trial, and that taking of a default judgment by virtue of fact that corporation may not defend is not a "right" within contemplation of Code section providing that reinstatement shall be without prejudice to any action, defense or "right" which has accrued by reason of original suspension.

Affirmed.

1. Corporations ⇐630(1)

During period when corporation's powers, rights and privileges are suspended or forfeited, it may not sue or defend an action. West's Ann.Rev. & Tax.Code, §§ 23301–23303.

2. Continuance ⇐7

Motion for continuance rests to a great extent in sound discretion of trial court. Superior Court Rules, rule 11.

3. Continuance ⇐38

Corporations ⇐499

Corporation not permitted to defend action could make motion for continuance so that it could be reinstated and thereafter participate in trial; but even if it were improper for such corporation to make any motion whatever, it would nevertheless have been permissible for trial court to grant continuance on its own motion, and corporation would not have been prohibited from merely informing court of reasons why court should so act. West's Ann.Rev. & Tax.Code, §§ 23301–23303.

4. Corporations ⇐615½

Taking of a default judgment by virtue of fact that corporation may not defend is not a "right" within contemplation of Code section providing that reinstatement shall be without prejudice to any action, defense or "right" which has accrued by reason of

original suspension. West's Ann.Rev. & Tax.Code, §§ 23304, 23305a.

Belle Silverman and Judith B. Aaronson, Beverly Hills, A. Marburg Yerkes, Los Angeles, for appellant.

Hunter & Liljestrom, Roger L. Liljestrom, Jr., Gizella L. Allen and Warren M. Goodwin, Los Angeles, for respondents.

FOX, Presiding Justice.

Plaintiff appeals from a judgment entered in favor of defendants, Magyar Athletic Club, and American-Hungarian Pioneer Families of California, in her action to recover damages for personal injuries.

In June, 1955, plaintiff filed her action against Magyar Athletic Club and Magyar House, Inc.[1] A copy of the complaint and summons was served upon American-Hungarian Pioneer Families as a "Doe I" defendant. Said complaint did not allege the corporate status of this defendant. Magyar House, Inc., did not appear, and a default judgment was entered as to this defendant. Magyar Athletic Club filed an answer in July, 1955, denying that it was a corporation. The answer filed by American-Hungarian Families in July, 1956, did not make any reference to its status. A pretrial conference order was filed on June 21, 1957, which stated the corporate status of the defendants was in issue, but no determination of this question was made at that time. The case was set for trial on June 28, 1957, but upon defendants' motion was continued until July 22, 1957. At that time a jury was sworn to try the cause. Thereafter, plaintiff moved the court "for judgment on the ground that the defendants are barred by law from defending the lawsuit." The trial was continued to the next day and ruling on plaintiff's motion was continued to the same date. At that time, plaintiff renewed her motion and offered documents to establish that the powers, rights and privileges of American-Hungarian Families were suspended on January 25, 1955, and those of Magyar Athletic Club suspended on February 16, 1955, for the failure to pay state franchise taxes. After the motion was argued, the defendants moved for a continuance and that the action be transferred back to Department I for further proceedings. The defendants' motion for transfer to Department I was granted, and all other matters continued to July 24, 1957. On that date the motions were ordered transferred back to Department 12, and plaintiff again renewed her motion to preclude defendants from defending, and defendants again moved for a continuance for the purpose of reviving the corporations. Defendants' motion was granted and the trial continued until August 5, 1957. Plaintiff's motion was continued to that date for further hearing and ruling. An affidavit was filed on July 24, 1957, in support of defendants' motion for a continuance, stating: "That both of said corporations are exempt from taxation imposed by the Bank and Corporation Franchise Tax Law, except as specifically provided in Section 23731b of the Revenue and Taxation Code. That neither has had sufficient income to subject it to ('Article 2' net income) taxation under Section 23731b of the Revenue and Taxation Code. That Section 23705 of the Revenue and Taxation Code was added by Statutes 1953, Chapter 1503, Section 2, which provide that any organization claiming to be exempt from franchise tax shall annually on or before March 15th of each year file a statement establishing its right to the exemption by executing a declaration that the organization making the statement does not advocate the overthrow of the government of the United States or the State of California by force or violence or other unlawful means or advocate the support of a foreign government against the United States in the event of hostilities. If such a declaration is not made the corporation shall not receive the exemption allowed under the Revenue and Taxation Code to such corporations.

1. Magyar House, Inc., is not involved in this appeal.

"The officers of both of said corporations are laymen who volunteer their services to said corporations, which corporations are organized for charitable and educational purposes and do not have any capital stock. That the officers of said corporation were unaware of the fact that it was necessary for them under said enactment in 1953 to file on or before the 15th day of March, an annual statement which if they had filed would have exempted them from the payment of any franchise tax. That due to said failure to file said annual statement now required by Section 23705 of the Revenue and Taxation Code, said corporations were suspended. That neither the officers or directors of either of said corporations knew of said suspension, nor were the attorneys for said corporations aware of said suspension.

"That, upon being advised that a suspension was in effect against both corporations, the officers of each of said corporations did execute an Application for a Certificate of Revivor and forwarded the same to the Franchise Tax Board with the statement required by Section 23705 of the Revenue and Taxation Code and the necessary amount to revive said corporations. That affiant has been informed by an employee of the Franchise Tax Board of the State of California, in Sacramento, to wit, a Mr. Eastman, that it is in order for said corporations to file a claim for refund of the moneys requested by the state to revive said corporations, who waived their exemption by failure to file a 'loyalty declaration.'

"Affiant is informed and believes and therefore alleges that the constitutionality of the Act requiring an exempt corporation to file a loyalty declaration as a condition precedent to its exemption from franchise tax has been questioned and an action involving said question is now pending. That upon the receipt by the Franchise Tax Board of the Application for Certificate of Revivor the statement required by Section 23705 of the Revenue and Taxation Code executed by the corporations, and the amount of franchise tax now payable to remove the suspension of the exemption of said corporations, said corporations will be revived."

The defendants received their certificate of revivor from the State Franchise Tax Board on July 26, 1957. On August 1, 1957, defendants' notice of motion to file amended answers, their amended answers and affidavits in support of the motion were filed. In substance, the affidavit in behalf of the American-Hungarian Pioneer Families stated that it was served with a copy of the complaint and summons on May 23, 1956, and that the complaint contained no allegation as to whether this defendant was a corporation, and the answer to the complaint made no allegation as to the corporate entity; in the pre-trial conference order there was no determination as to whether this defendant was or was not a corporation. The affidavit in support of Magyar's motion stated that in its original answer it denied it was a corporation; that no determination was made as to this question in the pre-trial, and that this defendant is presently a corporation. Both affidavits contained the following:

"The above entitled matter was set for trial on July 22, 1957, and after the jury had been selected, the plaintiff moved that the defendants be barred from setting forth a defense on the ground that each of said defendants was a corporation whose rights had been suspended and that said corporations had no right to appear in the proceedings to defend in the action. That counsel for both defendants made a motion for continuance on the basis among others, that said motion was made without notice and was a complete surprise. That on July 24, 1957, the trial judge continued the matter until August 5, 1957, at 10:00 a. m. That on July 24, 1957, the American-Hungarian Pioneer Families of California [the Magyar Athleta Club] forwarded to the Franchise Tax Board, at Sacramento, the following documents: 1) An application for Certificate of Revivor on behalf of said corporation executed by the directors thereof; 2) annual statement required to be executed by corporations un-

der Section 23705 of the Revenue and Taxation Code; 3) certified check in the sum of $136.00 which represented the amount of franchise tax due at the time; 4) claim for refund of said $136.00 which claim for refund is designated as to be filed by those corporations who waived their exemption by failing to file a loyalty declaration as required by Section 23705 of the Revenue and Taxation Code.

"That said defendant corporation was revived on July 26, 1957, and the corporate powers, rights and privileges of said corporation were revived as of that date and were restored to full force and effect.

"Wherefore, said defendant corporation prays for leave to file an amended answer alleging that it is a corporation in good standing."

On August 5, 1957, the court, after argument, denied plaintiff's motion to preclude defendants from defending the action and granted defendants' motion for leave to amend their answers.

The case was reset for trial on September 20th, and continued until October 17, 1957, by stipulation, and thereafter continued until February 24, 1958, on plaintiff's motion. At that time plaintiff objected to proceeding with trial because defendants' answers were not verified. The objection was overruled and defendants given until 10:00 a. m. the following day to verify their answers. The action was tried and judgment ordered for defendants on February 25, 1958. On February 28, 1958, the court amended its minute order of February 24th to read as follows: "Plaintiff's objection to proceeding with trial on the ground that defendants were suspended corporations at the time plaintiff made her original objection after commencement of trial, and that the revival of the defendant corporations subsequent to the original objection of plaintiff did not have a retroactive effect which would give the defendants a right to defend this action, is overruled."

Plaintiff's position is that as defendants' powers, rights and privileges were suspended for the failure to pay franchise taxes pursuant to sections 23301, 23302, and 23303, Revenue and Taxation Code, they had no standing to defend or to participate in any lawsuit, and the court therefore erred in granting the motions to continue the action, and plaintiff's motion for judgment should have been granted as the defendants' pleadings should have been stricken from the records and plaintiff allowed to take judgment by default. Furthermore, argues plaintiff, her "right" to a default judgment was an "accrued right," and the revival of defendants' powers, rights and privileges could not have retroactive effect so as to prejudice this "accrued right" to obtain a default judgment. In support of this latter point, plaintiff quotes from section 23305a, which section along with section 23305 provides for reinstatement after payment of delinquent taxes, penalties and interest, as follows: "* * * the taxpayer therein named shall become reinstated but such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension * * *." Plaintiff does not raise any question relative to the sufficiency of the evidence or any matter pertaining to the judgment on the merits.

[1–3] This appeal essentially presents a single question for determination, and that is: May a defendant corporation which, pursuant to section 23301, is not permitted to defend an action, make a motion for a continuance so that it may be reinstated pursuant to section 23305, and thereafter participate in the trial? We are of the opinion that this must be answered in the affirmative.

While it is true that during the period a corporation's powers, rights and privileges are suspended or forfeited, it may not sue or defend an action (Reed v. Norman, 48 Cal.2d 338, 343, 309 P.2d 809; Boyle v. Lakeview Creamery Co., 9 Cal.2d 16, 18–20, 68 P.2d 968; Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 155 Cal.App.2d 46, 49–51, 317 P.2d 649; Ocean Park Bath House & Amuse-

ment Co. v. Pacific Auto Park Co., 37 Cal. App.2d 158, 159–160, 98 P.2d 1068), it does not necessarily follow that the legislature intended to preclude a trial court from recognizing the corporation for limited purposes.

, In the instant case, the plaintiff, on July 22, 1957, over two years from the filing of her original complaint, first raised the question of the corporations' capacity to defend. On July 24, the defendants' motion to continue the trial for approximately two weeks was entertained and granted by the trial court. At this time, the trial court had an affidavit before it explaining why the franchise taxes were not paid and that proceedings had already been instituted to revive the corporations' powers, rights and privileges. Recognizing the corporation for the limited purpose of permitting it to inform the court of facts which, in reason and justice, would warrant the court in continuing the action for a limited period, is neither violative of the letter nor spirit of section 23301. That section has been interpreted to mean the suspended corporation cannot defend until it is reinstated. There is nothing express or implied in that section which would prohibit such a corporation from seeking a continuance for the limited purpose of paying delinquent taxes. See Reed v. Norman, supra, 48 Cal.2d at page 344, 309 P.2d at page 812. Such a motion would not constitute a defense or actual participation upon the merits of the action. To construe this section to prohibit participation for the sole purpose of making such a motion would tend to defeat the very purpose for which it was enacted, viz., to enforce the payment of these taxes. See Sale v. Railroad Commission, 15 Cal.2d 612, 617, 104 P.2d 38; Boyle v. Lakeview Creamery Co., supra.

In passing on the motion for a continuance, which rests to a great extent in the sound discretion of the trial court (Vallera v. Vallera, 73 Cal.App.2d 466, 471, 166 P.2d 893; Capital National Bank of Sacramento v. Smith, 62 Cal.App.2d 328, 339, 144 P.2d 665), the trial judge may inquire into the merits of the defense, pass on any questions presented as to any possible prejudice to either of the parties which would result from granting or denying the motion, and determine whether there is good cause therefor. Rules for the Superior Courts, Rule 11.

Even assuming that it would have been improper for the defendants to make any motion whatever, it would, nevertheless, have been permissible for the trial court to grant a continuance on its own motion, and section 23301 does not prohibit the corporation from merely informing the court of reasons why the court should so act. Upon the court's being advised by the affidavit of the facts and circumstances leading up to the suspension of the defendant corporations, the declared purposes and objects of the corporations, and being informed that application had already been made for reinstatement of the corporations' powers, rights and privileges, and that the state was not being deprived of any franchise tax, the court was justified, in the interest of justice, in granting upon its own motion a continuance for approximately two weeks to enable the revival proceedings to be consummated. In light of this situation it was not an abuse of discretion for the court to delay ruling on plaintiff's motion for this brief period. Therefore, it was proper for the court to grant defendants' motion to file amended answers on August 5, 1957, for they were at that time fully reinstated. By this procedure the court was enabled to pass upon the merits of plaintiff's alleged cause of action and render judgment accordingly, rather than deprive defendant of a meritorious defense upon purely technical grounds, which would not, in the instant situation, advance the underlying fiscal policy of the tax involved.

Plaintiff places considerable reliance on the Alhambra Gold Mine Corporation case, supra, in support of her position that a suspended corporation may not defend or participate in any litigation. That case, however, is clearly distinguishable from the one at bar. In the Alhambra case, an

action was commenced against a suspended corporation. Plaintiff, on the last day of trial, made a motion to strike all the pleadings and evidence tendered by the corporation and to enter a default on the ground that the corporation could not defend as its powers, rights and privileges had been and were at that time suspended. This motion was denied and the case taken under submission. Judgment was thereafter entered in favor of the corporation, while its powers were suspended. It was over two months after the entry of judgment before the corporation was revived. On appeal, the judgment was reversed, the court holding that as the corporation was not revived prior to entry of judgment it had no capacity to defend. In the instant case, in contrast, the corporations were fully revived before the trial; they were in the process of reinstatement when the continuance was granted at which time the court had before it affidavits explaining why the taxes had not theretofore been paid; and the corporations were fully restored prior to the time their amended answers were filed. In view of the completely different factual situations presented by the two cases, the Alhambra decision is not authority for plaintiff's position.

[4] Plaintiff's argument that once she was in a position to file a default judgment against the defendants, some "right" had accrued or vested in her and that such a "right" could not be prejudiced by the subsequent reinstatement of the corporations, is untenable. While it is true that section 23305a does provide that the reinstatement "shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension * *", we are of the view that the taking of a default judgment by virtue of the fact that defendant may not defend is not a "right" within the contemplation of the above provision. Although no reported case has, as yet, construed the language quoted above, it would appear to have application, for instance, to a situation where a contract made by the corporation is voidable because entered into while the corporation's powers, rights and privileges were suspended (Rev. & Tax. Code, § 23304), and the fact of reinstatement does not deprive the other party of the right to avoid the contract.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.



168 Cal.App.2d 117

John K. DUNN, Plaintiff and Appellant,

v.

VOGEL CHEVROLET CO., a corporation, and General Motors Corporation, a corporation, Defendants and Respondents.

Civ. 9262.

District Court of Appeal, Third District, California.

Feb. 19, 1959.

Hearing Denied April 15, 1959.

Action by motorist against garage for alleged negligence in installing a brake hose on motorist's automobile and action against garage and manufacturer of brake hose for negligence in manufacture of brake hose and for sale of brake hose to garage for resale and use of such defective hose on motorist's automobile. From a judgment of nonsuit entered by the Superior Court, Sacramento County, Malcolm C. Glenn, J., in favor of garage and manufacturer on one cause of action and from a judgment in favor of garage on jury verdict in other action for personal injuries, the motorist appealed. The District Court of Appeal, Peek, J., held that where motorist took his automobile to garage when brakes failed and mechanic installed a new brake hose and motorist returned and got his automobile after the repair was finished and while driving down a hill after traveling a distance of approximately 70 miles, during which time motorist noticed brakes were

spongy, his brakes failed and automobile went out of control and went off highway at a curve at bottom of hill and into a gulley and it was found that threads on male end and those on female end of hose were stripped, doctrine of res ipsa loquitur was applicable.

Judgments reversed.

Opinion, 333 P.2d 793, vacated.

1. Appeal and Error ⇐927(3)

On appeal by plaintiff from a judgment of nonsuit entered in an action in which plaintiff contended that evidence warranted an instruction on res ipsa loquitur, evidence must be reviewed in light most favorable to the plaintiff.

2. Automobiles ⇐16, 368

Where motorist took his automobile to garage when brakes failed and mechanic installed a new brake hose and motorist returned and got his automobile after repair was finished and while driving down a hill after traveling a distance of approximately 70 miles, during which time he noticed brakes were spongy, his brakes failed and automobile went out of control and went off highway at a curve at bottom of hill, and it was found that threads on male end and those on female end of hose were stripped, doctrine of res ipsa loquitur was applicable in action by motorist against garage and manufacturer of brake hose.

3. Negligence ⇐121(2)

An accident must be of a kind which ordinarily does not occur in absence of someone's negligence, it must be caused by an agency or instrumentality in control of defendant, and it must not have been due to any voluntary action or contribution on part of plaintiff before doctrine of res ipsa loquitur is applicable.

4. Negligence ⇐136(6)

Where evidence is conflicting or subject to different inferences, it is for jury, under proper instructions, to determine whether each of conditions necessary to bring in rule of res ipsa loquitur are present.

Robert A. Zarick, Anthony J. Scalora, Sacramento, for appellant.

Johnson, Davies & Greve, Sacramento, for Vogel Chevrolet Co.

Fitzwilliam & Memering, Sacramento, for General Motors Corp.

PEEK, Justice.

In order to give adequate consideration to the questions raised by defendants in their petitions for rehearing, such petitions were granted and the cause resubmitted without argument. After due deliberation, we adopt the opinion heretofore filed with one modification necessitated by an inadvertent misstatement of the conditions to be met before the doctrine of res ipsa loquitur may be applied.

This is an appeal from a judgment of nonsuit entered in favor of defendants Vogel Chevrolet Company and General Motors Corporation on the second cause of action alleged in plaintiff's second amended complaint and from a judgment entered in favor of defendant Vogel Chevrolet upon a jury verdict as to the first cause in an action for personal injuries. The first cause of action alleged negligence on the part of Vogel in installing a brake hose on plaintiff's automobile. The second cause alleged that General Motors negligently manufactured the brake hose and negligently sold the same to Vogel for resale and use and that Vogel was negligent because it used the defective hose on plaintiff's auto.

[1] Since this is an appeal from a judgment of nonsuit and since plaintiff contends that the evidence warranted an instruction on res ipsa loquitur we are confronted with two well established rules, each compelling us to review the evidence in the light most favorable to plaintiff. See, Dunn v. Pacific Gas & Electric Co., 43 Cal.2d 265, 272 P.2d 745, and Edgett v. Fairchild, 153 Cal.App.2d 734, 738, 314 P.2d 973.

[2] The evidence so reviewed shows that while plaintiff was driving in downtown Sacramento his brakes failed. The car was taken to the Vogel garage and was

assigned for repair to one Alexander, a mechanic in the employ of Vogel. Vogel's practice appears to have been that when a car was brought in for repair, an employee would discuss the condition of the car with the customer and following his diagnosis the car would be assigned to a mechanic accompanied by a time card which set forth the repair instructions. In this case the mechanic was instructed to "replace brake hose, adjust and bleed the brakes." Pursuant to the instructions, Alexander went to the parts department and obtained a new hose. All parts were ordered from General Motors Oakland plant. Brake hoses were packaged and delivered two in a carton, and upon receipt the carton was opened and the hoses placed in a bin where they remained until requested by a mechanic. Only the employees so assigned were allowed in that specific department. When the new parts were taken from the package they were "looked at" and if anything was "obviously wrong it was seen" and the part returned to General Motors. The parts manager recalled no defective hoses being returned during the time in question. After Alexander obtained the hose from the parts department, he examined it, determined it to be satisfactory and proceeded to install it on plaintiff's car. Plaintiff, who was there at that time, looked at the hose, noted that it appeared new, but made no particular inspection and left the garage before it was installed. After installing the hose and checking the brake system, Alexander tested the same and found it to be in good working order. Upon plaintiff's return he was informed the repair was finished. He in turn tested the brakes by stepping on the pedal, found them to be satisfactory, paid his bill and left. He concluded one errand in downtown Sacramento, drove to his home in the northern part of the city, and then to the home of his mother in Grass Valley, altogether a distance of approximately 60 miles. The brakes felt all right to him when he left Sacramento, but on the way to his mother's they appeared "spongy". Following dinner at his mother's he left to visit his brother in Penn Valley, some 10 or 12 miles distant from Grass Valley. The highway in this area traverses rolling foothill country. While descending Martell Grade he noticed some deer grazing along the highway. When he stepped on the brake pedal to slow down for the deer, there was a snapping sound, and the pedal went all the way to the floorboard. The car immediately began to pick up speed with the result that it went out of control, making it impossible for plaintiff to negotiate a turn at the bottom of the hill. As a result the car went over the side of the road into a gulley some 30 feet below the road bed. There were no skid marks or other tire marks on the paved portions of the highway but there were marks on the shoulder. Following the accident the car was towed to a garage in Grass Valley. When the brake system was examined six days after the accident, it was found that the threads on the male end and those on the female part of the hose were stripped. The hose, which was introduced in evidence, also showed that the brass nipple insert on the female end was flattened. The witness Alexander, who was called under section 2055 of the Code of Civil Procedure, first testified that it would have been impossible to have installed the hose so as to have stripped the threads. However he later testified that when threads are stripped upon installation, "you're in for a lot of trouble."

[3] It is plaintiff's contention that the court erred in failing to give his requested instruction on the doctrine of res ipsa loquitur, as set forth in BAJI, 206–c, Vol. 2, pages 642–643. As stated in Seneris v. Haas, 45 Cal.2d 811, 823, 291 P.2d 915, 53 A.L.R.2d 124, the conditions to be met before the doctrine may be applied are that the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence, that it must be caused by an agency or instrumentality in control of the defendant and that it must not have been due to any voluntary action or contribution on the part of plaintiff.

In regard to the first element certainly it cannot be said that brakes ordinarily fail immediately after repair. The testimony relied upon by defendants as dispelling this element as a matter of law does nothing more than present a conflict in the evidence. Defendants further argue that since Vogel had relinquished control of the car to plaintiff the second requisite had not been met. The fact that the accident occurred after plaintiff took the car from the garage does not preclude application of the rule provided there is no evidence that the instrumentality had been improperly handled or that its condition otherwise changed as control was relinquished by defendants. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041. As to the third condition it is defendants' contention that plaintiff was contributorily negligent by driving the car after the brakes were spongy; that the curves where the accident occurred could be negotiated at 30 miles per hour; that there was no evidence of brake fluid on the pavement; that there were tire marks on the shoulder, and that the damaged brake hose was not discovered until six days after the accident all point to the conduct of the driver and not the defective brakes as the cause of the accident. Again this only presents a conflict.

[4] Thus where, as here, "the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur are present." Baker v. B. F. Goodrich Co., 115 Cal.App. 2d 221, 229, 252 P.2d 24, 29. In amplification of the previous rule the court in the Seneris case, supra, further held, 45 Cal.2d at page 827, 291 P.2d at page 924:

> "* * * The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence even though the court itself would not draw that inference; the court must still leave the question to the jury where reasonable men may differ as to the balance of probabilities (Res Ipsa Loquitur in California, Prosser, 37 Cal. L.Rev. 183, 194–195). The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it. Bauer v. Otis, 133 Cal.App.2d 439, [443], 284 P.2d 133. The existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the right of the jury to find those facts must be carefully preserved (Black v. Partridge, 115 Cal.App.2d 639, 646, 252 P.2d 760; Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335; Knell v. Morris, 39 Cal.2d 450, 247 P.2d 352; Milias v. Wheeler Hospital, 109 Cal. App.2d 759, 241 P.2d 684."

Additionally in the present case there is evidence to show that the defect in the hose was *patent* not *latent*. In discussing a similar situation, the Supreme Court in Escola v. Coca Cola, 24 Cal.2d 453, 459–460, 150 P.2d 436, 439, held:

> "If the explosion resulted from a defective bottle containing a safe pressure, the defendant would be liable if it negligently failed to discover such flaw. If the defect were visible, an inference of negligence would arise from the failure of defendant to discover it. Where defects are discoverable, it may be assumed that they will not ordinarily escape detection if a reasonable inspection is made, and if such a defect is overlooked an inference arises that a proper inspection was not made. A difficult problem is presented where the defect is unknown and consequently might have been one not discoverable by a reasonable, practicable inspection."

A situation even more comparable to the instant case was presented in Northern v. General Motors Corp., 2 Utah 2d 9, 268 P.2d 981. There it was held that where the purchaser of a new truck sustained dam-

ages when the steering mechanism, which was alleged to have been defective, broke and caused the truck to turn over, the questions whether the defect in the mechanism existed at the time it was assembled, whether the defect could have been discoverable by reasonable inspection, and whether the injury to the purchaser was caused by the failure of the defective steering mechanism, were questions for the jury. In that case the facts showed that the shaft in the steering column, which was completely enclosed until the time of the accident, had a distinct penetration of rust at the place of the break. Such evidence, the court said, was sufficient to support a reasonable inference that the defect existed at the time it was assembled, and that the evidence was likewise sufficient to support the conclusion that the defect was such as could have been discovered by reasonable inspection. The court in the Northern case cited Hooper v. General Motors Corp., 123 Utah 515, 260 P.2d 549, where it was held that where a wheel and rim separated, causing the wheel to collapse, and the evidence showed loose connections, it was some evidence of a defective wheel at the time of the assembly and some evidence of the cause of the accident, and certainly from such evidence reasonable minds could infer that the wheel was defective at the time of assembly.

What we have heretofore said concerning the applicability of the rule of res ipsa loquitur to the nonsuit as it applies to both defendants is equally applicable to the first cause of action on which the jury found for the defendant.

Since the case must be reversed for the reasons heretofore set forth, it becomes unnecessary to discuss the further questions raised by plaintiff.

The judgment of nonsuit as to the second cause of action and the judgment entered pursuant to the verdict of the jury on the first cause of action are reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

168 Cal.App.2d 135

J. D. MOREHOUSE, S. H. Cornwell and Sons, J. M. Kuykendall, M. Little, M. L. Watkins, William Sario and W. Hansen, Plaintiffs and Appellants,

v.

SHIPMAN LUMBER SERVAES CO. and Rounds Lumber Co., Defendants and Respondents.

Civ. 9436.

District Court of Appeal, Third District, California.

Feb. 20, 1959.

Rehearing Denied March 18, 1959.

Hearing Denied April 15, 1959.

Action against mill operator for services rendered on logs from trees felled by defendant and to impress loggers' liens therefor on lumber sold by mill operator to codefendant. From portions of judgment of the Superior Court, Merced County, R. R. Sischo, J., denying such liens, plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that under provisions of West's Annotated Civil Code, § 3065a, loggers' liens were lost when the logs on which lien claimants had worked were removed from county where such work was done.

Portions of judgment appealed from affirmed.

1. Master and Servant ⇐82(1)

Labor liens are remedial in character, must be liberally construed to effect their purpose, and are particularly favored in equity.

2. Logs and Logging ⇐32

Loggers' liens were lost when the logs or lumber on which lien claimants had worked was removed from county where the work for which liens were claimed was done. West's Ann.Civ.Code, §§ 3065, 3065a.

3. Evidence ⇐20(1)

It is common knowledge that the method of handling and manufacturing logs into lumber has changed radically with the advent of powerful trucking equipment and machinery for use in the woods.

4. Constitutional Law ⇐70(1)

Any change in loggers' lien laws necessitated by change in method of handling and manufacturing logs into lumber is a matter for the legislature and cannot be accomplished by judicial construction of such legislation. West's Ann.Civ.Code, §§ 3065, 3065a.

5. Logs and Logging ⇐26(2)

Truckers would be entitled to loggers' liens against logs transported from woods to lien debtor's mill in another county and against the lumber manufactured therefrom, at least for that portion of trucking services rendered in county to which such logs were transported. West's Ann. Civ.Code, §§ 3065, 3065a.

6. Logs and Logging ⇐33(8)

In action to establish loggers' liens for services rendered in transporting logs from woods to original lien debtor's mill, record supported finding that lien claimants had not shown that logs transported by them had been made into the lumber sold by original lien debtor to codefendant upon which claimants sought to impress their liens. West's Ann.Civ.Code, § 3065.

7. Logs and Logging ⇐33(8)

Where logs received at original lien debtor's mill and lumber cut therefrom were intermingled regardless of source and truckers sought to establish loggers' liens for services rendered in transporting logs from woods to mill against lumber sold by original lien debtor to codefendant regardless of source, lien claimants had the burden of showing that such lumber constituted the product of logs upon which claimants had labored, in absence of showing that owner of such lumber was in any way responsible for or could have prevented the intermingling of logs and lumber by original lien debtor. West's Ann.Civ.Code, § 3065.

8. Logs and Logging ⇐26(2)

Trucker was not entitled under statute to a loggers' lien for transporting lumber which had been manufactured at mill to a point where it was prepared for consumption, even though mill operator employed trucker to transport such lumber to buyer's customers for remanufacture. West's Ann. Civ.Code, § 3065.

Mayes & Courtney, Merced, for appellants.

Marvin J. Colangelo, San Francisco, for Shipman Lumber Servaes Co.

Doyle & Clecak, San Francisco, for Rounds Lumber Co.

VAN DYKE, Presiding Justice.

Plaintiffs and appellants appeal from those portions of a judgment which were in favor of the defendant and respondent Rounds Lumber Co., hereinafter called "Rounds", adjudging that the appellants had no loggers' liens against certain lumber found by the trial court to belong to Rounds and to be located in an area within the lumber yard of the defendant Shipman Lumber Servaes Co., a corporation, hereinafter called "Shipman", at Merced, California, the area being referred to in the proceedings as the "Lawrence Warehouse area". Plaintiffs brought action against Shipman Lumber Servaes Co., for services rendered and sought to impress a lien upon the lumber. They obtained judgment against Shipman, but the court denied the liens. Shipman has not appealed.

Appellants Morehouse, Cornwell, Kuykendall and Little were loggers and small mill operators working in the woods in Madera County. All of them performed various services in that county on logs from trees felled in the woods by Shipman. Almost as soon as the trees were felled they were sawed into log lengths and the logs were either trucked directly to the Shipman mill at Merced or were "canted" in the woods, that is, slabbed on one or more sides, then trucked to the mill. Since, with a few exceptions, all the work for which loggers' liens were claimed was performed in Madera County and since the logs and cants were then taken out of that county and into Merced County, the basic controversy herein arises under the claim of Rounds that under the lien statute the liens

were lost when the logs and cants were moved out of Madera County. We shall consider that contention first.

Section 3065 of the Civil Code provides that:

"Any person who shall, by his own labor, or by using his livestock, machinery or appliances, or both, do or perform any work or render any service in connection with felling, preparing or transporting any logs, or in manufacturing lumber or other timber products from such logs, * * * shall have a lien upon any and all of such logs and upon any and all of the lumber and other timber products manufactured therefrom, whether said work was done or service was rendered on the logs themselves, or any of them, or in manufacturing the lumber or other timber products from them, * * *"

Section 3065a of the Civil Code provides as follows:

"The lien created by the last preceding section shall continue in force for a period of thirty days from the time the person claiming such lien shall have ceased to do or perform the work or render the service for which said lien is claimed, while such logs, lumber or other manufactured timber products are in the county in which such labor was performed or service rendered, and said lien shall cease at the expiration of the said thirty days unless the claimant thereof, * * * brings suit to foreclose the same, in which case the lien continues in force until the said lien foreclosure suit is finally determined and closed, * * * If any part of the property on which the lien existed is removed from the said county, the lien continues on the balance remaining in the county to the full extent of the claim."

[1–4] Section 3065 was adopted in 1905 and amended in 1927. Section 3065a was added in 1927. The latter section appears to have been the subject of appellate decision only once and that was in the case of Virden v. Neese, 66 Cal.App.2d 724, 152 P.2d 761. As to the effect on the lien of the removal of logs or lumber out of the county wherein the work was done, the decision by an obiter dictum states that the lien ceases on removal from the county where the work was done. Bearing in mind the well-settled law that labor liens are remedial in character, must be liberally construed to effect their purpose, and are particularly favored in equity, we have studied the statute with care. We think the language of the statute admits of no construction save that it declares a loggers' lien is lost when the logs or lumber worked upon are removed from the county where the work was done. We are aware that this construction, as of today, renders the statute largely ineffective. It is common knowledge that the method of handling logs and the manufacture of logs into lumber has changed radically with the advent of powerful trucking equipment and powerful machinery for use in the woods. Instead of mills located in the woods whereby the process of making lumber was carried at least to the point of rough lumber manufacture before the materials were hauled out, it is now common for the trees to be felled, prepared for shipment and then trucked as logs or cants to centrally-located mills that may be hundreds of miles from the point where the trees were felled. As the industry is now conducted loggers' liens limited to the county where the work is done are often lost before the next pay day of the laborer. These considerations, however, do not justify a distortion by way of construction of plain legislative provisions. Any needed change in the legislation is for the legislature.

At the time the loggers' liens here under discussion arose a contract existed between Shipman and Rounds whereunder Shipman agreed to sell and Rounds agreed to purchase all of Shipman's output at its Merced mill of certain grades and types of lumber, specifically "the entire output of No. 2 Common through Moulding and better, Ponderosa Pine and Sugar Pine," and "the entire output of No. 3 Shop and better of

California Red and White Fir." The agreement provided that Rounds pay Shipman 80% of the market value of such lumber at the time it was produced, that the lumber so purchased by Rounds under the said contract be placed in a field warehouse in a separate location in Shipman's yard at Merced, and that, as soon as the lumber was placed in the warehouse, title to such lumber passed to Rounds. From time to time Rounds sold the warehoused lumber to various customers throughout California. Under the agreement when lumber was warehoused Lawrence Warehouse Company issued to Rounds negotiable receipts for the lumber received into the warehouse area. As Rounds sold, the lumber was released to Shipman who then transported the lumber to the purchaser.

Concerning these matters the trial court found that the lumber sought to be liened by the plaintiffs was lumber owned by Rounds and located in the Lawrence Warehouse area of the Shipman lumber yard. There is no challenge to the sufficiency of the evidence to support these findings. The trial court also found that the work and services done and performed by Morehouse, Cornwell and Sons, Kuykendall and Little were all done and performed in Madera County after which the logs and cants upon which their services were performed were removed from that county before their liens were filed or this action was begun. There is no challenge as to the sufficiency of the evidence to support these findings also. Under the findings related and under our interpretation of the loggers' lien statutes the above named plaintiffs had no lien upon the lumber belonging to Rounds.

[5] Appellant Sario was a trucker working for Shipman. He hauled logs from Madera County to Shipman's mill in Merced. Hansen's claim was based upon like services. Watkins' claim falls into two classifications. A part of it was for trucking cants from the Madera County woods to Shipman's mill. The balance of his claim was for hauling lumber from Merced and we will treat of that portion of his claim separately. It is obvious that Sario, Hansen and Watkins, for hauling logs and cants from the Madera County woods into Merced County and to Shipman's mill, would have a claim of lien at least for that portion of the service rendered within Merced County unless for some reason they failed to establish their liens at the trial. As heretofore stated, plaintiffs sought to establish their liens on lumber belonging to Rounds and situated in the Lawrence Warehouse area. The basis for the trial court's denying them any lien upon Rounds' lumber was that they had failed to establish and prove that the products of the logs and timber upon which they performed work and rendered services were in the lumber located in the said Lawrence Warehouse area belonging to said Rounds Lumber Company.

[6] As heretofore stated, the agreement whereunder Rounds purchased lumber from Shipman did not provide that Rounds should buy all of the lumber manufactured by Shipman at its Merced mill. The agreement was limited to specified types and grades of lumber. It was in evidence that during the logging season 60% of the logs delivered to Shipman's mill came from sources other than those upon which the appellants performed labor or services, and that as received at the mill all logs and cants were intermingled without regard to source. It was also shown that Shipman followed no particular method or schedule in selecting logs or cants for cutting into lumber, but simply cut whichever were the most convenient from time to time. Shipman testified as to the plan of operation at the mill and the testimony was that the logs and cants to be cut into lumber were selected without regard to origin and that as the lumber was made the boards produced were intermingled. The lumber was graded on the "green chain" by graders placed there for that purpose and the result of grading was that the lumber was further mixed. Finally, the varying grades were removed and stacked in the yard according to grade and species. Some of it went into the Lawrence Warehouse area for Rounds and some of it remained in the yard

for sale and disposal otherwise by Shipman. The record supports the conclusion, and the parties appear to be in agreement, that for the individual lien claimant it would have been extremely difficult, if not practically impossible, to have proved that the lumber in the warehouse area belonging to Rounds came from the logs and cants upon which he had performed labor. So far, therefore, as the proof went the finding of the court that claimants had not shown that the logs and cants upon which they had labored had been made into the lumber that went to Rounds is supported factually by the record.

[7] Appellants contend that since the logs and cants were mixed in the yard regardless of source and the lumber sawed therefrom was further mixed in grading and distribution they are entitled by reason of this mixing to lay their liens upon the whole of the lumber belonging to Rounds and located in the warehouse area at the time they filed their claims of lien and began this action. They argue that Shipman could not destroy their liens by intermingling the logs and cants and the lumber produced therefrom. It is unnecessary to determine whether or not this claim would be good against Shipman. Claimants were not endeavoring to establish a lien against lumber belonging to Shipman. They were endeavoring to establish liens upon the lumber belonging to Rounds. It was not shown that Rounds was in any way responsible for or could have controlled or prevented the intermingling of logs and cants or the mixing of the grades of lumber without regard to source. By Rounds' contract with Shipman it agreed to take certain specified kinds and grades of lumber produced by Shipman without regard to the source of the logs or cants from which the same were cut. Rounds therefore was not estopped to claim that, so far as the lumber belonging to them and located in the warehouse area be concerned, the burden was upon the appellants to establish their lien upon it by showing that it constituted the product of the logs and cants upon which they had bestowed labor.

[8] As we have said, a part of Watkins' claim of lien was for hauling manufactured lumber from Merced to Loomis, Placer County, for remanufacture. The statute does not give a loggers' lien for such services. The lien is given to any person "who shall * * * do or perform any work or render any service in connection with felling, preparing or transporting any logs, or in manufacturing lumber or other timber products from such logs * * *." Such person, says the statute, "shall have a lien upon any and all of such logs and upon any and all of the lumber and other timber products manufactured therefrom, whether said work was done or service was rendered on the logs themselves, or any of them, or in manufacturing the lumber or other timber products from them * * *." The lumber hauled to Loomis by Watkins was lumber belonging to Rounds located in the warehouse area and under negotiable warehouse receipts. So far as the record shows, it did not differ in quality or kind from other lumber purchased by Rounds from Shipman and thereafter sold into the consuming market. However, it appeared that this lumber was released from warehouse certificates to Shipman and that Shipman employed Watkins to haul it to Loomis for remanufacture. As to that lumber, if the statute gave to Watkins a loggers' lien for hauling it then he should have judgment to that effect since there appears to have been no lack of identification in the Loomis yard. But we think the statute did not give a lien for hauling lumber as such after it had been manufactured to a point where it was prepared for consumption merely because the person who purchased it wanted to have it hauled to another point for remanufacture. While, as stated, we have no California authority on the point, yet similar statutes in other jurisdictions have been so construed. See Villenuve v. Sines, 92 Mich. 556, 52 N.W. 1007; McGeorge v. Stanton-De Long Lumber Co., 131 Wis. 7, 110 N.W. 788; Mitchell

v. Page, 107 Me. 388, 78 A. 570; Billings v. Missoula White Pine Sash Co., 88 Mont. 322, 292 P. 714.

Those portions of the judgment appealed from which deny loggers' liens are affirmed.

SCHOTTKY and PEEK, JJ., concur.



168 Cal.App.2d 147

ESTATE of Giovanni VAI, Deceased.

Tranquilla VAI, Petitioner and Appellant,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, as Trustee, etc., Respondent.

Civ. 5920.

District Court of Appeal, Fourth District, California.

Feb. 20, 1959.

Petition was filed in probate proceedings for decree determining interests in estate of deceased. The Superior Court of San Bernardino County, sitting in exercise of its probate jurisdiction, James E. Cunningham, J., entered an "interlocutory judgment" ordering that there be no further trial or hearing on the petition for decree determining interests in the estate until final determination of a pending rescission action, and the petitioner appealed. The District Court of Appeal, Shepard, J., held that the "interlocutory judgment" was a mere interim order attempting to postpone a decision and did not come within purview of appealable probate matters, and that District Court of Appeal had no jurisdiction to consider the appeal.

Appeal dismissed.

1. Appeal and Error ⇐17

The District Court of Appeal cannot entertain an appeal unless right of appeal exists, however much District Court of Appeal might desire to assist parties by determination of issues presented.

2. Appeal and Error ⇐792

Where appeal does not lie, reviewing court has no jurisdiction to entertain appeal and may dismiss appeal on its own motion.

3. Descent and Distribution ⇐71(7)

"Interlocutory judgment" of Superior Court, sitting in exercise of its probate jurisdiction, ordering that there be no further trial or hearing on petition for decree determining interests in estate of deceased until final hearing of pending rescission action was not a refusal to make an order within meaning of section of the Probate Court providing the only specifications of appealable matters in probate cases, but was merely a postponement of the hearing. West's Ann.Prob.Code, § 1240.

4. Executors and Administrators ⇐314(12)

Order of Superior Court sitting in exercise of its probate jurisdiction, refusing to postpone a decree of final distribution of an estate or an order postponing a consideration of the petition for such a decree is not appealable.

5. Mandamus ⇐26

If a court refuses to act at all, or within time prescribed by law, either to grant or to deny relief in a matter in which it is that court's duty to act, writ of mandamus will lie in a proper case.

6. Certiorari ⇐28(2)

If court acts in excess of or beyond its jurisdiction, writ of certiorari will lie in a proper case, and such is true in probate as in other proceedings.

7. Mandamus ⇐4(1)

Mandamus does not lie where in an heirship or distribution proceeding court does, in fact, act by a final ruling that a person contending for an heirship interest has no such interest, since such a final order is appealable. West's Ann.Prob.Code, § 1240.

8. Descent and Distribution ⇐71(7)

"Interlocutory judgment" of Superior Court, sitting in exercise of its probate ju-

risdiction, ordering that there be no further trial or hearing on petition for decree determining interests in estate of deceased until final determination of pending rescission action was a mere interim order attempting to postpone a decision and did not come within purview of appealable probate matters, and District Court of Appeal had no jurisdiction to consider appeal therefrom, and appeal would be dismissed. West's Ann.Prob.Code, § 1240.

Martin & Camusi, Los Angeles, and Kenneth D. Holland, Beverly Hills, for appellant.

George M. Breslin, Michael G. Luddy, Henry G. Bodkin, Jr., E. E. Hitchcock, Los Angeles, for respondent.

SHEPARD, Justice.

In this cause appellant Tranquilla Vai is the widow of the deceased Giovanni Vai. They married in Italy in 1907 and after coming to America as practically penniless immigrants in 1912, acquired substantial community property. In 1953, they signed a property settlement agreement but were never divorced.

14 February 1957, Giovanni died and his will was admitted to probate on petition of the named executors in the superior court of San Bernardino County, where said probate matter is still pending. 18 March 1957 the widow-appellant filed an action in the superior court of Los Angeles County asking for rescission of said property settlement agreement on the ground that appellant was induced to sign it through fraud and coercion. She named as defendants, among others, the executors and the testamentary trustee named by said deceased's will, which is under probate in San Bernardino County. On 9 August 1957 the appellant filed in said probate matter in the San Bernardino superior court her "Petition for Decree Determining Interests in Estate". In the rescission matter in Los Angeles County, said executors were never served but, after appellant's petition for heirship proceedings was filed in the San Bernardino County probate proceedings, said executors and trustee voluntarily appeared in the rescission action in Los Angeles County and the cause was set for trial. The material allegations relating to marriage, acquisition of property, signing of property settlement agreement, fraud, coercion, and appellant's claimed community and heirship interest are substantially the same in both the complaint for rescission in Los Angeles County and the heirship petition filed in probate proceedings in San Bernardino County.

After the rescission case had been set for trial in Los Angeles County, said executors and trustee interposed in the San Bernardino heirship proceedings the plea of "another action pending" by which they sought a temporary order that said heirship proceedings should be suspended until the rescission action in Los Angeles County could be tried and determined. The nature of this allegation was that the Los Angeles County cause had been filed by this appellant, that it was at issue and later to be tried, and that appellant ought not to be permitted to force an heirship proceeding in the probate matter in San Bernardino County until the rescission action which appellant had herself started, initially, in Los Angeles County could be heard and determined. The superior court of San Bernardino County, sitting in exercise of its probate jurisdiction, upheld said plea of the executors and trustee, and signed and filed an "interlocutory judgment" by which it was ordered that there be no further trial or hearing on the "Petition For Decree Determining Interests in Estate" until a final determination of said rescission action now pending in Los Angeles County. In the interim, in order to preserve the status quo of the estate for the protection of appellant, the executors were ordered to make no final distribution of the estate property. From this interlocutory judgment the widow Tranquilla Vai appeals to this court.

Appellant and respondent present well written briefs on the several aspects of alleged priority between the heirship proceeding before the probate court and the

equity action of rescission before the superior court of Los Angeles County, but due to our views respecting the appealability of the so-called interlocutory judgment we deem it fruitless to discuss those matters.

[1, 2] However much this court might desire to assist the parties by a determination of the issues they have presented, this court can not entertain an appeal unless the right of appeal exists. Schlyen v. Schlyen, 43 Cal.2d 361, 367(2), 273 P.2d 897. "Where an appeal does not lie, the appellate court has no jurisdiction to entertain the same, and may dismiss it on its own motion." In re Estate of Murphy, 50 Cal. App.2d 440, 442(3), 123 P.2d 129, 130.

Subdivision 3 of section 963 of the Code of Civil Procedure, subsequently transformed into Probate Code section 1240, provides the only specifications of appealable matters in probate cases except on motions for a new trial. In re Estate of Armstrong, 8 Cal.2d 204, 206(1), 64 P.2d 1093; In re Estate of Schechtman, 45 Cal. 2d 50, 54(5), 286 P.2d 345; In re Estate of Herrington, 79 Cal.App.2d 389, 390(2), 179 P.2d 650.

[3, 4] The so-called "interlocutory judgment" was not a refusal to make an order mentioned in section 1240, Probate Code, but was merely a postponement of the hearing. An order refusing to postpone a decree of final distribution or an order postponing a consideration of the petition for such a decree is not appealable. Johnson v. Superior Court, 102 Cal. App. 178, 191(9), 283 P. 331.

[5–7] The fact that an intermediate order of the type here referred to is not appealable does not mean that an aggrieved party is without remedy. If a court refuses to act at all, or within the time prescribed by law, to either grant or deny relief in a matter in which it is that court's duty to act then a writ of mandamus will lie in proper case. Johnson v. Superior Court, supra, 102 Cal.App. 178, 191(8), 283 P. 331. If the court acts in excess of or beyond its jurisdiction a writ of certiorari will lie in proper case, and this is true in probate as in other proceedings. In re Estate of Kay, 30 Cal.2d 215, 220(3), 181 P.2d 1. Mandamus, of course, does not lie where in an heirship or distribution proceeding the court does, in fact, act by a final ruling that a person contending for an heirship interest has no such interest, for such a final order is appealable. Attorney General of California v. Superior Court, 41 Cal.2d 249, 251(4), 259 P.2d 1; Dockweiler v. Superior Court, 106 Cal.App. 2d 744, 746(1), 236 P.2d 20.

[8] Because we are satisfied that the interlocutory judgment above referred to is a mere interim order attempting to postpone a decision, and does not come within the purview of appealable probate matters, we have no jurisdiction to consider this appeal. It is therefore dismissed.

GRIFFIN, P. J., and MUSSELL, J., concur.



168 Cal.App.2d 169

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Earl DALY, Defendant and Appellant.

Cr. 6390.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1959.

Prosecution for first-degree robbery. The Superior Court, Los Angeles County, Lewis Drucker, J., entered judgment of conviction and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Herndon, J.,

held that question asked alleged victim of robbery on direct examination as to whether he had ever seen defendant to his knowledge since the time of the alleged robbery other than the time he picked him out in a "show-up", was not improper on theory that it was propounded to leave jury with the impression that witness had positively identified defendant as the robber, in view of fact witness previously testified to the circumstances under which he picked out defendant from the line-up and to observations which formed the basis of his identification.

Judgment and order denying motion for new trial affirmed.

1. Criminal Law ⇐706

In robbery prosecution, question asked alleged victim of robbery on direct examination as to whether he had ever seen defendant to his knowledge since the time of the alleged robbery other than the time he picked him out in a "show-up", was not improper on theory that it was propounded to leave jury with the impression that witness had positively identified defendant as the robber, in view of fact witness previously testified to the circumstances under which he picked out defendant from the line-up and to observations which formed the basis of his identification.

2. Criminal Law ⇐730(3)

In robbery prosecution, question asked defendant on cross-examination as to whether or not he had talked with a named individual within a few days prior to the robbery about "pulling some burglaries" would not be deemed prejudicial in view of fact that after defendant answered the question in the negative his counsel interposed an objection and court ordered the answer stricken, sustained the objection and instructed the jury that no inference should be drawn from the question.

3. Robbery ⇐24(3)

In robbery prosecution, evidence as to identification of defendant as the robber was sufficient to sustain conviction.

4. Robbery ⇐26

In a robbery prosecution, identification of defendant need not be positive, but sufficiency of evidence of identification is generally a question for the trier of the facts.

5. Robbery ⇐24(3)

In a robbery prosecution, testimony that a defendant resembles the robber, or looks like the same man is sufficient identification to sustain conviction.

6. Criminal Law ⇐566

Fingerprint evidence is the strongest evidence of identity, and is ordinarily sufficient alone to identify defendant.

7. Criminal Law ⇐977(3)

Where a defendant in a criminal prosecution was sentenced immediately upon disposition of his application for probation, court acted within time prescribed by law, notwithstanding fact that judgment was not entered within 21 days after the verdict. West's Ann.Pen.Code, § 1191.

8. Criminal Law ⇐977(3)

Where defendant in criminal prosecution expressly and voluntarily waived time for sentencing at time he sought leave to apply for probation, he could not contend he was not sentenced within time prescribed by law merely because judgment was not entered within 21 days after the verdict. West's Ann.Pen.Code, § 1191.

9. Criminal Law ⇐977(3)

A defendant may waive his right to be sentenced within the time prescribed by law. West's Ann.Pen.Code, § 1191.

10. Criminal Law ⇐1144(17)

Where record was silent as to reasons for continuances of probation hearing following a verdict finding defendant guilty of offense charged, and record showed no objection by defendant, District Court of Appeal was required to presume that no objection to the continuances was raised, and that any postponement of the hearing was with the sanction of defendant, and therefore defendant could not contend that he was not sentenced within time prescribed by law, even though he was not

sentenced within 21 days after the verdict. West's Ann.Pen.Code, § 1191.

Robert E. Daly, in pro. per.

Edmund G. Brown, Atty. Gen., Arthur C. de Goede, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

A jury convicted appellant of first degree robbery, and found that he was armed with a deadly weapon at the time the offense was committed. He seeks a reversal on three grounds: (1) that the district attorney was guilty of prejudicial misconduct in asking certain improper, leading and suggestive questions; (2) that the evidence is insufficient to support the verdict; and (3) that appellant was not sentenced within the time prescribed by law.

The essential substance of the evidence will be summarized. Douglas Wolfe, a service station attendant, testified that on the night of August 11, 1957, at about 11:00 o'clock, a warning signal directed his attention to the men's restroom. As he entered that room a man's voice informed him that "this was a hold-up" and ordered him to put up his hands. Wolfe obeyed and turned around to observe a man wearing dark glasses, with a handkerchief covering his nose, pointing a revolver at him. The robber took from Wolfe his station keys, one of which fitted the cash box, and ordered him to stay in the restroom five minutes. Wolfe overheard conversation between the robber and another person who apparently was a confederate. After the departure of the criminals, Wolfe found that the cash box had been opened and the money taken therefrom. The telephone cord was broken. Investigating police later found finger prints on the telephone receiver.

Some five months later Wolfe selected out of a line-up of five men two who appeared to have the same general physical characteristics as the robber. After hearing the two men talk, Wolfe designated appellant as the one whose voice resembled the voice of the robber. A detective, whose qualifications were not questioned, testified positively that the finger prints found on the telephone receiver were those of appellant.

[1] Appellant sought to prove an alibi by his own testimony and that of his mother to the effect that he and his fiancée had spent the night in question in the home of his parents. The direct examination of the witness Wolfe included the following: "Q. Had you known the defendant before the date of August 11th, sir? A. No, sir, I hadn't. Q. Had you ever seen him to your knowledge since that time other than the time you picked him out in the show-up? A. No, I hadn't."

Appellant contends that the intended effect of the last quoted question propounded by the deputy district attorney was to leave the jury with the impression that the witness had positively identified appellant as the robber. In view of the fact that the witness had just previously testified to the circumstances under which he had picked out the defendant from the line-up and to the observations which formed the basis of his identification, we fail to see how the question complained of could be regarded as prejudicial. Able counsel representing appellant at the trial offered no objection to it.

[2] Appellant further complains that the district attorney improperly attempted to prejudice him in the eyes of the jury by asking him, on cross-examination, whether or not he had talked with one Sonny Clark within a few days prior to the robbery about "pulling some burglaries". After appellant had answered this question in the negative, appellant's counsel interposed an objection, whereupon the court ordered the answer stricken, sustained the objection and instructed the jury that no inferences should be drawn from the question. There is nothing in the record to indicate that the question was propounded in bad faith, and in the context of the entire record it cannot be regarded as prejudicial.

Appellant complains of a number of other questions propounded by the deputy dis-

trict attorney which he characterizes as leading and suggestive. All of these questions related to matters of detail without any direct bearing upon defendant's guilt or innocence. The failure of appellant's counsel to object to any of these questions indicates that he properly considered the questions in that light.

[3–6] Appellant's contention as to the sufficiency of the evidence relates solely to the matter of his identification as the robber. However, as we stated in People v. Yates, 165 Cal.App.2d 489, 332 P.2d 314, 317: "The identification of the defendant need not be positive. The sufficiency of the evidence of identification is generally a question for the trier of the facts. People v. White, 44 Cal.App.2d 183, 185, 112 P.2d 60; People v. Shaheen, 120 Cal.App.2d 629, 637, 261 P.2d 752; People v. Addington, 43 Cal.App.2d 591, 593, 111 P.2d 356; People v. Richardson, 81 Cal.App.2d 866, 870, 185 P.2d 47. Testimony that a defendant 'resembles' the robber (People v. Richardson, supra) or 'looks like' the same man (People v. Spellings, 141 Cal.App.2d 457, 460, 296 P.2d 889) has been held sufficient." And as the Supreme Court recently stated in People v. Riser, 47 Cal.2d 566, 589, 305 P.2d 1, 15: "Fingerprint evidence is the strongest evidence of identity, and is ordinarily sufficient alone to identify the defendant." See People v. Adamson, 27 Cal.2d 478, 495, 165 P.2d 3.

[7] Finally, we must reject appellant's contention that he was not sentenced within the time prescribed by law. Although section 1191 of the Penal Code requires the trial court to appoint a time for pronouncing judgment "* * * which must be within 21 days after the verdict," it also provides that the court "* * * may further extend the time until the probation officer's report is received and until any proceedings for granting or denying probation have been disposed of." The verdict of the jury in this case was returned on May 8, 1958. Pursuant to appellant's request for leave to file a written application for probation, the trial court referred the matter to the probation department for investigation and report. The hearing on probation and sentence was set for May 29, 1958. After two continuances, the application was heard on June 12, 1958, at which time appellant moved for a new trial upon all statutory grounds. The motion for a new trial and the application for probation were denied, and appellant was sentenced to state prison. It thus appears that appellant was sentenced 35 days after the return of the verdict, and immediately upon disposition of the application for probation. The record is silent as to the reasons for the continuances of the probation hearing. Since appellant was sentenced immediately upon disposition of his application for probation, it is clear that the court acted within the time prescribed by law. Decisions cited by appellant such as Rankin v. Superior Court, 157 Cal. 189, 106 P. 718, are not controlling for the reason that they were decided before the 1951 amendment to section 1191, which expressly conferred upon the trial court the power to extend the time for sentencing until after disposition of probation proceedings.

[8–10] Furthermore, appellant is precluded from asserting this contention for two additional reasons: first, appellant expressly and voluntarily waived time for sentencing at the time he sought leave to apply for probation. It is settled that a defendant may waive his right to be sentenced within the time prescribed by law. People v. Von Moltke, 118 Cal.App. 568, 571–572, 5 P.2d 917; People v. Tenedor, 107 Cal.App.2d 581, 585–586, 237 P.2d 679. Secondly, since the record is silent as to the reasons for the continuances and shows no objection by appellant "[o]n such a record we must presume that no objection was raised and that any postponement was with the sanction of the appellant." Cf. People v. Baker, 164 Cal.App.2d 99, 330 P.2d 240; People v. Lamb, 133 Cal.App.2d 179, 186, 283 P.2d 727.

Accordingly, the judgment and the order denying the motion for a new trial are affirmed.

FOX, P. J., and ASHBURN, J., concur.

168 Cal.App.2d 99

In the Matter of the Guardianship of the Person and Estate of Manuel Joseph JOAQUIN, a Minor.

Carl JOAQUIN, Petitioner and Appellant,

v.

Father Manuel Vieira ALVERNAZ, Petitioner and Respondent.

Civ. 18280.

District Court of Appeal, First District, Division 2, California.

Feb. 18, 1959.

Guardianship proceeding. The Superior Court, Alameda County, A. J. Woolsey, J., entered order appointing guardian for the person and the estate of a minor, and the minor's father appealed. The District Court of Appeal, Dooling, J., held that where mother's will nominated guardian of person and estate of her seven year old son and father had never consented to such nomination, under the statutes the appointment of the guardian for that part of the son's estate coming by will from the mother was proper, but the father, if fit, was entitled to be appointed guardian of person of son and guardian of that portion of son's estate not coming through mother's will, and this was so even though father would place the son to live with son's adult brother and the latter's wife.

Order reversed with directions.

1. Guardian and Ward ⇐11

Under statute giving unqualified right to parent to appoint a guardian by will for the property which minor child may take under that parent's will, mother could appoint by her will a guardian for that part of minor's estate coming by will from the mother, notwithstanding that minor's father had never consented to the appointment. West's Ann.Prob.Code, § 1402.

2. Guardian and Ward ⇐11

Under statute relating to appointment by a parent of guardian of person and estate of minor child with the written consent of the other parent, one parent has no power to nominate by will a general guardian without the written consent of the other. West's Ann.Prob.Code, § 1403.

3. Parent and Child ⇐2(1)

A parent is entitled to custody of minor child over a stranger unless the parent is unfit.

4. Parent and Child ⇐2(1)

A fit parent is not to be deprived of his child's custody because he may be unable to furnish the child a home with him; such parent has the right to custody and the related right of selecting a fit and proper place where the child should be kept and cared for.

5. Guardian and Ward ⇐10, 11

Where mother's will nominated guardian of person and estate of her seven-year-old son and father had never consented to such nomination, under the statutes the appointment of the guardian for that part of the son's estate coming by will from the mother was proper, but the father, if fit, was entitled to be appointed guardian of person of son and guardian of that portion of son's estate not coming through mother's will, and this was so even though father would place the son to live with son's adult brother and the latter's wife. West's Ann.Prob.Code, §§ 1402, 1403.

Charles W. Jennings, Lemoore, for appellant.

Haley, Schenone, Tucker & Birchfield, Hayward, for respondent.

DOOLING, Justice.

Appellant, father of the minor, a boy seven years of age, appeals from an order appointing respondent guardian of the person and estate of said minor. Appellant and the minor's mother were divorced and the custody of the minor had been given to the mother. The mother died in 1957 leaving her entire estate of the value of approximately $20,000 to the minor. By her will she nominated the respondent to be the guardian of her minor son.

The matter was submitted to the court on the oral testimony of appellant and respondent and an extensive report of the probation officer. This report concluded that no substantial unfitness of the father was determined. The probate court made no finding of the father's unfitness and although respondent argues that findings must be presumed to have been waived or are not required (arguments which we need not here consider) he makes no argument that the evidence would support a finding that the father is unfit and we find no substantial evidence of unfitness in the record.

The father frankly stated that if granted the guardianship he would place the boy to live with an adult brother of the minor and his wife because he has no housekeeper and could not look out for the boy himself during his working hours. The probation officer's report includes a finding that the care of the minor in the home of this adult brother and his wife would be adequate. Respondent is a Roman Catholic parish priest and he as frankly stated that he could not take the boy to live with him but would leave him in the Catholic boarding school where he was at the time of the hearing or place him in some similar school if made his guardian.

Because of differences in the statutory law the guardianship of the person and estate must be separately considered.

Probate Code sections 1402 and 1403 govern:

"1402. A parent may appoint a guardian by will * * * for the property of any child of such parent * * * which such child may take from such parent by will or succession."

"1403. Either parent of a legitimate child * * * may appoint a guardian of the person and estate * * * of such child, by will * * * to take effect upon the death of the parent appointing, with the written consent of the other parent, or if the other parent is dead or incapable of consent. * * *"

[1] Section 1402 gives the unqualified right to a parent to appoint a guardian by will for the property which such child may take under that parent's will. Unlike section 1403 it requires no consent of the other parent for such appointment. (24 Cal. Jur.2d, Guardian and Ward, § 53, p. 245.) For the estate left to the minor by his mother the appointment of respondent as guardian of such estate is therefore proper.

[2] Under section 1403 however one parent has no power to nominate by will a general guardian without the written consent of the other (In re Estate of Moore, 179 Cal. 302, 176 P. 461; Matter of Allen's Estate, 162 Cal. 625, 124 P. 237; In re Arkle, 93 Cal.App. 404, 269 P. 689) and the written consent of the appellant was not given in this case.

[3] Under our decisions a parent is entitled to custody over a stranger unless he is unfit. In re Guardianship of Smith, 42 Cal.2d 91, 93, 265 P.2d 888, 37 A.L.R.2d 867.

[4] The only argument which respondent makes on this point is the claim, quoting an isolated statement from In re Guardianship of Willis, 123 Cal.App.2d 446, 266 P.2d 944, and which was not necessary to that decision, that in order to assert his prior right to custody the father must be in a position to have the minor reside with him. It may be remarked that in this respect the guardian actually appointed is equally in no position to have the minor reside with him, but the decisional law is in any event to the contrary. In re Estate of Akers, 184 Cal. 514, 523, 194 P. 706; Guardianship of Mathews, 169 Cal. 26, 145 P. 503. Both cases hold that a fit parent is not to be deprived of his child's custody because he may be unable to furnish the child a home with him. He still has the right to custody "and the related right of selecting a fit and proper place where he should be kept and cared for." In re Estate of Akers, supra, 184 Cal. at page 523, 194 P. at page 710; Guardianship of Mathews, supra, 169 Cal. at page 27, 145 P. at page 504.

[5] It is conceded that the minor has a small estate which did not come through the mother's will. Appellant, if fit, is entitled to be guardian of his son's estate except for

that part coming by will from the mother. In re Estate of Tetsubumi Yano, 188 Cal. 645, 648, 206 P. 995.

The order appealed from is reversed with directions to the probate court: 1. to appoint respondent special guardian of the estate of the minor coming to him from his mother's estate; 2. to take additional evidence on the question of appellant's fitness if respondent desires to produce any and to appoint appellant guardian of the minor's person and of his estate (other than that coming from the estate of his mother) unless evidence is produced satisfying the court of appellant's unfitness to be such guardian.

KAUFMAN, P. J., and DRAPER, J., concur.



168 Cal.App.2d 779

J–J CLUB, INC., dba Ringside, a corporation, Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State of California, Russell S. Munro, Director of the Department of Alcoholic Beverage Control of the State of California, Alcoholic Beverage Control Appeals Board of the State of California, Defendants and Respondents.

Civ. 23077.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1959.

Appeal from an order of the Superior Court of Los Angeles County denying petition for writ of mandate; Bayard Rhone, Judge.

Allan M. Myerson and Alexander Googooian, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for respondents.

HERNDON, Justice.

This is an appeal from an order denying a petition for writ of mandate to compel the Alcoholic Beverage Control Appeals Board to hear and determine the merits of an appeal from a decision of the Department of Alcoholic Beverage Control revoking appellant's "on-sale" liquor license. The controlling issue is the timeliness of appellant's notice of appeal to the Appeals Board; the facts bearing upon said issue are essentially the same as those presented in Pesce v. Department of Alcoholic Beverage Control, 51 Cal.2d 310, 333 P.2d 15.

On the authority of that decision the order here appealed from is reversed.

FOX, P. J., and ASHBURN, J., concur.



168 Cal.App.2d 123

George KITAGAWA, Plaintiff, Cross-Defendant, Appellant and Respondent,

v.

Benton F. WILLIAMS, Defendant, Cross-Complainant, Respondent and Appellant,

Pacific Union Association of Seventh Day Adventists, a corporation, dba Loma Linda Food Company, Cross-Complainant and Appellant.

Civ. 5905.

District Court of Appeal, Fourth District, California.

Feb. 19, 1959.

Action and cross-actions arising out of collision occurring when following vehicle allegedly struck rear of preceding vehicle and shoved preceding vehicle across center

line into path of approaching truck. From judgment and order of the Superior Court of Riverside County, S. Thomas Bucciarelli, J., all the parties appealed. This District of Appeal, Stone, J. pro tem., held that where jury found driver of preceding vehicle to be free of liability as to the owner of the truck, order granting owner of truck a new trial against owner of preceding vehicle as to damages only had effect of finding owner of preceding vehicle conclusively liable and was not within authority of trial court in absence of motion for direct verdict and motion for judgment notwithstanding verdict.

Order granting new trial as to damages only reversed and judgment reversed.

1. New Trial ⇐9

In action and cross actions arising out of collision occurring when following vehicle struck rear of preceding vehicle and shoved preceding vehicle across center line into path of approaching truck, where jury found driver of preceding vehicle to be free of liability as to owner of the truck, order granting owner of truck a new trial against driver of preceding vehicle as to damages only had effect of finding driver of preceding vehicle conclusively liable and was not within authority of trial court in absence of motion for directed verdict and motion for judgment notwithstanding verdict. West's Ann.Code Civ.Proc. § 629.

2. Stipulations ⇐18(7)
Trial ⇐315

In action and cross actions arising out of collision occurring when following vehicle struck rear of preceding vehicle and shoved preceding vehicle across center line into path of approaching truck, where the only evidence of damages presented to jury was stipulation that damage to preceding vehicle was $945.04 and that damage to truck was $14,412.75, verdict awarding $8,000 for damage to truck and $600 for damage to preceding vehicle was reached as result of compromise, and such verdict was not supported by evidence.

Bolton, Groff & Dunne, Los Angeles, for plaintiff Kitagawa.

Mount, Pendleton & Gillaspy, Los Angeles, for defendant Williams.

Herbert G. Staples, Staples & Meifert, Los Angeles, for cross complainant Pacific Union Ass'n of Seventh Day Adventists, a corporation, dba Loma Linda Food Co.

STONE, Justice pro tem.

George Kitagawa was driving his automobile in a southerly direction on U. S. Highway 99 in the vicinity of Thermal, California, on February 9, 1955, at approximately 4 A.M. At this point Highway 99 is a two-lane thoroughfare, one lane for north-bound traffic and the other for south-bound. Just prior to the accident which gave rise to this litigation Kitagawa had slowed his vehicle for the purpose of making a left turn to enter a side road. As Kitagawa slowed his vehicle he observed approaching from the south a tractor-trailer unit owned and operated by Pacific Union Association of Seventh Day Adventists, a corporation, doing business as Loma Linda Food Company, and hereinafter referred to as Loma Linda. Following Kitagawa and also traveling in a southerly direction was a vehicle driven and operated by Benton F. Williams. The Williams vehicle struck the Kitagawa vehicle in the rear and shoved it across the center line and into the path of the north-bound Loma Linda Truck.

Kitagawa filed a complaint naming Williams and Loma Linda as defendants. Williams filed a cross-complaint against Kitagawa and Loma Linda. In turn, Loma Linda filed a cross-complaint naming Kitagawa and Williams as cross-defendants. At the trial no claim was made for damages by reason of personal injuries and the only evidence concerning damages as to all three vehicles was the following stipulation:

"Mr. Staples: With the presenting of this stipulation, which I think should probably be in the record, I will conclude the case for Loma Linda; and that is the stipulation regarding the

damage to the respective vehicles which Counsel have joined in. The damage to the Loma Linda equipment or vehicle was $12,912.75, and an additional item of loss of use damage for that equipment was $1500.00. The damage as to the Kitagawa vehicle was $945.04. The damage to the Williams vehicle was $1263.14. Those items of damage to those vehicles and those parties have been stipulated to.

"The Court: You join in the stipulation?

"Mr. Pendleton: Yes.

"Mr. McGurl: Yes, I believe my office did. I didn't personally. I go along with the stipulation.

"Mr. Staples: With that Loma Linda Food Company rests."

The jury brought in a verdict in favor of plaintiff Kitagawa for the sum of $600 against defendant Williams, but found in favor of defendant Loma Linda. The jury brought in a verdict in favor of cross-complainant Loma Linda for the sum of $8,000 against cross-defendant Williams and found in favor of cross-defendant Kitagawa. The jury found against cross-complainant Williams on his cross-complaint. Cross-complainant Loma Linda and cross-complainant Williams moved for a new trial. Plaintiff Kitagawa made no motion for a new trial. The court denied the motion of defendant and cross-complainant Williams, and granted the motion of defendant and cross-complainant Loma Linda for a new trial but on the issue of damages only. Defendant and cross-complainant Williams appealed from the order granting the new trial on the issue of damages only and also appealed from the judgment. Loma Linda appealed from the judgment and provisionally appealed from the order granting a new trial in the event it did not apply to cross-defendant Kitagawa. Plaintiff and cross-defendant Kitagawa appealed from the order granting a new trial. Kitagawa also appealed from the judgment but in his brief he has withdrawn the appeal and has asked the court to reverse the order granting a new trial and to affirm the judgment.

[1] The appeal from the order granting Loma Linda a new trial as to damages only will be considered first. Loma Linda moved for a new trial as against both Williams and Kitagawa. The order granting a new trial as to damages only does not except Kitagawa and must be construed as an order granting a new trial as to both cross-defendants. The clerk's transcript reflects the following order: "The motion of the cross-defendant and cross-complainant Pacific Union Association of Seventh Day Adventists, a corporation, dba Loma Linda Food Company, be and it is hereby granted on the issue of damages only". The jury found Kitagawa to be free from liability and brought in its verdict that Loma Linda take nothing from him on its cross-complaint. Judgment was entered accordingly. The effect of the order granting a new trial against Kitagawa as to damages only is to reverse the judgment and find Kitagawa conclusively liable. The trial court had no authority to enter a judgment contrary to the verdict of the jury on a motion for a new trial in the absence of a motion for a directed verdict and a motion for judgment notwithstanding the verdict. Code Civ.Proc. Sec. 629. The motion granting Loma Linda a new trial as to damages only must be reversed.

[2] On the appeal from the judgment both Loma Linda and Williams contend that the judgment awarding Loma Linda $8,000 in the face of the stipulation conceding its damages to have been $14,412.75, and awarding Kitagawa $600 in view of the stipulated sum of $945.04, constitutes a compromise verdict. The record before us reflects that the only evidence of damages presented to the jury during the trial was the stipulation set forth hereinabove. There was no testimony nor was there documentary or other evidence upon which the jury could have based its verdict. Once the jury determined the question of liability it had no choice other than to bring in a judgment for Loma Linda in the sum of $14,412.75, and for Kitagawa in the sum of $945.04. Hence we conclude that the jury reached its verdicts as the result of

compromise. Leipert v. Honold, 39 Cal.2d 462, 467, 247 P.2d 324, 29 A.L.R.2d 1185. The judgments must be reversed for the additional reason that there is no evidence to support them. Had there been testimony or receipted repair bills, or evidence of any kind which the jury could have evaluated, this court would accept the finding of the jury. The damages in this case are all special and the amount was fixed as to each party to the action so that it can be demonstrated mathematically that the verdicts are not supported by the evidence.

The order granting a new trial as to damages only is reversed. The judgment is reversed.

MUSSELL, Acting P. J., and SHEPARD, J., concur.



Clarence E. LAMBERT, John F. Lambert, Plaintiffs and Appellants,

v.

SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation; Louis G. Dreyfus, Jr.; Constance Dreyfus Lazear; Isidora D. Parsons; County National Bank and Trust Company of Santa Barbara, a national banking association, as Trustee; Isidora D. Parsons, as Trustee and Constance Dreyfus Lazear, as Trustee, Defendants and Respondents.*

Civ. 23063.

District Court of Appeal, Second District, Division 1, California.

Feb. 24, 1959.

Rehearing Denied March 25, 1959.

Hearing Granted April 22, 1959.

Action by owner of equipment destroyed when such equipment, hired by defendant ranch owner by the hour, punctured gas pipe which ignited. The Superior Court of Santa Barbara County, Ernest D. Wagner, J., sustained gas company's demurrer without leave to amend and equipment owner appealed. The District Court of Appeal, White, P. J., held that equipment described in complaint as a Caterpillar tractor equipped with a bulldozer blade attachment and cable control attachment could not be said to be a "motor vehicle" within meaning of statute providing that negligence of operator of motor vehicle shall be imputed to owner for all purposes of civil damages.

Reversed with directions.

* Opinion vacated 340 P.2d 608.

1. Pleading ⇐216(2)

Each ruling on demurrer must be made upon the facts as stated in pleading which is attacked by demurrer.

2. Pleading ⇐216(1)

In ruling on a demurrer, only the facts pleaded and those of which court may take judicial notice may be considered.

3. Negligence ⇐93(13)

Where owner of equipment, rented by hour to ranch owner, brought action for destruction of equipment resulting when blade thereon struck gas pipeline which ignited and destroyed equipment, and complaint attacked by demurrer described equipment as a Caterpillar tractor equipped with a bulldozer blade attachment and cable control attachment, such equipment could not be said to be a "motor vehicle" within meaning of statute imputing negligence of operator of motor vehicle to owner for all purposes of civil damages. West's Ann. Vehicle Code, § 402.

See publication Words and Phrases, for other judicial constructions and definitions of "Motor Vehicle".

4. Evidence ⇐5(2)

Court was not required to take judicial notice of fact, if it be a fact, that a "Caterpillar D8 tractor equipped with a Bulldozer 8S blade attachment and No. 29 Cable Control attachment" or even the tractor alone without such equipment, is a device which may be propelled, moved or drawn upon a highway. West's Ann.Vehicle Code, § 402.

W. P. Butcher, Frank R. Crandall, Santa Barbara, for appellants.

Schramm, Raddue & Seed, by Edw. W. Schramm, Santa Barbara, for respondent Southern Counties Gas Co. of California.

WHITE, Presiding Justice.

Plaintiffs appeal from a judgment for defendant Southern Counties Gas Company after its general demurrer to the first amended complaint was sustained without leave to amend.

The pertinent allegations of the first amended complaint are that plaintiffs' equipment worth $32,000 was bailed with driver to the defendant ranchowner with the understanding that it was to work by the hour at the direction of the ranch overseer. Early in the second day, the equipment blade hit and punctured defendant Southern Counties Gas Company's high pressure gas pipe less than 15 inches under the surface of the ground, the gas ignited and the plaintiffs' equipment was totally destroyed. The action is against the ranchowner (named only in the first count) and the gas company (named only in the second count) to recover the $32,000 damage caused by the destruction of the equipment and to recover certain other damages alleged.

In the first count, it is alleged that the ranchowner, having made a contract with the gas company many years before for the right of way across the ranch, should have known where the pipe was located and was negligent in directing the work of the plaintiffs' equipment over said pipeline. By stipulation, the ranchowner will not answer until this appeal from the judgment after ruling on the gas company's demurrer is decided.

In the second count, it is alleged that the gas company was negligent in permitting its pipeline to remain so near the surface of the ground.

The general demurrer of the gas company, the defendant named only it Count II of the complaint, was sustained without leave to amend, because of negligence of the ranch overseer alleged in Count I of the complaint and imputed to the plaintiffs, the owners of the equipment, under Section 402 of the Vehicle Code of California.

Said Section 402 provides in part that "Every owner of a motor vehicle is liable and responsible for the * * * injury to * * * property resulting from negligence in the operation of such motor vehicle * * * by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

First, appellants' claim that it was error to classify the appellants' equipment as a motor vehicle will be considered. Respondent gas company relies upon the decision in Behling v. County of Los Angeles, 139 Cal.App.2d 684, 294 P.2d 534, and particularly the language of Mr. Justice Fourt, speaking for this court at pages 687 and 688 of 139 Cal.App.2d, at page 537 of 294 P.2d, where he said: "Tested by the definitions heretofore set forth, it is apparent that a bulldozer is a motor vehicle within the commonly understood meaning thereof * * * Had the Legislature been so minded to exempt such equipment from the provisions of the code (Vehicle Code, Sec. 400), wherein the operation of such equipment might bring about liability to a political subdivision, such as a county, it could have done so easily. It did not do so."

In the Behling case, supra, the plaintiff sought damages for personal injuries caused by the negligent operation of the County's bulldozer in connection with road work. Judgment for defendant was reversed with instructions that its demurrer to the complaint be overruled. The allegations of the complaint in the Behling case, supra, are not stated in the opinion.

[1] Each ruling on demurrer must be made upon the facts as stated in the pleading which is attacked by the demurrer.

Paragraph I of the First Count is identical with Paragraph I of the Second Count of the First Amended Complaint in the instant action. Those paragraphs contain the only description of appellants' said equipment to be found in the complaint, and they read as follows: "That plaintiffs at all times herein mentioned were the

owners of a Caterpillar D8 tractor equipped with a Bulldozer 8S blade attachment and No. 29 Cable Control attachment; that hereinafter said equipment will be referred to as plaintiffs' bulldozer."

The Vehicle Code, Section 31, defines a "vehicle" as "a device in, upon or by which any person or property is or may be propelled, moved or drawn upon a highway, excepting a device moved by human power or used exclusively upon stationary rails or tracks." Section 32 provides that a motor vehicle is a "vehicle which is self-propelled".

The agreement between plaintiffs and said ranchowner alleged in said First Amended Complaint was that said bulldozer was to be used "on said Eagle Canyon Ranch for a period of six days". It is also alleged that U. S. Highway 101 "extends across" said ranch; that approximately 300 feet north of said Highway 101, also crossing said ranch, is "an old and abandoned paved portion of what used to be many years ago, the old state coast highway"; that there is a private ranch dirt road intersecting said old coast highway and running north to the ranch buildings; that the bulldozer would be delivered to the private ranch dirt road where it intersects the old abandoned coast highway; that the equipment was delivered to that point as agreed; and that the equipment was used on said Eagle Canyon Ranch according to said agreement for one day and a portion of another before the striking of the gas pipe.

The appellants' equipment involved in the instant action is concededly "self-propelled". Appellants urge that it is not a device "in, upon or by which any person or property is or may be propelled, moved or drawn upon a highway".

[2] In ruling on a demurrer only the facts pleaded and those of which the court takes judicial notice may be considered. Southern Pac. R. Co. v. Wood, 124 Cal. 475, 57 P. 388; Livermore v. Beal, 18 Cal. App.2d 535, 539–540, 64 P.2d 987; Chavez v. Times-Mirror Co., 185 Cal. 20, 23, 195 P. 666.

Therefore, the further characteristics of plaintiffs' equipment described by them in their opening brief and claimed to negative any finding that said equipment is a motor vehicle have not been considered by this court in connection with the instant appeal.

[3] A meticulous reading and rereading of the complaint fails to find any allegation that plaintiffs' said equipment was a "motor vehicle" or a "device in, upon or by which any person or property is or may be propelled, moved or drawn upon a highway". There is no allegation that the equipment ever had been so used, and the agreement set forth is that the equipment was intended to be and was used only upon the ranch.

According to Webster's New International Dictionary, a bulldozer is "an upsetting machine, as a forging or bending press. The ram slides in a horizontal path and is actuated by a pair of powerful cranks and connecting rods."

[4] The courts are not required to take judicial notice of the fact—if it be a fact—that "a Caterpillar D8 tractor equipped with a Bulldozer 8S blade attachment and No. 29 Cable Control attachment", or even "a Caterpillar D8 tractor" without such other equipment is a device which "may be propelled, moved or drawn upon a highway".

Because of our decision above stated, it is not necessary to consider appellants' contention that the court erred in considering the allegations of the first count, or of a superseded complaint, in connection with the demurrer of a defendant named only in the second count of plaintiffs' first amended complaint.

The judgment is reversed with directions to overrule the general demurrer of defendant gas company, allowing a reasonable time within which said defendant may file its answer if so advised.

FOURT and LILLIE, JJ., concur.

168 Cal.App.2d 142

Royal LEONARD, Plaintiff, Appellant and Respondent,

v.

Michael J. HERMRECK and James B. Easter et al., Defendants, Respondents and Appellants.

Civ. 5789.

District Court of Appeal, Fourth District, California.

Feb. 20, 1959.

Action by subcontractor against prime contractors for amount allegedly due on construction contract and for conversion of subcontractor's hauler, wherein prime contractors made motions for nonsuit and subcontractor moved for dismissal of prime contractors' counterclaims. The Superior Court, Riverside County, S. Thomas Bucciarelli, J., granted both motions and both parties appealed. The District Court of Appeal, Stone, J. pro tem., held that where subcontractor furnished loader and trucks which took dirt from pit and hauled it to places on highway roadbed subcontractor was a contractor within statute defining contractor as any person who undertakes to add to highway and subcontractor was not entitled to maintain suit under contract in view of fact that subcontractor had no contractor's license at time he executed contract or while he was performing work pursuant thereto, but that cause of action for alleged conversion by prime contractors of subcontractor's hauler after termination of contract was not barred and that, in view of fact that it was impossible to determine whether prime contractors' counterclaims related in some degree to matters occurring subsequent to termination of contract, counterclaims should have been, litigated.

Judgment of nonsuit on subcontractor's cause of action on contract affirmed, judgment of nonsuit on cause of action for hauler reversed, and judgment of dismissal of counterclaims reversed.

1. Licenses ⇐39.43

Where subcontractor furnished loader and trucks with drivers which took dirt from pit and hauled it to places on highway roadbed and subcontractor agreed to comply with engineering plans and drawings for construction of freeway, subcontractor was a "contractor" within statute defining contractor as any person who undertakes to add to highway and subcontractor was not entitled to maintain suit against prime contractors for amount allegedly due for services performed under contract in view of fact that subcontractor had no contractor's license at time he executed contract or while he was performing work pursuant thereto. West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7031.

See Publication Words and Phrases for other judicial constructions and definitions of "Contractor".

2. Trover and Conversion ⇐4

Fact that relationship between subcontractor and prime contractors was founded upon an illegal contract because subcontractor did not have a contractor's license did not, upon termination of relationship, give prime contractor right to appropriate property belonging to subcontractor. West's Ann.Bus. & Prof.Code, §§ 7028, 7031.

3. Licenses ⇐39.44

Action against prime contractors for conversion of loader of subcontractor whose contract with prime contractors was illegal because subcontractor had not had a contractor's license was not barred by statute prohibiting recovery on construction contract by person who does not have a contractor's license in view of evidence indicating that contractual relationship had terminated when prime contractors commenced using subcontractor's equipment for their own purposes. West's Ann.Bus. & Prof. Code, §§ 7028, 7031.

4. Contracts ⇐138(1)

Where it was impossible to determine from record whether counterclaims of prime contractors against subcontractor related solely to matters arising pursuant to illegal contract entered into between parties or whether they related in some degree to matters occurring subsequent to termination of contract, counterclaims should have been litigated and a factual determination made

and judgment of nonsuit should not have been granted subcontractor with respect to counterclaims on basis that contract was illegal and parties were in pari delicto and neither could recover.

Fred W. Chase, Glendale, for plaintiff.

A. W. Swarner, Riverside, for defendants.

STONE, Justice pro tem.

The defendants were awarded a contract to construct a section of State highway known as the Colton Freeway Project. Subsequently, they entered into a subcontract dated November 21, 1955, with the plaintiff who agreed to haul approximately 220,000 tons of dirt from the Portland Cement pit to the roadbed of the freeway between certain designated stations. The contract rate to be paid plaintiff was 7½ cents per ton. By the terms of the subcontract plaintiff agreed to furnish trucks and drivers while the defendants agreed to furnish loaders. The agreement was modified by a written instrument dated November 30, 1955, whereby plaintiff agreed to furnish the loader and defendants agreed to increase the price per ton from 7½ cents to 11 cents for all dirt hauled. The plaintiff had no contractor's license at the time he executed the contracts nor while he was performing work pursuant to the contracts. For reasons which are not material to the issues before us the plaintiff ceased work before the contract was completely performed. He commenced an action against the defendants based upon two causes of action. The first was in the nature of a common count for the value of services rendered to defendants, and the second was for damages by reason of defendants' alleged wrongful detention and use of plaintiff's loader. At the conclusion of plaintiff's case the defendants made a motion for nonsuit upon the ground that plaintiff had no contractor's license. The motion was granted, a judgment was entered pursuant thereto, and the plaintiff appeals from that judgment.

At the time the court granted the motion for nonsuit plaintiff moved for a dismissal of defendant's counterclaim. The court, remarking that the parties were in pari delicto, granted the motion. The defendants appeal from the judgment dismissing their counterclaims.

Business and Professions Code section 7028 makes it unlawful for any person to act in the capacity of a contractor within this state without a license therefor. Section 7031 of the same code provides as a civil penalty a bar to maintaining an action if a license is required. Section 7031 provides:

> "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

Therefore if plaintiff was acting as a contractor and without a license the motion for nonsuit was properly granted as to the first cause of action. The term "contractor" is defined in Business and Professions Code section 7026 as "any person, who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. The term contractor includes subcontractor and specialty contractor."

[1] The plaintiff furnished a loader and trucks with drivers which took dirt from a "pit" and hauled it to designated places on the highway roadbed where it was dumped. Plaintiff contends that he did not come with-

in the provisions of section 7026 because he did nothing except deposit dirt on the roadbed, and that the grading, tamping and other work was performed by defendants and at defendants' direction. However, plaintiff did "subtract from the pit" and he "added to and improved" the highway, which brought his work within the provisions of the section. Furthermore, the contract between the parties in which defendants are designated as general contractors and plaintiff as subcontractor provides that:

> "The Subcontractor agrees to complete the above work in a workmanlike manner ready for use and in good operating condition, in accordance with the general conditions, special provisions, specifications and drawings for the aforesaid Project, all as prepared by the Owner, and for which Project public bids were received by the Owner * * *; it is further agreed that the aforesaid general conditions, special provisions, specifications and drawings now become a part of This Subcontract with which the Subcontractor agrees to comply."

Clearly, by agreeing to comply with the engineering plans and drawings for the construction of the freeway plaintiff became more than a mere conveyor of dirt (Lewis & Queen v. N. M. Ball Sons, 48 Cal.2d 141, 150, 308 P.2d 713.) The motion for nonsuit was properly granted as to the first cause of action.

The second cause of action is based upon conversion of plaintiff's loader. It is alleged that when the plaintiff ceased work on the project on January 26, 1956, the defendants wrongfully took his loader and refused to deliver possession of it to him until July 1, 1956. The complaint also alleges that plaintiff not only suffered loss of use but that the equipment was damaged by the defendants. These alleged wrongful acts of defendants occurred after the relationship created by the contract had terminated. Reviewing the record insofar as it relates to the second cause of action, disregarding the conflicts in the evidence and indulging in every legitimate inference favorable to the plaintiff, we find substantial evidence to support the allegations of the complaint. Perera v. Panama-Pacific Int. Exp. Co., 179 Cal. 63, 64, 175 P. 454; Downey v. Santa Fe Transportation Co., 134 Cal.App.2d 720, 728, 286 P.2d 40.

[2, 3] The second cause of action is not founded upon an illegal contract and therefore is not barred by section 7031 of the Business and Professions Code. Defendants argue that the transaction to which the second cause of action pertains is tainted with illegality because it emanated from a relationship which was illegal in its inception. There is evidence in the record indicating that the relationship had terminated when defendants commenced using plaintiff's equipment for their own purposes. The fact that there had been a relationship founded upon an illegal contract did not, upon termination of the relationship, give the defendants the right to appropriate property belonging to the other party to the contract. Defendants' conversion of plaintiff's property was wrongful insofar as the pleadings are concerned, and the evidence, when viewed in the light of a motion for a nonsuit, supports the pleadings sufficiently to justify completely trying the issue.

[4] The defendants have appealed from judgment of dismissal of their counterclaims. The dismissal was entered by the court upon motion of plaintiff upon the ground the contract being illegal the parties were in pari delicto and neither could recover. As pointed out hereinbefore, the second cause of action does not stem from the illegal contract but upon alleged actions of defendants after the contract was abandoned. The defendants presented no evidence in support of their counterclaims because the motion for nonsuit was granted. It it impossible to determine from the record whether the counterclaims relate solely to matters arising pursuant to the illegal contract or whether they relate in some degree to matters occurring subsequent to the termination of the contract. Therefore, the counterclaims must be litigated and a factual determination made in the trial court.

The judgment of nonsuit of plaintiff's first cause of action is affirmed. The judgment of nonsuit of plaintiff's second cause of action is reversed. The judgment of dismissal of defendants' counterclaims is reversed.

MUSSELL, Acting P. J., and SHEPARD, J., concur.



168 Cal.App.2d 151

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Melvin Joseph CONERLY and George Henry Hilton, Jr., Defendants.

George Henry Hilton, Jr., Appellant.

Cr. 6100.

District Court of Appeal, Second District, Division 1, California.

Feb. 24, 1959.

Prosecutions for burglary. The Superior Court of Los Angeles County, Kenneth C. Newell, J., entered judgments of conviction of second degree burglary and order denying motion for new trial and one of the defendants appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain defendant's conviction and witness who allegedly received stolen goods from defendant was not an accomplice of defendant within meaning of rule that testimony of an accomplice must be corroborated.

Affirmed.

1. Larceny ⇐64(1)

While possession of property recently stolen is not, standing by itself, sufficient to support a conviction, nevertheless it is a circumstance which, unexplained, is strongly indicative of guilt, and where this circumstance is established only slight other evidence is required to sustain a conviction.

2. Criminal Law ⇐1159(2)

Unless testimony found to be true by a duly constituted arbiter of fact is inherently improbable, an appellate tribunal is not authorized to substitute its judgment for that of the trier of fact.

3. Burglary ⇐41(1)

Evidence was sufficient to sustain conviction of second degree burglary. West's Ann.Pen.Code, § 459.

4. Criminal Law ⇐507(5)

Where person was being prosecuted for offense of burglary, witness who allegedly received stolen goods from defendant was not an accomplice of defendant within meaning of rule that testimony of an accomplice must be corroborated. West's Ann.Pen.Code, § 1111.

Rufus W. Johnson, Santa Barbara, for appellant.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an amended information filed by the District Attorney of Los Angeles County, defendants were jointly charged in Count I with the crime of burglary (Penal Code, sec. 459) in that on or about May 2, 1957, in Los Angeles County, they entered the clothing store of Hubert Ewart and Robert Ewart with intent to commit theft. Count II charged the crime of grand theft (Penal Code, sec. 487, subd. 1) in that on or about May 2, 1957, in the County of Los Angeles, they feloniously took certain men's suits of the value of $15,000, belonging to Hubert Ewart and Robert Ewart.

As to defendant Hilton it was also charged that he had previously been convicted of three felonies in the courts of this state, viz., manslaughter, violation of Vehicle Code, section 503, and receiving stolen property. These prior convictions were admitted. Defendants pleaded not guilty. Tried by a jury, they were convicted of burglary as charged in Count I,

which the jury found to be burglary of the first degree. They were acquitted of the offense of grand theft as charged in Count II. Their motion for a new trial was denied, but the court reduced the degree of the burglary from first to second degree. Defendants were sentenced to state prison. From the judgment of conviction and the order denying his motion for a new trial, defendant Hilton prosecutes this appeal.

Concerning the factual background surrounding this prosecution, the record reflects that on May 1, 1957, an employee of the Ewart Clothing Store in Pomona, Los Angeles County, was the last person to leave there. Before departing he saw that the upstairs was securely locked and that the front and rear doors downstairs were also locked. He departed through the front door on Second Street and was the last person out of the store.

At approximately 3 o'clock on the morning of May 2, 1957, Officers William C. Julian and Donald P. Burke of the Pomona City Police Department were on routine patrol in a police car. While eastbound through the alley south of Second Street going towards the block in which Ewart's Clothing Store is located, Officer Julian observed an automobile turn into the alley from Main Street. This automobile was headed west. The automobile did not stop in the alley behind Ewart's but proceeded past there, came out of the alley and turned north. The officers stopped the automobile, a 1947 Chevrolet two-door sedan, and discovered defendants Conerly and Hilton therein with Conerly driving.

Conerly was wearing a light brown checked sport jacket, similar to People's Exhibit No. 11, and sport trousers. Officer Julian asked Conerly for his operator's license, and, after he produced that, asked him why was he in the alley. Conerly stated that he and Hilton were looking for the address of a friend, but apparently had gotten lost. Conerly was given a citation for carrying an improper driver's license. Officer Julian noticed that the rear seat was out of the car and asked Conerly if he would open the trunk so they could see inside. The officer noticed that the trunk of the car was quite clean.

Officer Burke asked Hilton where they (Conerly and Hilton) were going, and was informed they were looking for a place called "Cookie's". The officers knew where Cookie's was and furnished defendants Conerly and Hilton with directions as to how to reach there. The officers followed Conerly and Hilton to Cookie's, waited around a little bit, and a few minutes later followed them until they left town.

Mr. Hubert Ewart was a co-owner of Ewart's Clothing Store. On the morning of May 2 he arrived at the store about 8:00 o'clock. The back door of the store was unfastened. The bar of the lock had been chipped in two. There were about 400 suits missing from the clothing racks that morning and two different stacks of suits had been placed near the back door. A hole had been chopped in the roof of the building, making an opening from the roof down into a storage room on the second floor. This hole had at one time been an opening which people used to go in and out of but it had been boarded up for at least two years. The ceiling side of this opening from the roof into the storage room had been sealed with building paper prior to May 1, but on the morning of May 2, there was a hole in this ceiling.

Harvey Densel King was a dry cleaner, operating a place of business at 4455 Avalon Boulevard, Los Angeles. About 2:00 p. m. on May 3, 1957, King had a conversation with defendant Hilton at King's shop regarding the purchase of suits. Hilton stated he had "a bunch" of suits and King stated he would look at them that night. That night between 10:00 p. m. and 11:00 p. m. Hilton and Conerly brought the suits in a pick-up truck. There was a woman in the truck, but King never did see who this woman was. King was alone in the shop and Conerly and Hilton brought in the suits an armload at a time. King checked the suits and observed that "they had Ewart's label, Ewart's, Pomona." The next morning defendants Conerly and Hilton came to the shop and King "paid them

$2500 and $50 in hundred dollar bills, $50 bills, and $20 bills." They both took the money and counted it out together.

Donald M. Whitehead was a police officer of the City of Pomona and one of the investigating officers in the case. On the morning of May 2, Officer Whitehead found certain clothing fibers (People's Exhibit No. 13) clinging to portions of the wood at the point of entry into Ewart's Clothing Store. On May 6, 1957 Officer Whitehead called at defendant Conerly's home in San Bernardino. There he discovered a jacket hanging in a clothes closet. From this jacket he took certain fibers (People's Exhibit No. 12) and transported them to the Sheriff's crime laboratory. Officer Whitehead received a report that the fibers found adhering to the point of entry were quite similar in color and characteristics to the fibers in a coat which the report spoke of as coat X–1. Coat X–1 was the coat removed from the home of defendant Conerly.

On May 7, 1957, Officer Whitehead called at King's place of business. At King's establishment and at two other places to which the officer was directed by King the officer recovered 158 or 159 suits. Mr. Ewart was called to come in and pick up the suits. He proceeded in the company of an officer to the 4400 block on Avalon in Los Angeles (King's establishment) and there met with Officer Whitehead and other officers. He saw a number of suits that he recognized. The 158 or 159 suits were returned to Ewart's in Pomona. The wholesale value of the suits found missing from the store was $10,572.43.

Sworn as witnesses in their own behalf, both defendants denied any knowledge of the burglary here in question, and denied selling any suits of clothing to Harvey D. King. They admitted their presence in Pomona as testified to by the police officers, but declared they were there "* * * looking for a little gambling" at Cookie's place. Defendant Hilton testified that the rear seat was removed from the automobile because it was used as a work car.

Defendant Hilton further testified that about 8:00 p. m. on Friday, May 3, 1957, he, defendant Conerly, Mattie Bruce, and one Ira E. Bluford had been at a store in Colton, California. That they went from Colton to Riverside, arriving about 9:00 p. m., and from Riverside to San Bernardino. He testified that he, Mattie Bruce, Laura Roberson, and J. C. Roberson, her husband, then had gone from San Bernardino to visit one Sally Dickson at Pear Blosson, arriving about 12:00 midnight. Pear Blossom is about fifty miles from San Bernardino. Defendant Conerly testified that he had been with Hilton at the store in Colton around 8:00 p. m., that he had parted with Hilton in San Bernardino, about 9:30 p. m., and that he had gone to his house and stayed home the rest of the night. Defendant Conerly further testified that from 8:00 a. m. until 11:00 a. m. the next day he had been with his mother downtown in San Bernardino.

Laura Roberson testified that Hilton and Mattie Bruce had come to her house in San Bernardino about 10:00 p. m., May 3, that she, her husband, defendant Hilton, and Mattie Bruce had gone to Pear Blossom, arriving between 11:30 p. m. and 12:00 midnight, that they left Pear Blossom about 2:00 a. m., returning to her home in San Bernardino, that she and Mattie Bruce had left her husband and defendant Hilton asleep in the car at her home, and that Hilton and Mattie Bruce had left her home about 8:30 a. m. The testimony of Mrs. Roberson was corroborated by her husband.

Sally Dickson testified that defendant Hilton, Mattie Bruce and Mr. and Mrs. Roberson had arrived at her place at Pear Blossom between 11:00 p. m. and 12:00 midnight May 3, 1957 and had left about 2:00 a. m. Beryl Guthridge testified that he was a shoe salesman at Willet's Department Store in Colton and had sold defendant Conerly shoes about 8:00 p. m., on May 3. Mary S. White testified that she was the mother of defendant Conerly, that on May 3, 1957 he had come home about 10:00 p. m., that he had stayed home the rest

of that night, and that he had been downtown in San Bernardino with her the next morning. Ira Bluford testified that from about 6:00 p. m. until about 9:30 p. m., May 3, 1957, he was with defendants Conerly and Hilton in San Bernardino, in Colton, and in Riverside.

On cross-examination it was brought out that defendant Conerly was the son-in-law of the witness, J. C. Roberson. It was also revealed that defendant Hilton owned a 1950 Chevrolet convertible coupe and that he had not loaned this vehicle to anyone on May 2, 3, 4, 5, 1957. Also, that the automobile was green with a black top.

On rebuttal, Mary King testified that she was the wife of Harvey D. King and conducted a cleaning business under the name of Kay Dry Cleaners. She testified that on May 3, around noon, defendant Hilton came to the shop, asked for her husband, and then went to the back of the shop where her husband was. She further testified that she observed the car that defendant Hilton got out of, noticed that it was a beige or yellow convertible with no top, and wrote down the license number, HPA–263. She stated there was another man in the car. She did not notice the make of the automobile. Mr. James Beard testified that he was an automobile salesman and that in March of 1957 he had sold to defendant Hilton a green 1950 Chevrolet convertible license No. HPA–263.

On surrebuttal, defendant Hilton testified that the 1950 Chevrolet automobile was green in color, that he had not been at the Kay Cleaners on the morning of May 3, and that he had never seen Mrs. King before the day of the trial.

[1] As his first ground for reversal of the judgment and order, appellant Hilton contends that the evidence was insufficient to sustain the guilty verdict. In support of this claim he argues that the exact time the burglary was committed is not shown by the evidence. From which, he urges, there is no evidence to establish as a fact whether or not the burglary had or had not been committed at the time the Pomona police officers encountered appellant Hilton and his co-defendant on the early morning of May 2, 1957. That the mere presence alone in the vicinity where a burglary was committed on the date of its commission is insufficient to establish guilt of such burglary. However, appellant overlooks other direct and circumstantial evidence in the record of an incriminatory character. We deem it unnecessary to here repeat the evidence which we have narrated herein. Suffice it to say that on the very next day following the burglary, appellant and his co-defendant were in possession of the stolen goods which they sold to a dry cleaner for $2,550 when the established wholesale value of such goods was $10,572.43. People v. Buratti, 96 Cal.App.2d 417, 419, 215 P.2d 500; People v. Conrad, 125 Cal.App.2d 184, 186, 270 P.2d 31. While it is true, as urged by appellant, that mere possession of property recently stolen is not, standing by itself, sufficient to support a conviction, nevertheless, it is a circumstance which, unexplained, is a circumstance strongly indicating guilt (People v. Jackson, 146 Cal.App.2d 553, 555, 556, 303 P.2d 767). And, where this circumstance is established, only slight other evidence is required to sustain a judgment of conviction (People v. Wiley, 8 Cal.App.2d 135, 136, 46 P.2d 817). The jury was also authorized to conclude that when considered in the light of other proven facts and circumstances, it was more than a mere coincidence that appellant and his co-defendant were discovered by the police in the alley behind the burglarized premises on the night of the crime and that fibers adhering to the wood at the point of entry into the building were disclosed by laboratory tests as "quite similar in color and characteristics to the fibers in a coat belonging to defendant Conerly".

[2, 3] Appellant complains that, "The testimony of witnesses for the defendants was completely disregarded. Their testimonies, exclusive of the defendants themselves, proved conclusively that the testimony of Harvey Densel King was false"

That the testimony of witnesses for the defense was not accepted by the jury is of course manifest, but as conceded by appellant in his brief, "However, we are aware of the fact that the question of the credibility of witnesses is for the court below and not for the Appellate Court to determine". It is axiomatic that unless the testimony found to be true by the duly constituted arbiters of the facts is inherently improbable, an appellate tribunal is not authorized to substitute its judgment for that of the triers of fact. No such claim of inherent improbability is urged in the case at bar.

[4] Finally, appellant contends that the witness, Harvey D. King, was an accomplice, and that "the trial court erred in failing to instruct the jury on the law governing testimony of accomplices". Although the instructions requested, given and refused have not been brought here on this appeal in compliance with Rule 33(b) (1) (b) of the Rules on Appeal, even though we assume that the jury was not instructed that the testimony of an accomplice must be corroborated (Penal Code, sec. 1111), the failure to give such an instruction was proper. Appellant's contention to the contrary is answered by the language of our Supreme Court in People v. Raven, 44 Cal.2d 523, at pages 526, 527, 282 P.2d 866, at page 868, wherein it is said:

"The next question is whether the court erred in refusing to instruct the jury that defendant could not be convicted on the uncorroborated testimony of Diggs. Section 1111 of the Penal Code provides that a 'conviction cannot be had upon the testimony of an accomplice unless it be corroborated' and defines an accomplice as 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' It is settled that the thief and the one knowingly receiving stolen property from him are guilty of distinct and separate substantive offenses and are not accomplices of each other. (Citing cases.) An exception to the rule is recognized when the thief and the receiver conspire together in a prearranged plan whereby one is to steal and the other is to buy. (Citing cases.) The evidence here however, does not warrant a conclusion that defendant and Diggs entered into such a conspiracy, and, accordingly, no corroboration of the testimony of Diggs was required." See also People v. Hamilton, 143 Cal.App.2d 305, 309, 310, 299 P.2d 716, and People v. Conrad, 125 Cal.App.2d 184, 185, 186, 270 P.2d 31.

In the instant case, the record clearly reveals that the witness Harvey D. King was not the accomplice of appellant and the latter's co-defendant in the crime of burglary.

For the foregoing reasons, the judgment and the order denying appellant Hilton's motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.



168 Cal.App.2d 174

Beatrice N. DE STACKELBERG and La Verne J. Woodworth, Plaintiffs and Appellants,

v.

LAMB TRANSPORTATION CO., a Corporation, Doe One, Doe Two and Doe Three, Defendants.

Lamb Transportation Co. and Edwin Earl Robinson, Respondents.

Civ. 23284.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1959.

Rehearing Denied March 27, 1959.

Hearing Denied April 22, 1959.

Consolidated action was brought by four occupants of automobile against owner of truck and others for injuries sustained

by occupants of automobile when automobile ran into rear of truck after truck came out of driveway. The Superior Court of Los Angeles County, Kenneth E. Sutherland, J., entered judgment adverse to the four occupants of the automobile, and two of them appealed. The District Court of Appeal, Herndon, J., held that evidence justified giving of instructions on defense of contributory negligence of occupants of automobile in riding with driver of automobile knowing him to be allegedly intoxicated.

Judgment affirmed.

1. Automobiles ⇐246(58)

In consolidated actions by occupants of automobile against owner of truck for injuries sustained by occupants of automobile when automobile struck rear of truck after truck came out of driveway, wherein owner of truck contended that occupants of automobile were guilty of contributory negligence in riding in the automobile knowing that driver of automobile was allegedly intoxicated, evidence justified the giving of instructions on two aspects of defense of contributory negligence.

2. Appeal and Error ⇐882(12)

Assertion of error by appellants in form of appellant's requested instruction given by trial court would invoke doctrine of invited error.

3. Witnesses ⇐62

In consolidated actions by occupants of automobile against owner of truck for injuries sustained by occupants of automobile when automobile struck rear of truck after truck came out of driveway, testimony of truck driver's estranged wife in favor of occupants of automobile was properly excluded as incompetent under statute preventing a wife from testifying against her husband without his consent, though the two occupants of the automobile who complained of the exclusion of such testimony had not joined the truck driver as a defendant, and though wife's testimony would allegedly have been admissible if truck driver had not been made a defendant, where truck driver was clearly identified and designated as a party defendant in the action by terms of pretrial conference order, and the complaints of all occupants named the truck driver and stated primary causes of action against him, and in two of the complaints he was joined as a defendant. West's Ann. Code Civ.Proc. § 1881.

4. Trial ⇐9(1)

Pretrial conference order supersedes the pleadings to the extent of any inconsistencies and controls the subsequent course of the case. Superior Court Rules, rule 8.8.

5. Appeal and Error ⇐1064(1)

In consolidated actions by occupants of automobile against owner of truck for injuries sustained by occupants of automobile when automobile struck rear of truck after truck came out of driveway, giving of allegedly erroneous instruction that general human experience justifies the inference that when one looks in direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible, was not prejudicial error.

Demler & Eckert and Edison J. Demler, Long Beach, for appellants.

Ball, Hunt & Hart, Joseph A. Ball, Long Beach, for respondents.

HERNDON, Justice.

On July 20, 1955, at about 4:15 a. m., on Alameda Street in Los Angles County, an automobile driven by Roy Nelson collided with a truck and trailer combination owned by Lamb Transportation Company. The four occupants of the automobile were seriously injured, and each sued Lamb Company on a theory of *respondeat superior* for the alleged negligent operation of the truck and trailer by Edwin Earl Robinson, Lamb's truck driver. The cases having been consolidated for trial, there was a judgment for defendants entered on a jury verdict and two of the four plaintiffs, Beatrice de Stackelberg and La Verne J. Woodworth, have appealed. They contend that the trial

court erred in the giving and refusal of certain instructions bearing upon the issue of their alleged contributory negligence. Since appellants contend that there was no evidence to support a finding of contributory negligence on their part or to justify any instructions on this theory of the defense, it will be necessary to recite the facts in some detail.

On the evening preceding the accident, appellants Mrs. de Stackelberg and Mrs. Woodworth, after a cocktail party at the latter's home, attended a dinner party in Los Angeles Chinatown. Later, they drove to a bar in Gardena where they were served alcoholic beverages. Still later, at about 1:00 a. m., appellants went to the Village Spa, a restaurant and bar on Lakewood Boulevard, where they met Roy Nelson and Harold Fair, police officers of the city of Compton. Mrs. Woodworth and Mrs. de Stackelberg both admitted having another drink at this last establishment, and soon thereafter, at about 2:00 a. m., appellants left with the officers to inspect a small boat at Los Angeles Harbor in which Fair was interested. Nelson drove the party to the harbor in a 1953 Chevrolet four-door sedan, a city-owned vehicle, assigned to him. The group boarded the boat for a cruise around the harbor. During the boat ride Fair produced a can of warm beer and gave Mrs. Woodworth a taste of it. After the boat ride, and at about 4:00 a. m., the party returned to the car and started home. Nelson was driving with appellant de Stackelberg beside him in the front seat, and appellant Woodworth beside Fair in the rear seat. At about 4:15 a. m. the vehicle was proceeding northerly on Alameda Street.

Alameda Street, in the area of the collision, is a four-lane highway, running north and south, unlighted, straight, level and paved. The area is in a fifty-five mile an hour zone. The night of the accident was dark and clear. The Lamb Company has a transportation yard on the east side of Alameda Street from which a private driveway leads to the paved shoulder. At the entrance to the highway there were boulevard stops erected for vehicles coming from the yard. On the night of the accident, Robinson was directed to take his truck and trailer to a loading point on Alameda Street about a mile south of the Lamb yard. The overall length of truck and trailer was 60 feet, and it was equipped with the variety of lights and reflectors characteristic of such large trucks. Robinson drove from the yard to Alameda Street, where he testified he stopped and observed two cars to his left about 700 yards south. To the north, he observed another car stopped at a red signal. Robinson started the truck and trailer forward, making a left turn at a slow speed across Alameda Street. One of the two cars approaching from the south (to Robinson's left) was that driven by Nelson. The other vehicle was a small truck driven by George Aistrope, an eyewitness to the accident. Aistrope testified that he was driving north at a speed of 40 to 50 miles per hour when the Nelson car approached from the rear and overtook him, passing in the right-hand lane and then returning to the center lane. After Nelson had passed, Aistrope increased his speed to about 50 miles an hour. At about this time he saw defendant's truck come out on the highway, fully lighted. Aistrope testified that the truck proceeded slowly across the highway and that the cab had completed the turn and was west of the center lane of the highway when the Nelson vehicle collided with the rear wheels of the trailer. Aistrope fixed the point of impact at or near the center line of the highway, and he testified that at the moment of the collision the right-hand lane of the highway, northbound, was clear. He testified: that he was traveling about fifty miles per hour and was about 75 yards from the point of impact when the accident occurred; that he first began to slow down after the collision, and that he came to a stop in the Lamb driveway where he alighted from his car to render aid. The terrific force of the impact was indicated by the facts that the trailer was thrown across the highway, its wheels knocked from under it, and that the Nelson car was completely demolished.

The occupants of the Nelson car could give only fragmentary testimony as to the

exact circumstances of the accident. Nelson testified that he was driving north on Alameda at about 50 to 52 miles per hour, and was asked:

"Q. * * * As you approached the Lamb Yard just tell us what happened. A. An object shot out in front of me and I saw the truck and at the time I saw it there he had both the inside lane and the outside lane and the inside lane I was traveling at fully blocked.

"Q. Now, did you see the truck in motion? A. Yes, I did.

"Q. Did you see the truck at any time stop? A. No, I did not.

"Q. Did you see the truck at any time before it was on to the highway?"

He testified that he had not seen the truck before this time.

It was one theory of the defense that appellants' recovery was barred by their own negligence in riding with Nelson knowing him to be intoxicated and it is on the question of Nelson's alleged intoxication that there is a substantial conflict in the evidence.

All of the passengers in the Nelson car admitted to having consumed alcoholic beverages on the night of the accident, but Nelson insisted that he had consumed only one drink, a bourbon and soda, at the Village Spa about two hours before the accident. Although there was testimony that Fair produced some beer during the boat ride, there was no direct evidence that Nelson had more than the one drink he admitted consuming. However, there is such substantial evidence of Nelson's intoxication that the jury had most reasonable grounds for disbelieving Nelson's testimony. Following the collision, at about 6 a. m., Nelson was examined and treated by Dr. Chauncey Dobson, a resident physician at the Harbor General Hospital in Torrance, for his substantial injuries. Dr. Dobson testified that in his opinion Nelson was "quite drunk at 6:30." Although the doctor did not perform a blood alcohol test, he testified that there was a strong odor of alcohol on Nelson's breath which could not be produced by just one drink; that Nelson's speech was slurred; that his movements were uncoordinated, and that "he [Nelson] was under the influence of alcohol" at 6:30 on the morning of the accident. On cross-examination, Dr. Dobson testified as follows:

"In order for you to find him drunk, intoxicated at 6:30 as to what it would have been at 4:00 o'clock, do you have any opinion? A. No, sir.

"Q. Could you even estimate, doctor? A. Yes, sir.

"Q. What would be your estimate? A. It would be a large amount. That would be my estimation.

"Q. You saw him in such a condition at 6:30 that you formed the conclusion that he was quite drunk at 4:00 o'clock, even if he had nothing to drink in those two or two and one-half hours? A. He was quite drunk at 6:30.

"Q. I beg your pardon? A. He was quite drunk at 6:30.

"Q. If he was quite drunk at 6:30, he would have been quite drunk at 4:00 o'clock, wouldn't he? A. Yes."

In addition to the testimony of Dr. Dobson, two witnesses who observed Nelson in the car immediately after the accident testified that his breath had a noticeable odor of alcohol.

Appellants contend that there was no evidence to justify instructions given by the court upon two aspects of the defense of contributory negligence: (a) relative to the circumstances under which a guest is required to protest against the obvious negligence of the driver; and (b) relative to the effect of a guest accepting a ride, or continuing to ride, with a driver known to be intoxicated. Appellants argue: (1) that there was no evidence of erratic or negligent driving on the part of Nelson sufficient to suggest to his guests a need for protest or cautionary admonition; (2) that the evidence of Nelson's intoxication at the time of the accident was not adequate; and (3) that there was a complete

lack of proof that appellants knew, or should have known, that Nelson was intoxicated.

A review of the evidence in conformity with the familiar rule (Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183; Ashburn v. Miller, 161 Cal.App.2d 71, 326 P.2d 229) reveals the complete lack of merit in these arguments. There was both direct and circumstantial evidence that Nelson's car was traveling at a speed which the jury reasonably could have regarded as obviously excessive and grossly negligent under the circumstances. The testimony of Dr. Dobson alone was clearly sufficient to support a finding that Nelson was intoxicated to a degree that seriously impaired his ability to operate an automobile. It is granted that for the instruction to be applicable it was necessary for the jury to find that appellants knew, or should have known, of Nelson's intoxication. Enos v. Montoya, 158 Cal.App.2d 394, 322 P.2d 472. However, such knowledge may be inferred from circumstances and, in the light of the activities which preceded the accident, the jury had ample basis for inferring that appellants, who had been in the company of Nelson for over two hours, must have been aware of his inebriation. Cf. Kroplin v. Huston, 79 Cal.App.2d 332, 340, 342, 179 P.2d 575; Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 489–490, 55 P.2d 870. There was other evidence from which the jury could have inferred that Nelson's ability to drive had been substantially impaired. The witness Aistrope, traveling some 75 yards behind Nelson's car, observed the brightly-lighted truck entering the highway, and had no difficulty in coming to a stop at the scene of the accident. From Aistrope's testimony it was reasonable to conclude that Nelson could easily have avoided the accident simply by turning into the right-hand lane which was unobstructed.

[1, 2] Thus, we readily conclude that the evidence clearly justified the giving of the challenged instructions. Appellants themselves submitted requested instructions on both aspects of the theory of defense presently under discussion. The trial court gave appellants' requested instruction with reference to the duty of a guest to protest against the obvious negligence of the driver. Thus, assertion of error in the form of this instruction would invoke the doctrine of invited error. Butigan v. Yellow Cab Co., 49 Cal.2d 652, 657, 320 P.2d 500; see 4 Cal.Jur.2d 423, § 557. However, we find no fault with any of the instructions given.

Appellants next contend that the trial court erred to their prejudice in denying an oral motion made during the trial to strike Robinson's answer to their complaints. Although the complaints filed by appellants named and identified Robinson as the negligent driver of Lamb's truck, they did not join him as a party defendant. However, it appears that Robinson was joined as a defendant in the complaints of plaintiffs Nelson and Fair. The only basis for appellants' claim of prejudice in this ruling was developed at a later stage of the trial, when plaintiffs called Robinson's estranged wife, who according to an offer of proof, was prepared to give testimony favorable to plaintiffs. The offer of testimony was excluded as incompetent under Code of Civil Procedure, section 1881, preventing a wife from testifying against her husband without his consent. Appellants' theory is that the testimony of Robinson's wife would have been admissible if Robinson were not a defendant in the action (cf. Sylvester v. Kirkpatrick, 79 Cal.App.2d 443, 451–452, 180 P.2d 36), and that a litigant has the right to select the persons against whom he seeks to recover (cf. Strauss v. Owens, 148 Cal.App.2d 570, 574, 307 P.2d 81). It is asserted that Robinson had no right to intrude himself as a defendant by filing answers to complaints in which he was not joined as a party.

[3, 4] These arguments are unavailing in the instant case for two reasons. In the first place, Robinson was clearly identified and designated as a party defendant in the consolidated actions by the terms of the pre-trial conference order, which is a part of the record herein. The pre-trial confer-

ence order supersedes the pleadings to the extent of any inconsistencies and controls the subsequent course of the case. Rules for the Superior Courts, rule 8.8; Baird v. Hodson, 161 Cal.App.2d 687, 327 P.2d 215. In the second place, the complaints of all four plaintiffs named Robinson and stated primary causes of action against him; two of them joined him as a defendant. Certainly he was a proper party, and it would seem unquestionable that Lamb could have compelled his joinder as a "conditionally necessary party" under the provisions of section 389 of the Code of Civil Procedure.

[5] Appellants' third contention is that the trial court erred in instructing the jury in the terms of BAJI No. 140, the familiar "looking and seeing" instruction.[1] While a similar instruction has been criticized as argumentative and as assuming a question of fact (see Colbert v. Borland, 147 Cal. App.2d 704, 709, 306 P.2d 53), we hold that in the circumstances of the present case the giving of this instruction, even if it were to be considered erroneous, could not, with reason, be regarded as prejudicial (Alarid v. Vanier, 50 Cal.2d 617, 625, 327 P.2d 897).

Finally, we have considered appellants' other criticisms of the instructions, including their rather general arguments to the effect that there was error in the refusal of certain "appropriate and helpful instructions" requested by them. We conclude that the jury was fully, fairly, and adequately instructed upon all applicable principles of law. Cf. Curland v. Los Angeles County Fair Ass'n, 118 Cal.App.2d 691, 699, 258 P.2d 1063.

Affirmed.

FOX, P. J., and ASHBURN, J., concur.

Hearing denied; PETERS, J., dissenting.

1. "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either some part of such evidence is untrue or the person was negligently inattentive."

168 Cal.App.2d 7

Hattie E. BRIGHT, Plaintiff and Appellant,

v.

EAST SIDE MOSQUITO ABATEMENT DISTRICT, W. D. Miller, Individually and as a member of the Board of Trustees of the East Side Mosquito Abatement District, et al., Defendants and Respondents.

Civ. 9518.

District Court of Appeal, Third District, California.

Feb. 13, 1959.

Rehearing Denied March 11, 1959.

Hearing Denied April 8, 1959.

Action for injuries sustained in automobile collisions as result of creation of a dense chemical fog on the highway by the defendant Mosquito Abatement District. Judgment for the defendants in the Superior Court, Stanislaus County, Thomas P. O'Donnell, J., and the plaintiff appealed. The District Court of Appeal, Schottky, J., held that the District could be held liable for creating a nuisance, and on the ground that it was engaged in the negligent "operation" of a motor vehicle within the statute though the operation was 200 feet off the highway on private property.

Judgment of dismissal reversed.

1. Automobiles ⇐264

Statute declaring to be a "nuisance" anything which is an obstruction to the free use of property or which unlawfully obstructs the free passage or use in the customary manner of any highway, means that it is the free passage or use in the customary manner of the highway which is prohibited and anything which does so is prohibited and where a Mosquito Abatement District by thick blanket of chemical fog made it impossible for a motorist to see or proceed safely down the highway a "nui-

sance" was created within the statute. West's Ann.Civ.Code, §§ 3479, 3482.

See publication Words and Phrases, for other judicial constructions and definitions of "Nuisance".

2. Nuisance ⇐65

A statutory sanction cannot be pleaded in justification of acts which by general rules of law constitute a nuisance unless the acts complained of were authorized by the express terms of the statute under which the justification is made or by the plainest implication from the powers expressly conferred.

3. Automobiles ⇐264

While a Mosquito Abatement District was authorized by the statute to abate mosquitoes, such power did not permit the district to abate mosquitoes in such a manner as to create a nuisance by the creation of a thick blanket of chemical fog which made it impossible for motorists to see or to proceed safely down a highway. West's Ann.Civ.Code, §§ 3479, 3482.

4. States ⇐112

Ordinarily in the absence of a statutory constitutional provision to the contrary the state and its agencies are immune from liability for tort in the discharge of governmental duties and activities.

5. Health ⇐18

The abatement of mosquitoes by a Mosquito Abatement District is a governmental function for which the district is immune from tort liability except where the district is engaged in maintaining a nuisance. West's Ann.Civ.Code, §§ 3479, 3482.

6. Automobiles ⇐187

The statute making every district established by law responsible to any person sustaining an injury as result of negligent "operation" of a motor vehicle uses the word "operation" as meaning to be in operation, the vehicle must be in the state of being at work or in the act or exercise of some specific function by performing work or producing effects at the time and place the injury is inflicted. West's Ann. Vehicle Code, § 400.

See publication Words and Phrases, for other judicial constructions and definitions of "Operation".

7. Automobiles ⇐238(3)

Where complaint alleged that the district was operating a jeep and trailer on private property some 200 feet off intersecting roads for the purpose of spraying for mosquitoes on private property and that the district caused a dense chemical fog to settle on the highway resulting in four automobile collisions and the injuries to the plaintiff, cause of action against the district was alleged under the statute providing that every district established by law is responsible to every person sustaining an injury as result of the negligent "operation" of a motor vehicle. West's Ann.Vehicle Code, §§ 32, 400.

Bush, Ackley & Milich, Oakdale, for appellant.

Honey, Mayall & Hurley, Stockton, for respondents.

SCHOTTKY, Justice.

This is an appeal from the judgment of dismissal entered after a demurrer to plaintiff's second amended complaint was sustained without leave to amend.

The East Side Mosquito Abatement District is a duly organized pest abatement district. Defendants Joe Phillips and Lonnie J. Owen were employees of the district. On September 24, 1954, Phillips and Owen were operating a jeep and trailer owned by the district on private property near a public highway. The employees in the performance of their duties released a chemical spray or fog which it was intended would settle on a field infested with mosquitoes. Instead the chemical fog blanketed the public highway for a distance of approximately 200 yards. At this time Hattie E. Bright was driving her car on the highway. The chemical fog enveloped her automobile and made it impossible for her

to proceed as visibility declined to three or four feet. She decreased her speed and attempted to drive off the road, but before she could do so her vehicle was struck from the rear and the motor stalled. Mrs. Bright told her two granddaughters, who were passengers, to get out of the car and seek a place of safety. Before Mrs. Bright was able to get out of the car the two children disappeared from her view into the fog. She heard them screaming and she left her car and stepped between the rear of her automobile and the vehicle which had struck her car. While she was there a second car struck the rear of the first vehicle, moving it forward and pinning her legs between the front end of the moving car and her automobile. Before she could be removed a third car hit the second, and again the first car was moved forward and shoved against Mrs. Bright's legs. As a result Mrs. Bright suffered serious injuries to her legs. She then filed a verified claim for damages with the district. After the claim was rejected she brought this action.

In her first amended complaint plaintiff alleged three causes of action against the district, its officers and its employees. The first cause of action alleged negligence of the two employees in releasing the chemical fog; the second cause of action alleged that the release of the fog impeded and obstructed the free and safe passage and use of the highway in the customary manner and made the highway dangerous and unsafe for vehicular traffic and that the obstruction constituted a nuisance; the third cause of action alleged that the employees of the district negligently operated the vehicle so as to cause the fog to blanket the highway and as a direct and proximate result of the operation of the vehicle plaintiff suffered injuries. The defendants entered a demurrer to the complaint. The trial court overruled the demurrer as to the two named employees, sustained with leave to amend as to the trustees and officers of the district and without leave to amend as to the district. A second amended complaint was then filed. Counts one and two were similar to counts one and two of the first amended complaint. The third count alleged that the employees of the district negligently operated the jeep and trailer so that a chemical fog blanketed the highway so as to cause the highway to become unsafe for vehicular traffic and as a result plaintiff's injuries occurred. A demurrer to the third cause of action was filed by the district, its trustees and its officers; and a motion to dismiss the first and second counts of the complaint was made. The trial court sustained the demurrer to the third count of the complaint without leave to amend and granted the motion to dismiss as to the first and second counts, and the second amended complaint was dismissed as to the district and its officers.

Plaintiff has appealed from the judgment of dismissal and contends (1) that a cause of action against the district and its officers for nuisance was stated in the second cause of action; and (2) that the third cause of action of the second amended complaint stated a cause of action under the provisions of the Vehicle Code, section 400.

We shall first consider whether the facts alleged in the second cause of action show the acts of respondents complained of to be within the statutory definition of a nuisance. Section 3479 of the Civil Code states: "[Nuisance, what.] Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

In the instant case the chemical spray released by the defendant district reduced visibility to zero on a heavily traveled public highway. Four automobiles were involved in the accident. It is clear that the spray was of such density that it obstructed the passage and use of the highway in

the customary manner. One of the meanings of the word obstruct is "to hinder from passing, action, or operation; hence to hinder; impede; retard; as, clouds obstruct the light." (Webster's International Dictionary.)

[1] Respondents argue that the word "nuisance" is a statutory term in California and that the Civil Code's use of the word "obstruct" is used in the sense of physical obstruction, that is, a barrier, but respondents have cited no authority which supports this contention. We cannot agree with respondents that the word "obstruct" as used in section 3479 can be so limited. The section declares that "anything which * * * obstructs the free passage or use, in the customary manner, of any * * * street, or highway, is a nuisance." We think it is clear that it is the free passage or use, "in the customary manner," of the highway which is prohibited. Anything which does so is prohibited. In the instant case the complaint alleges that respondents caused to be released "a chemical fog, smoke or spray of such nature and density as to then and there impede and obstruct the free and safe passage and use, in the customary manner, of said Modesto-Waterford Highway (Highway (132) for a distance of approximately 200 yards in the vicinity of Garner Road, and made the same dangerous and unsafe for vehicular travel." We are satisfied that a thick blanket of chemical fog which makes it impossible for a motorist to see or to proceed safely down the highway is a nuisance within the meaning of said section 3479.

Respondents cite section 3482 of the Civil Code which reads: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Respondents argue that the above section precludes liability in this case because the respondent district was engaged in the very activity for which it was created, to-wit, spraying for mosquitoes.

[2] The general rule is stated in People v. Glenn-Colusa Irr. Dist., 127 Cal.App. 30, at page 36, 15 P.2d 549, at page 552:

> "'A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury.'"

[3] While respondent district is authorized by statute to abate mosquitoes, this power cannot be construed so as to permit the district to abate mosquitoes in such a manner as to create a nuisance. In Ambrosini v. Alisal Sanitary District, 154 Cal.App.2d 720, 317 P.2d 33 (hearing denied), the sanitary district constructed a sewer outfall under express statutory authorization. The court rejected the district's contention that section 3482 of the Civil Code precluded its liability for nuisance, declaring that express authority to construct a sewer outfall was not authority to construct a defective outfall.

In People v. Glenn-Colusa Irrigation District, supra, the court held that defendant district's rights to divert water from the Sacramento river, although expressly granted by statute, did not give it the right to do so without protecting the fish in the river, and that its failure to protect the fish was a public nuisance.

[4] Having concluded that the facts alleged in the second cause of action come within the statutory definition of a nuisance, we shall next consider the question of whether or not a mosquito abatement district can be subject to a civil suit in the absence of a statute waiving immunity. As stated in the recent case of Vater v. County of Glenn, 49 Cal.2d 815, at page 818, 323 P.2d 85, at page 87:

> "The general rule is that, in the absence of a statutory or constitutional provision to the contrary, the state and its agencies are immune from liability for tort in the discharge of govern-

mental duties and activities. Pianka v. State, 46 Cal.2d 208, 210, 293 P.2d 458; Talley v. Northern San Diego County Hospital Dist., 41 Cal.2d 33, 36, 257 P.2d 22; Stang v. City of Mill Valley, 38 Cal.2d 486, 488, 240 P.2d 980. This rule has been applied to irrigation districts. (Citing cases.)"

[5] It is clear that the abatement of mosquitoes by a mosquito abatement district is a governmental function. However, several cases have recognized an exception to the general rule where the governmental unit is maintaining a nuisance. In Vater v. County of Glenn, supra, plaintiff brought the action against Glenn County and the Glenn-Colusa Irrigation District for damages for wrongful death of her husband and son. The Supreme Court reviewed the doctrine of governmental immunity as it applied to the state and its agencies. (323 P.2d 87, 88) At page 88 of 323 P.2d the court declared, "Several cases have recognized an exception to the immunity doctrine where a governmental unit is maintaining a nuisance. (Citing cases.) In considering whether the facts alleged are sufficient to constitute a nuisance, we must keep in mind that, in order to state a cause of action based upon this theory, the plaintiff must show that a legislative body has declared the condition complained of to be a nuisance. (Citing cases.)" The court then went on to state that the facts alleged in the complaint did not state facts sufficient to state a cause of action against the irrigation district for nuisance under section 3479 of the Civil Code and upheld the sustaining of defendant's demurrer on that ground.

[6] It is to be noted that the court's decision was based not on the ground that irrigation district was immune from liability for damages arising from nuisance but on the ground that the facts alleged did not constitute a nuisance. We believe that the language of the Supreme Court in the Vater case, supra, is susceptible of no other construction than that an irrigation district is liable for damages arising from nuisance, if the facts alleged spell out a nuisance under Civil Code section 3479.

Appellant contends also that the third cause of action of appellant's second amended complaint states facts sufficient to constitute a cause of action against the district and its officers under the provisions of section 400 of the Vehicle Code. It is there alleged that the district was the owner of a certain jeep to which was attached a trailer with spraying equipment mounted thereon; that this jeep and trailer were being operated on private property at a point some 200 feet south of two intersecting roads for the purpose of spraying for mosquitoes on private property; that the defendants did not negligently operate said jeep and trailer so as to cause the same to spread a dense chemical fog, smoke, or spray in such a manner as to blanket the highway in the vicinity for a distance of 200 yards; and that as a direct and proximate result of the negligent operation of the vehicle and the collisions plaintiff was injured. Section 400 of the Vehicle Code provides that every district established by law is responsible to every person who sustains any injury as a result of the negligent operation of a motor vehicle.

Appellant argues that a jeep with trailer attached is a motor vehicle (Vehicle Code, sec. 32) and that respondent district is liable for negligent operation of its jeep and trailer even though such operation was not on a public highway. Respondents in reply contend that the facts in the instant case do not show "operation" of a motor vehicle within the meaning of the Vehicle Code. They rely strongly on the case of Chilcote v. San Bernardino County, 218 Cal. 444, 23 P.2d 748, which was a case in which county oil trucks spilled oil on a county highway. Plaintiff's son was killed when his motor vehicle slipped on the oil, went out of control, and threw him to the road. The plaintiff contended that the county was liable under Vehicle Code section 400. In affirming a judgment in favor of the county, the court held that the situa-

tion did not come within the contemplation of Civil Code section 1714½ (1931) (now codified in Vehicle Code section 400) which imposes liability for the *"negligent operation"* (emphasis added) by employees of the state. The court said 218 Cal. at page 446, 23 P.2d at page 749: "Supplementing these facts are allegations that the condition of the highway was due to the negligent operation of motor oil trucks by servants of said county of San Bernardino. The injury under these allegations was primarily based upon the condition of the highway and whether or not it was brought about by the negligence of the servants of the county is not the controlling factor in the situation. Therefore, in view of the construction we have placed on the word 'operation' in the statute, the complaint fails to state a cause of action."

However, as pointed out by appellant, the court in the Chilcote case construed the word "operation" as follows: "That is, to be in operation, the vehicle must be in a 'state of being at work' or 'in the active exercise of some specific function' by performing work or producing effects *at the time and place the injury is inflicted.* (Italics added.)"

We are here concerned with the question of whether or not a general demurrer to the third cause of action should have been sustained. We believe that the allegations are sufficient to bring the cause of action under the provisions of section 400 of the Vehicle Code.

[7] If a person drove an automobile down a dusty road in such a manner that the dust raised obscured the vision of a motorist who followed him and the driver of the following vehicle was injured because he ran off of the road because of obscured vision, it would seem that the driver of the second vehicle was injured because of the negligent operation of the first vehicle. If a car with a faulty muffler exuded smoky fumes which obscured the road, it would seem that a person injured because of reduced vision would have been injured in part because of the faulty operation of a motor vehicle. The only difference in the instant case is that the point of emission of the spray was at a distance from the spot where the fog settled over the highway. But this would only go to the question of negligence which would be a question for the jury. Henderson v. Northam, 176 Cal. 493, 168 P. 1044. In the instant case the jeep and the trailer were operated as a unit. The jeep was in operation. A spray was being emitted from the trailer portion of the motor vehicle. It was alleged that this was the cause of plaintiff's injuries. As against a general demurrer we believe that sufficient was alleged to state a cause of action under the provisions of the section. The statute is broad enough to embrace an injury which results from the negligent operation of a vehicle. It is not limited to situations where a person is injured because of contact with a vehicle.

No other points require discussion.

For the reasons hereinbefore set forth we conclude that the court erred in granting the respondents' motion to dismiss the second cause of action of the second amendment and in sustaining without leave to amend respondents' demurrer to the third cause of action.

The judgment of dismissal is reversed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

51 Cal.2d 666

In re Barney A. DENNIS on Habeas Corpus.

Cr. 6364.

Supreme Court of California,

In Bank.

March 2, 1959.

Rehearing Denied April 1, 1959.

Habeas corpus proceeding. The Supreme Court, Carter, J., held that where, prior to commencement of trial, four psychiatric reports were filed with court, all of which were to the effect that defendant was insane at time of offense and at time of trial and two of which specifically pointed out that defendant was unable to cooperate with his attorney in conducting his defense, and all the testimony at the trial was to the same effect, the defendant was, in legal effect, deprived of his constitutional right to be present at his trial because his mental condition prevented him from knowing what was occurring, and this lack of mental presence was a denial of due process of law, and consequently conviction would be set aside and trial court would be directed to determine whether defendant was presently sane and if so to retry the issue of defendant's sanity at time of offense.

Writ granted and defendant discharged from the custody of the warden and committed to the custody of the sheriff for further proceedings in the superior court.

1. Constitutional Law ⇐268
Habeas Corpus ⇐25.1(4), 112

Where, prior to commencement of trial, four psychiatric reports were filed with court, all of which were to effect that defendant was insane at time of offense and at time of trial and two of which specifically pointed out that defendant was unable to co-operate with his attorney in conducting his defense, and all the testimony at the trial was to the same effect, the defendant was, in legal effect, deprived of his constitutional right to be present at his trial because his mental condition prevented him from knowing what was occurring, and this lack of mental presence was a denial of due process of law, and consequently conviction would be set aside on petition for writ of habeas corpus and trial court would be directed to determine whether defendant was presently sane and if so to retry the issue of defendant's sanity at time of offense. West's Ann.Pen.Code, §§ 1367, 1368.

2. Constitutional Law ⇐257

Due process does not permit the states to take away from a defendant notice of the charge against him and an adequate opportunity to be heard in defense of it.

3. Constitutional Law ⇐268

When the presence of the defendant will be useful or of benefit to him and his counsel, the lack of his presence becomes a denial of due process of law.

4. Criminal Law ⇐311

The presumption of sanity is a disputable one which may be overcome by a preponderance of the evidence to the contrary.

5. Criminal Law ⇐311

Where the evidence is uncontradicted and entirely to the effect that the accused is insane, the presumption of insanity may not be permitted to prevail.

Casper & Jensen and William E. Jensen, Vallejo, for petitioner.

Edmund G. Brown and Stanley Mosk, Attys. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and John S. McInerny, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Barney A. Dennis was convicted and sentenced to state prison in 1954 on two counts of assault with intent to commit murder and four counts of assault with a deadly weapon. A petition for a writ of habeas corpus has been filed on his behalf in this court.[1]

1. The actual petitioner in this proceeding is William E. Jensen, an attorney. Mr. Jensen will be referred to as the petitioner and Dennis as the defendant. A petition for habeas corpus filed in propria persona by defendant was denied by this court in September, 1955.

[1] The only contention is that Dennis was tried, convicted and sentenced while insane and that therefore he is illegally confined in San Quentin Prison.

Dennis was charged in an information with the shooting of his wife and five police officers who came to the scene. At the arraignment be entered the single plea of not guilty by reason of insanity.

Section 1367 of the Penal Code provides that "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." Section 1368 of the same code provides that "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; and, from the time of such order, all proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined, and the trial jury in the criminal prosecution may be discharged, or retained, according to the discretion of the court until the determination of the issue of insanity."

The trial of defendant commenced before the court without a jury [2] on July 8, 1954; the court pronounced him sane at the time of the alleged offenses on July 9, 1954. Judgment and sentence were pronounced on July 23, 1954. Prior to the commencement of the trial four psychiatric reports were filed with the court, all of which were to the effect that Dennis was insane at the time of the commission of the offenses and at the time of trial. Proceedings were not suspended for a determination of defendant's sanity at the time of trial. Apparently the psychiatric reports were ignored and Dennis was found sane at the time of the crime.

In a report dated June 25, 1954, prepared by Dr. F. L. Crowley, a psychiatrist employed at Patton State Hospital, and filed with the court on July 1, 1954,[3] at the request of Judge Arthur L. Mundo, it was stated in part that "At the present time he [Dennis] shows evidence of schizophrenic reaction, manifested by bizarre thinking, inappropriate laughter, ideas of reference and paranoid trends. At the time of the alleged crime the examiner considers that his judgment was disordered and impaired by his mental illness and he lacked the capacity to fully understand the nature and quality of this act, and was so disordered of mind that he was unable to abide by the right.

"He is not able to cooperate with his attorney in the preparation of his own defense at this time."

In a report dated June 19, 1954, prepared by Dr. Elmer Peterson, a psychiatrist, and filed with the court on June 23, 1954, it was stated, in part, that "I feel that this man [Dennis] is insane; is not able to properly cooperate with his attorney; does not know the difference between right and wrong; and that this condition existed at the time of the assault and probably has existed for a period of many years. I believe that he is in need of hospitalization; that he is potentially extremely dangerous because of his assaultive tendencies and his psychosis.

"Diagnosis: Schizophrenia, paranoid state."

On May 4, 1954, Charles M. Sult, M.D., wrote a letter addressed to the district attorney's office in San Diego County which was later introduced in evidence at the trial. Dr. Sult noted that Dennis had been discharged from the United States Army in 1944 "on the basis of Schizophrenia, paranoid type"; that he had twice been hospitalized therefor in the San Diego County Hospital. He concluded that "In my opinion Barney Allen Dennis is insane in that he does not know right from wrong. It is likewise my opinion that at the time of the shooting in question he also was in-

2. Honorable John A. Hewicker was the trial judge.

3. The report shows a stamped filing date of "Jun 1—1954" which is obviously incorrect.

sane and did not know right from wrong. He is suffering with Schizophrenia, paranoid type.

"*Discussion*: Schizophrenia, paranoid type, is a chronic, incurable disease. It is my opinion that this man should be committed to a State Hospital for the criminally insane for the remainder of his life. Regardless of how well he would appear to recover under any form of treatment, he would be a threat to society."

In a report dated July 2, 1954, and filed with the court on July 3, 1954, Dr. C. E. Lengyel, a psychiatrist, who examined Dennis at the request of the District Attorney of San Diego County, stated that "I saw this man on a previous occasion on July 23, 1948. At that time I described him as being aggressive, arrogant, uncooperative, and belligerent. My diagnosis at that time was dementia praecox, paranoid type. I considered him to be psychotic then, and I do now.

"Diagnosis: Schizophrenic reaction, paranoid type.

"It is my opinion that this man was psychotic at the time of commission of the act, namely shooting several people. I feel that the type of condition that he is suffering from is a chronic type of psychosis; that he presents a hazard to others for he is paranoid, aggressive, and unpredictable. He reacts on impulse, and it is my opinion that this man will probably never recover."

Drs. Crowley, Lengyel and Peterson testified at the trial in accordance with their reports, and Dr. Sult's report was admitted in evidence. The People presented no evidence to the contrary.

This court held in People v. Aparicio, 38 Cal.2d 565, 567, 241 P.2d 221, 223, that "The sanity contemplated by the code section is tested by appraising the present ability of the defendant to so understand the nature and purpose of the proceedings taken against him as to be able to conduct his own defense in a rational manner. People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123; In re Buchanan, 129 Cal. 330, 334, 61 P. 1120, 50 L.R.A. 378; People v. West, 25 Cal.App. 369, 143 P. 793; see also 3 A.L.R. 94. A strong showing is required before an abuse of discretion is deemed to result from the failure of the trial court to order a determination of present sanity. It was said in People v. Lindley, 26 Cal.2d 780, at page 789, 161 P.2d 227 at page 232: 'The "doubt" mentioned is one that must arise in the mind of the trial judge, rather than in the mind of counsel for the defendant or in that of any third person (People v. Perry, (supra), 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123, and cases there cited) and the determination of a motion for a hearing upon the issue of a defendant's sanity at the time of the trial is one which rests within the sound discretion of the court. Necessarily, an appellate court cannot measure to a nicety the basis for the ruling, and the trial judge must be allowed a wide latitude (citing cases) . . .' Even the testimony of experts as to insanity in a general sense is not sufficient to create a doubt insofar as that testimony does not relate to the defendant's ability to conduct his own defense. People v. Darling, 107 Cal.App.2d 635, 237 P.2d 691; see also, People v. Huntoon, 41 Cal.App. 392, 182 P. 776. However, when a doubt of the defendant's sanity at the time of the trial as contemplated by the statute appears on the face of the record as a matter of law, an abuse of discretion is shown and the failure to order a determination of the question of sanity results in a miscarriage of justice and a reversal is required. People v. Vester, 135 Cal.App. 223, 26 P.2d 685; People v. West, supra, 25 Cal.App. 369, 143 P. 793." People v. Merkouris, 46 Cal.2d 540, 553, 297 P.2d 999.

Bearing the above rule in mind, it appears that all of the reports which were filed prior to trial were to the effect that the defendant was not only insane at the time of the commission of the offenses but was insane at the time of trial, and two of them specifically pointed out that he was unable to cooperate with his attorney in conducting his defense. All of the

testimony at the trial was to the same effect as heretofore noted.

The petitioner here alleges upon information and belief that after defendant was imprisoned, the court-appointed attorney who then represented him filed a notice of appeal; that the appeal was thereafter dismissed by the attorney at the request of defendant's mother while the defendant was still insane and imprisoned at the Terminal Island Medical Facility.

It is argued by petitioner that defendant was, in legal effect, deprived of his constitutional right to be present at his trial because his mental condition prevented him from knowing what was occurring and that this lack of mental presence constituted a denial of due process of law. In People v. Berling, 115 Cal.App.2d 255, 267, 268, 251 P.2d 1017, 1023, the court held that "Article I, Section 13 of the California Constitution gives a defendant the right to appear and defend in person, and Section 1043 of the Penal Code provides that 'If the prosecution be for a felony, the defendant *must* be personally present at the trial.' (Italics added.) The rule is familiar and fundamental, 'that the prisoner, in case of a felony, must be present during the *whole* of his trial.' (Italics added), quoting from People v. Kohler, 5 Cal. 72. The same case states: 'In favor of life, the strictest rule which has any sound reason to sustain it, will not be relaxed'.

"The only reasonable interpretation of the above requirement that a defendant be present at every stage of a felony prosecution is that the accused person must be both physically and mentally present. Mere physical presence without mental realization of what was going on would obviously be of no value to the accused. A defendant in such condition would be unable to confer with or assist counsel, unable to testify, and without ability to understand the nature of the accusation or the mechanics or consequences of the trial. An interpretation of the rule as requiring only physical presence would lead to such an absurdity as the purported trial of an imbecile or an insane person without the least understanding of what was taking place in the courtroom. Only in the most unenlightened age could such a so-called trial be countenanced."

[2, 3] The Supreme Court of the United States has held that the states may not take away from a defendant notice of the charge against him and an adequate opportunity to be heard in defense of it. Twining v. State of New Jersey, 211 U.S. 78, 110, 111, 29 S.Ct. 14, 53 L.Ed. 97; Powell v. State of Alabama, 287 U.S. 45, 68, 71, 53 S.Ct. 55, 77 L.Ed. 158; Holmes v. Conway, 241 U.S. 624, 632, 36 S.Ct. 681, 60 L.Ed. 1211; Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674. In Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 106, 107, 108, 54 S.Ct. 330, 333, 78 L.Ed. 674, the Supreme Court of the United States held: "So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." The court discussed the matter of the presence of the defendant in various aspects of the proceedings against him as an element of due process. The court stated: "In all the cases thus assumed the presence of the defendant satisfies the test that was put forward a moment ago as basic and decisive. It bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend. Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow." In other words it appears that when the presence of the defendant will be useful, or of benefit to him and his counsel, the lack of his presence becomes a denial of due process of law. In the case at bar it is obvious from the undisputed and uncontradicted medical testimony that while defendant was physically present his mental condition was such that he was

incapable of understanding the proceedings against him and wholly unable to be of any assistance to the counsel representing him. "A defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel, * * * Dowdell v. United States [221 U.S. 325, 31 S.Ct. 590, 55 L.Ed. 753], supra; Commonwealth v. Slavski [245 Mass. 405, 140 N.E. 465], supra." Snyder v. Commonwealth of Massachusetts, supra, 291 U.S. 97, 114, 54 S.Ct. 330, 335, 78 L.Ed. 674.

[4, 5] In people v. Chamberlain, 7 Cal. 2d 257, 260, 261, 60 P.2d 299, where ten lay witnesses and one "reputable physician of long professional practice and experience" all testified, without contradiction, that the defendant was insane, the court affirmed a judgment entered upon a jury's verdict finding the defendant sane which was predicated upon the presumption of sanity. It was held that "The personal appearance, mannerisms and actions of the defendant before the jurors during the trial, and the character of his testimony and manner of giving it, were matters properly to be considered by them. We cannot say that the jury, observing the defendant in these particulars during the trial, with the entire evidence adduced at the trial in their minds, aided by the presumption that the defendant was sane, did not have sufficient evidence on which to base the verdict in this case." We held in People v. Baker, 42 Cal.2d 550, 564, 268 P.2d 705, 714, that "On the trial of the issue raised by the plea of not guilty by reason of insanity, there is a rebuttable presumption that defendant was sane at the time the crime was committed, People v. Myers, 20 Cal. 518; People v. Loper, 159 Cal. 6, 11, 112 P. 720 [Ann. Cas.1912B, 1193]; People v. Williams, 184 Cal. 590, 593, 194 P. 1019; People v. Hickman, 204 Cal. 470, 477, 268 P. 909, 270 P. 1117; People v. Leong Fook, 206 Cal. 64, 67, 70, 273 P. 779; People v. Chamberlain, 7 Cal.2d 257, 260, 60 P.2d 299, and defendant has the burden of proving his insanity by a preponderance of the evidence. People v. Daugherty, 40 Cal.2d 876, 901, 256 P.2d 911. Proof that defendant was afflicted with a permanent insanity, as distinguished from a temporary or transient insanity, prior to the commission of the crime charged will, however, dispel the presumption of sanity and raise a presumption that his insanity continued to exist until the time of the commission of the crime. People v. Farrell, 31 Cal. 576, 581; People v. Francis, 38 Cal. 183, 188–191; People v. Lane, 101 Cal. 513, 518–519, 36 P. 16; People v. Schmitt, 106 Cal. 48, 53, 39 P. 204; People v. Findley, 132 Cal. 301, 307, 64 P. 472; People v. Keyes, 178 Cal. 794, 800–801, 175 P. 6; State of Oregon v. Garver, 190 Or. 291, 299–309, 225 P.2d 771, 27 A.L.R.2d 105 and authorities cited; see, 8 Cal.Jur., § 143; 27 A.L.R.2d 121; 1 Wharton's Criminal Evidence, § 212, 11th Ed., 1935." It is apparent from the rules set forth in People v. Baker, supra, that the presumption of sanity is a disputable one which may be overcome by a preponderance of the evidence to the contrary. Where, as here, the evidence is uncontradicted and entirely to the effect that the accused is insane, the presumption of sanity may not be permitted to prevail. Any implication to the contrary in People v. Chamberlain, supra, 7 Cal.2d 257, 60 P.2d 299, heretofore cited and discussed, is hereby disapproved.

Since the procedure here was in clear violation of petitioner's constitutional rights, the conviction must be set aside (In re James, 38 Cal.2d 302, 313, 240 P. 2d 596). Petitioner is not entitled to his liberty and the trial court should now determine whether he is presently sane (Pen. Code, §§ 1367, 1368) and if so retry the issue of his sanity at the time of the commission of the offenses.

The writ is granted, the return to the order to show cause shall stand as the return to the writ, and the defendant is discharged from the custody of the warden at San Quentin and committed to the

custody of the sheriff of San Diego County for further proceedings in the superior court of that county.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



51 Cal.2d 660

William B. McKESSON, as District Attorney of the County of Los Angeles, Petitioner,

v.

Joseph M. LOWERY, as Auditor of the County of Los Angeles, Respondent.

L.A. 25150.

Supreme Court of California, In Bank.

March 2, 1959.

Proceeding by office holder for writ of mandamus to compel county auditor to pay his salary at increased rate. The Supreme Court, Carter, J., held that where party elected to municipal office for four year term had died before taking office, appointment had been made to fill office until next election to be held in less than two years, and, several months before election, salary of office had been increased by ordinance, appointee, who was elected to office, was entitled to the increase in salary for the unexpired term to which he was elected, notwithstanding constitutional and municipal charter provisions prohibiting increase in compensation to office holders during term of office

Writ issued.

Traynor and Spence, JJ., dissented.

1. Officers ⇐100(1)

Although President of United States had not proclaimed termination of hostilities in Korean War on October 18, 1957, when municipal ordinance increased salary of office, statute suspending operation of constitutional and county charter provisions prohibiting increase of compensation of elective officers during time of war did not entitle officer to increased salary authorized. West's Ann.Gov.Code, §§ 53070, 53071; West's Ann.Const. art. 11, § 5.

2. Statutes ⇐181(1)

A statute is to be construed in light of legislative intent.

3. Municipal Corporations ⇐164

One of primary purposes of prohibitions against increases in compensation to municipal officers during term of office is to prevent officeholders from using their influence and position to secure salary increases after they have been elected. West's Ann.Const. art. 11, § 5.

4. Municipal Corporations ⇐164

Where party elected to municipal office for four-year term had died before taking office, appointment had been made to fill office until next election to be held in less than two years, and, several months before election, salary of office had been increased by ordinance, appointee, who was elected to office, was entitled to the increase in salary for the unexpired term to which he was elected, notwithstanding constitutional and municipal charter provisions prohibiting increase in compensation to officeholders during term of office. West's Ann.Gov.Code, §§ 53070, 53071; West's Ann.Const. art. 11, § 5.

5. Officers ⇐100(1)

Constitutional and Los Angeles County charter provisions do not prohibit a salary increase for officer elected to fill an unexpired term, where increase is adopted a sufficient time prior to election to comply with any local provisions. West's Ann. Gov.Code, §§ 53070, 53071; West's Ann. Const. art. 11, § 5.

William B. McKesson, Dist. Atty., Los Angeles, in pro. per.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Asst. County Counsel, and Donald K. Byrne, Deputy County Counsel, Los Angeles, for respondent.

CARTER, Justice.

The question presented by this petition for a writ of mandate is whether petitioner is entitled to payment of the salary increase which became effective after his appointment to the office of District Attorney of Los Angeles County but prior to his subsequent election to that office for the unexpired term of his predecessor. The factual situation presented by the petition is as follows:

On June 5, 1956, S. Ernest Roll was elected District Attorney of Los Angeles County for a four-year term which was to commence on the first Monday in December of 1956. Mr. Roll died on October 26, 1956. On December 4, 1956, which was after Mr. Roll's term was to commence, William B. McKesson, petitioner herein, was appointed to the office of District Attorney. He was to hold office until the election and qualification of his successor. (Los Angeles County Charter, § 16.) At the next general election, which was in June, 1958, petitioner was elected for a two-year term, the balance of Mr. Roll's unexpired term.

The salary for District Attorney at the time of petitioner's appointment was $23,000 per year. In September, 1957, an ordinance was passed increasing the salary to $25,000 per year. After his election petitioner requested Joseph M. Lowery, the Auditor of Los Angeles County, to enter the salary change on the county records and to pay him accordingly. The request was refused, and now petitioner seeks a writ of mandate to compel the county auditor to pay his salary at the increased rate.

Article XI, section 5, of the California Constitution provides that "the compensation of any county, township or municipal officer shall not be increased after his election or during his term of office * * *." Section 52 of the Los Angeles County Charter provides that "the compensation of any elective county or township officer shall not be increased or diminished during the term for which he was elected, nor within ninety days preceding his election."

[1] Petitioner contends that, since the President of the United States has not proclaimed the termination of hostilities in the Korean War, the operation of the above provisions is still suspended pursuant to sections 53070 and 53071 of the Government Code, and he is entitled to the increased salary from the effective date of the ordinance authorizing it, October 18, 1957. Section 53071 suspended the operation of provisions prohibiting the increase of compensation of elective officers during time of war as defined by section 53070. This contention has recently been answered adversely in Rapp v. Gibson, Cal., 334 P.2d 575.

Petitioner next contends that the constitutional and charter provisions, although precluding his receiving the increased salary during his appointive term, do not so preclude him during his elective term. These provisions, petitioner claims, apply to an officer who is appointed to fill an unexpired term of office, but not to one who is elected to fill the term. It is our opinion that this contention is correct.

[2, 3] It is a fundamental rule of statutory construction that the statute be scrutinized in the light of the legislative intent. It is clear that one of the primary purposes of the prohibitions against increases in compensation is to prevent office holders from using their influence and position to secure salary increases after they have been elected. Rutledge v. City of Eureka, 195 Cal. 404, 419, 234 P. 82. Where the increase in salary has been adopted in the portion of the term preceding the election of the one who is to fill the unexpired term, this danger is not present. Whether a candidate is elected is a matter subject to the public will. The candidate himself, of course, cannot be certain of the outcome of the election, and it would indeed be an op-

timistic candidate who attempted to procure a salary increase for the position to which he is seeking election.

The facts of the present case demonstrate the absence of the danger against which the prohibitions are directed. The salary ordinance was enacted some nine months prior to the time of the election. While at that time the petitioner may have decided to become a candidate, he could not know what opposition he would have or what the election results would be. To attempt to secure a salary increase at that time would be the result of mere wishful thinking.

[4, 5] There is no need to give the provisions here involved any interpretation broader than that necessary to accomplish their obvious purpose. We hold, therefore, that article XI, section 5, of the California Constitution, and section 52 of the Los Angeles County Charter do not prohibit a salary increase for an officer elected to fill an unexpired term, where the increase is adopted a sufficient time prior to the election to comply with any local provisions. Petitioner is therefore entitled to the increased salary from and after July 1, 1958.

Respondent has cited Larew v. Newman, 81 Cal. 588, 590, 23 P. 227; Storke v. Goux, 129 Cal. 526, 62 P. 68; Harrison v. Colgan, 148 Cal. 69, 82 P. 674; and Robbins v. Lambert, 43 Cal.App.2d 463, 111 P.2d 5, as controlling authority in this case. Those cases are distinguishable in that they involved persons appointed, not elected, to an unexpired term. An appointee stands in the same shoes as his predecessor. Moreover, although the danger of undue influence on the salary-authorizing body is not as great with an appointee as it is with an incumbent officer, the danger is nonetheless sufficient enough to warrant imposition of the constitutional and charter prohibitions.

Let the writ issue directing respondent to pay to petitioner the increased salary for the office of District Attorney of Los Angeles County commencing with the term for which petitioner was elected on June 3, 1958.

GIBSON, C. J., and SHENK, SCHAUER, and McCOMB, JJ., concur.

TRAYNOR, Justice (dissenting).

I dissent.

Since 1899 the courts of this state have consistently held that the phrase "his term of office" in Article XI, section 5, of the California Constitution means, not the period during which the incumbent holds the office, but the full period of time prescribed by law for the office. Larew v. Newman, 81 Cal. 588, 590, 23 P. 227; Storke v. Goux, 129 Cal. 526, 527, 62 P. 68; Harrison v. Colgan, 148 Cal. 69, 73–75, 82 P. 674; Robbins v. Lambert, 43 Cal.App.2d 463, 465, 111 P.2d 5. Accordingly, there cannot be any increase in salary during the statutory term "regardless of the fact that different persons may successively hold for successive parts of the term, so that one who is elected or appointed after a part of such term has expired cannot have an increase made after the term began, though prior to his election or appointment." Harrison v. Colgan, supra, 148 Cal. at page 75, 82 P. at page 677.

Under these cases the "term of office" herein is that to which Mr. Roll was elected,[1] and the salary ordinance, enacted after that term commenced, cannot take effect until the commencement of the next term of office in 1960. The majority opinion nevertheless holds that the ordinance became effective on July 1, 1958, the date that petitioner commenced serving the part of the unexpired term for which he was elected. It does not overrule the foregoing cases, but seeks to distinguish them on the ground that they apply only to persons appointed and not to those elected for an unexpired term.

1. Section 13 of the Los Angeles County Charter provides that the term of office for District Attorney "shall be four years, beginning at noon of the first Monday in December following the election, and ending at noon on the first Monday in December four years thereafter."

I regard this distinction as meretricious. The express application of section 5 of Article XI of the Constitution to "*any*" county officer precludes any implication that only appointed officers are included in its prohibition or that the phrase "his term of office" has one meaning for elected officers and a quite different meaning for appointed officers or varies in meaning according to whether the officer is elected or appointed for the full regular term of the office or for an unexpired part thereof. The section no more permits the exclusion from its operation of officers elected for part of a regular term than it permits the exclusion of those elected for the full regular term. Nor can such distinctions be drawn from the purpose of the statute. Courts have often declared that the purpose of such a constitutional prohibition is to preclude an officer's using his position to obtain increased compensation during his term of office as well as "unwarranted demands upon the public treasury resulting from a possible concert of action between public officers or expectant candidates for public office." Rutledge v. City of Eureka, 195 Cal. 404, 419, 234 P. 82, 88. These reasons apply as forcefully to an officer subsequently elected as to one subsequently appointed to an unexpired term. See Harrison v. Colgan, supra, 148 Cal. 69, 73, 75, 78, 82 P. 674; Lancaster v. Board of Commissioners, 115 Colo. 261, 171 P.2d 987, 989, 166 A.L.R. 839; Clark v. Frohmiller, 53 Ariz. 286, 88 P.2d 542, 545; Thornsberry v. City of Campbell, 218 Mo.App. 357, 274 S.W. 847, 848; Wilson v. Shaw, 194 Iowa 28, 188 N.W. 940, 941–942.

In my opinion the result reached in this case can be justified only by discarding the long established interpretation of the crucial phrase, "*his* term of office." (Italics added.) Were we interpreting this phrase for the first time, I should be disposed to view it as a reference to the term that the officer actually serves. Nevertheless, I would be reluctant to overrule the established interpretation in view of its still current plausibility, enhanced by its long standing. So long as it thus continues acceptable, the serviceable consistency of *stare decisis* should discourage its displacement. I would not undermine that consistency, while purporting to follow the precedents, by freighting the established interpretation with a distinction between elected and appointed officers that compels inequality in the application of the law.

SPENCE, J., concurs.



51 Cal.2d 649

Wayland T. LEONARD, Respondent,

v.

Roy E. FALLAS, Appellant.

L. A. 25227.

Supreme Court of California, In Bank.

Feb. 20, 1959.

Real estate broker brought action against owner of realty to recover commission. The Superior Court, Los Angeles County, Roger Alton Pfaff, J., entered judgment in favor of the broker, and the owner appealed. The Supreme Court, McComb, J., held that where licensed real estate broker and owner of realty entered into contract whereby owner agreed to pay broker certain commisson if realty was sold on prescribed terms while contract was in force, or if sold within 90 days after its termination to anyone whose name was registered with owner in writing as of March 22, the termination date, and on March 7 broker wrote letter to owner giving owner a list of persons contacted by broker, including name of certain prospective purchaser, and on March 22 broker's exclusive right to sell the realty expired, and on June 6 an escrow was opened between the owner and prospective purchaser listed by broker, whereby that prospective purchaser agreed to purchase the realty and the owner agreed to sell it to

him, broker was entitled to his broker's commission from owner, though sale was arranged by another broker, and though escrow was not closed and sale was not consummated until July 6

Judgment affirmed.

Opinion, 329 P.2d 529, vacated.

1. Brokers ⇐40

Parties to broker's contract for sale of realty are at liberty to make compensation depend on any lawful conditions they see fit to place therein.

2. Brokers ⇐56(3)

Where agreement provides that real estate broker's commission is to be paid if realty is sold within specified period to person whose name is furnished to owner by broker, and realty is sold by owner to such person during prescribed period, it is immaterial that broker was not the procuring cause of the sale.

3. Brokers ⇐52

A "sale" under an agreement by owner of realty to pay real estate broker a commission in event of a "sale" means the making of an executory binding agreement by which realty is to be sold to a purchaser obtained by the broker.

See publication Words and Phrases, for other judicial constructions and definitions of "Sale".

4. Brokers ⇐55(1)

Where licensed real estate broker and owner of realty entered into contract whereby owner agreed to pay broker certain commission if realty was sold on prescribed terms while contract was in force, or if sold within 90 days after its termination to anyone whose name was registered with owner in writing as of March 22, the termination date, and on March 7 broker wrote letter to owner giving owner a list of persons contacted by broker, including name of certain prospective purchaser, and on March 22 broker's exclusive right to sell realty expired, and on June 6 an escrow was opened between owner and prospective purchaser listed by broker, whereby that prospective purchaser agreed to purchase realty and the owner agreed to sell it to him, broker was entitled to his broker's commission from owner, though sale was arranged by another broker, and though escrow was not closed and sale was not consummated until July 6.

5. Appeal and Error ⇐1071(6)

If findings are made by trial court on issues, which determine a cause, other issues become immaterial, and a failure to find thereon does not constitute prejudicial error.

6. Appeal and Error ⇐1071(6)

Where, in action by real estate broker against owner of realty to recover commission, trial court found that broker exercised diligence in performing contract and made contact with prospective purchaser, and that broker listed prospective purchaser's name with owner before expiration of 90 days referred to in provision of contract that broker should be entitled to commission, if realty should be sold within 90 days after its termination to anyone whose name was registered with owner in writing, and owner sold realty to prospective purchaser registered by broker with owner, there was an implied finding that broker had not abandoned contract, and therefore it was not prejudicial error for trial court to fail to make additional findings on questions whether broker had abandoned contract and had performed all conditions of contract.

Bailie, Turner, Lake & Sprague and Frederick W. Lake, Los Angeles, for appellant.

Allan L. Leonard, Los Angeles, for respondent.

McCOMB, Justice.

Defendant appeals from a judgment in favor of plaintiff in the sum of $8,000 in an action to recover a commission alleged to be due for breach of a contract for the sale of real property.

Chronology

i. On February 29, 1956, plaintiff, a licensed real estate broker, and defendant entered into the following contract:

"February 29, 1956

"Mr Wayland T Leonard
Wayland T Leonard Co
215 West Sixth St.
Los Angeles 14 California

"Dear Mr. Leonard:

"In consideration of services rendered and to be rendered you are hereby granted the exclusive right to sell my property located at the northeast corner of Wilshire Blvd and Union in Los Angeles and described as Lots 14, 16 and 18 in Block 2 of the Fairview Tract, for a period of three weeks from the date of my signature.

"Date: 2-29-56

"Termination Date:
March 22 1956
at 5 p. m.

I agree to sell my property for $243,000.00 with 29% down and the balance payable annually within three years plus interest at 5% on the unpaid balance. I agree to pay you through escrow the Realty Board Commission which is 5% upon the first $100,000.00 of the purchase price, and 2½% upon the balance of the purchase price, if said property is sold on the above terms or any other terms acceptable to me while this contract is in force, or if sold within 90 days after its termination to anyone whose name is registered with me in writing as of the termination date.

"Receipt of a copy of this contract, which shall inure to the benefit of and bind the successors, assigns, executors and administrators of the parties respectively, is hereby acknowledged.

Owner: /s/ Roy E Fallas
Roy E Fallas
4618 West 6th Street
Los Angeles Calif.

"I accept the above described employment and agree to use diligence in procuring a purchaser.

"Date: 2-29-56

Realtor: /s/ Wayland T Leonard
Wayland T Leonard
215 W 6th Street
Los Angeles, Calif."

ii. On March 7, 1956, plaintiff wrote a letter to defendant giving him a list of the parties contacted by him to that date, which list included the name of Morgan Adams.

iii. On March 8, 1956, plaintiff obtained an offer of $200,000 from Gilbert and Rothschild for the property described in the contract, which offer defendant declined.

iv. On March 9, 1956, plaintiff, who had previously contacted Mr. Adams relative to the property, again contacted Mr. Adams, who stated that he was not interested in the property at the price asked.

v. On March 22, 1956, plaintiff's exclusive right to sell defendant's property expired.

vi. On June 6, 1956, an escrow was opened between Mr. Adams and defendant, whereby Mr. Adams agreed to purchase defendant's property for the sum of $220,000, and defendant agreed to sell it to him. This sale was arranged through Mr. Jones, a real estate broker associated with Dunn & Co. While the negotiations conducted by Mr. Jones were in progress, plaintiff telephoned Mr. Adams and was informed that he was then engaged in negotiations relating to the property. He told plaintiff, "don't upset my negotiations. Don't dis-

turb this deal." He also informed plaintiff, "Every broker in town has submitted the property to me one time or another."

vii. On July 6, 1956, the escrow was closed and the sale consummated.

Questions: First. *Did plaintiff comply with the terms of his contract with defendant?*

Yes. These rules are here applicable.

[1] 1. The parties to a broker's contract for the sale of real property are at liberty to make the compensation depend upon any lawful conditions they see fit to place therein. (Kimmell v. Skelly, 130 Cal. 555, 559, 62 P. 1067; cf. Fleming v. Dolfin, 214 Cal. 269, 4 P.2d 776, 78 A.L.R. 585.)

[2] 2. Where an agreement provides that a real estate broker's commission is to be paid if the property is sold within a specified period to a person whose name is furnished to the owner by the broker, and the property is sold by the owner to such a party during the prescribed period, it is immaterial that the agent was not the procuring cause of the sale. (Fleming v. Dolfin, supra; Gregory v. Bonney, 135 Cal. 589, 592, 67 P. 1038; Walter v. Libby, 72 Cal.App.2d 138, 141 [3] et seq., 164 P. 2d 21; Mills v. Hunter, 103 Cal.App.2d 352, 357 [3] et seq., 229 P.2d 456; Delbon v. Brazil, 134 Cal.App.2d 461, 464 [1], 285 P.2d 710.) [1]

[3] 3. Where a landowner has agreed to pay a real estate broker a commission in the event of a sale, "a sale" means the making of an executory binding agreement by which the property is to be sold to a purchaser obtained by the broker. (Twogood v. Monnette, 191 Cal. 103, 107 [2], 215 P. 542; Coulter v. Howard, 203 Cal. 17, 25 [6], 262 P. 751; Woodbridge Realty v. Plymouth Development Corp., 130 Cal.App. 2d 270, 279 [6], 278 P.2d 713; Freeman v. Van Wagenen, 90 N.J.L. 358, 101 A. 55, 56 [3, 4]; Felleman v. Von Luckner, 234 App.Div. 787, 253 N.Y.S. 567; Klipper v. Schlossberg, 96 N.J.L. 397, 115 A. 345, 346.)

[4] Applying the foregoing rules to the facts of the present case, it is evident that the property was sold "within 90 days after" the termination of the contract between plaintiff and defendant to a person "whose name" was registered with defendant by plaintiff in writing before the termination of the contract. Therefore, pursuant to the terms of the contract, plaintiff was entitled to his broker's commission from defendant.

Wright & Kimbrough v. Dewees, 52 Cal. App. 42, 197 P. 957, and Hobson v. Hunt, 59 Cal.App. 679, 211 P. 242, relied on by defendant, are not applicable to the facts in the present case. In Wright & Kimbrough v. Dewees, it was held that the rule here relied on was not applicable, because the contract provided " 'if sold to a party to whose attention said property was brought through the agency of said agent' the broker shall receive five per cent 'as a commission *for promoting said sale.*' " (52 Cal.App. at page 46, 197 P. at page 958) It was pointed out that in Kimmell v. Skelly, 130 Cal. 555, 62 P. 1067, in which case the rule was held to be applicable, the contract provided for a fixed compensation in the event of a sale by anyone during a specified period. The situation in the present case is the same as in the Kimmell case.

In Hobson v. Hunt, supra, the contract provided for a commission "if the agent during the life of this agreement, shall find a purchaser ready, willing and able to buy the said property at the above price" (59 Cal.App. at page 680, 211 P. at page 242), while in the present case, as pointed out supra, there was no requirement that the plaintiff find a purchaser ready, willing and able to buy defendant's property.

Second. *Did the trial court err in not making a finding (a) that plaintiff had*

1. In the present case the language of the contract does not imply an obligation on the part of the broker to do anything more than list the name of the prospective purchaser with the owner.

abandoned the contract and (b) whether plaintiff had performed all the conditions of the contract?

[5] *No.* This rule is here applicable: If findings are made upon issues which determine a cause, other issues become immaterial, and a failure to find thereon does not constitute prejudicial error. (Merrill v. Gordon & Harrison, 208 Cal. 1, 6 [3], 279 P. 996; Chamberlain v. Abeles, 88 Cal.App.2d 291, 299 [8, 9], 198 P.2d 927; Mortgage Guarantee Co. v. Smith, 9 Cal.App.2d 618, 621 [4], 50 P.2d 835; see cases cited in West's Ann.Cal. Code Civ.Proc., vol. 16, § 632, p. 533, n. 133.)

In the present case the trial court found "that plaintiff exercised diligence in performing his said contract; that plaintiff made contact with one Morgan Adams, also known as Morgan Adams Jr., in respect of the possible purchase by the said Adams of the said real property; that plaintiff under date of March 7th 1956, and on March 22nd 1956 by reference to the said letter of March 7th 1956, registered with defendant in writing the name of Morgan Adams (among others) as a prospective purchaser.

"The Court finds that before the expiration of the ninety days after March 22nd 1956 referred to in paragraph I of these findings, and on June 7th 1956, defendant sold to Morgan Adams, also known as Morgan Adams Jr., and to James H. Adams as nominee of Morgan Adams, the said real property for $220,000.00 through the agency of Charles J. Dunn & Co., real estate brokers.

"The Court finds that it is unnecessary to make findings in respect of issues not expressly covered herein."

[6] Clearly, the foregoing findings cover the material issues in the case, and there is an implied finding that plaintiff did not abandon the contract. Therefore, the above rule of law is applicable, and it was not prejudicial error for the trial court to fail to make additional findings.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



51 Cal.2d 655

PEOPLE of the State of California, Appellant,

v.

William G. BERNSTEIN, Respondent.

Cr. 6376.

Supreme Court of California, In Bank.

Feb. 27, 1959.

Prosecution for contributing to delinquency of certain minors. The Superior Court, Fresno County, Arthur C. Shepard, J., entered order dismissing information and State appealed. The Supreme Court, Carter, J., held that where, even assuming all evidence was true, it appeared that only conduct committed in presence of child consisted of defendant's presence in home and being on bed with child's mother when lights were probably on and being seen on his way to shower dressed in underclothing and shoes, it could not be said that such conduct would tend or cause child to lead idle, lewd, dissolute or immoral life.

Affirmed.

Opinion, 329 P.2d 737, vacated.

1. Infants ⇐13

Under offense of contributing to delinquency of a minor, test is reasonable effect that charged acts have upon children, not what conclusions can be drawn therefrom by adults. West's Ann.Welfare & Inst.Code, §§ 700, 702.

2. Infants ⇐13

It is fair and permissible to construe statute prohibiting contributing to delinquency of minor as referring exclusively to acts or omissions done or made directly with relation to minor child. West's Ann. Welfare & Inst.Code, §§ 700, 702.

3. Infants ⇐13

Where defendant because of his alleged relations with minor's mother was charged with contributing to delinquency of minor, and taking all the evidence on preliminary examination as true together with all the inferences to be drawn therefrom, it appeared that only conduct committed in presence of minor consisted of defendant's presence in the home, defendant's being on bed with child's mother when lights were probably on, and being seen on his way to shower dressed in underclothing and shoes, it could not be said that such conduct fell within statute making it a criminal offense to contribute to delinquency of minor. West's Ann.Welfare & Inst.Code, §§ 700, 702.

4. Indictment and Information ⇐137(4)

It is duty of trial court when, in its judgment, there is, as a matter of law, no evidence which tends to prove offense charged in information, to set it aside.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., E. Clarke Savory, Dist. Atty., and George J. Roth, Deputy Dist. Atty., Fresno, for appellant.

Leo R. Friedman, San Francisco, for respondent.

CARTER, Justice.

This is an appeal by the People from an order dismissing an information against William G. Bernstein, who is a licensed and practicing physician and surgeon.

He was accused by information of two counts of contributing to the delinquency of certain minors (Welf. & Inst.Code, § 702), in that he, on two dates certain, wilfully, unlawfully and knowingly "did live with Mrs. Beverly Enns as husband and wife" in the presence of the two minor children which conduct "caused and manifestly tended to cause and encourage * * * [the minor children] * * * to come within the provisions of Section 700 of the Welfare and Institutions Code of the State of California, to-wit: To become or remain minor persons who are leading, or from any cause are in danger of leading idle, lewd, dissolute or immoral lives." [1]

At the preliminary hearing the divorced husband of Mrs. Enns testified that he had seen a car, later identified as Dr. Bernstein's, near Mrs. Enns' home on the two nights specified in the information and probably a "half dozen" "to eight times" "in the past year." A police officer testified that he had identified Dr. Bernstein's car as the one which was parked near Mrs. Enns' home on the night of March 4, 1958, and that Dr. Bernstein left in the car between 11:00 and 11:30 and that he talked "to him for approximately 20 minutes"; that Mrs. Enns and the two children were at home at the time.

The only other witness for the People was Mrs. Enns' eight-year-old son Michael. Michael testified that he knew Dr. Bernstein; that he called him "Doc"; that Dr. Bernstein had come to his home "pretty often"; that he came to the house "Sometimes * * * in the day and sometimes he comes in the night and morning"; that he could hear Dr. Bernstein come in "and then talk to my mother, and then I don't hear them do anything else. Just talk." He testified that he didn't think Dr. Bernstein ever stayed all night. Michael further testified that there were two bedrooms in the house, one of which was occupied by his mother and one by his sister, aged six, and himself.

Michael also testified that "just once" he had seen Dr. Bernstein on his way to take a shower one morning and that he was

1. The complaint against Mrs. Enns was dismissed after the information against Dr. Bernstein was set aside.

dressed "in his panties, and his T-shirt and [that] his shoes [were] on"; that it was "long ago"; that Dr. Bernstein came from his mother's bedroom; that his mother was either in the bedroom or the kitchen and that she was dressed in her pajamas and robe. He also testified that once when he had come in from play in the afternoon about 4 o'clock he had passed his mother's bedroom, the door of which was open about a foot, and that he had seen his mother and Dr. Bernstein on the bed; that they were "just laying there"; that his mother had a headache; that he didn't know whether the lights were on or off but he thought they were on; that he had seen Dr. Bernstein in his mother's room "quite a few times" but only once on the bed. He also testified that once Dr. Bernstein had given his mother some money to buy Christmas toys.

After reading a transcript of the evidence and hearing oral argument of counsel, the trial court granted defendant's motion to set aside the information on the ground of lack of reasonable or probable cause.

The People contend that the trial court cannot usurp the function of the committing magistrate by substituting its judgment as to the weight of the evidence as long as there is some evidence in support of the information; and that a reasonable suspicion from the evidence that a crime has been committed coupled with a reasonable suspicion that the defendant committed the crime is sufficient to hold him to answer.

[1, 2] The crime with which we are here concerned, is contributing to the delinquency of a minor child; we are not concerned with the conduct of Dr. Bernstein and Mrs. Enns except insofar as the effect it might tend to have on the minor children involved. The test is the reasonable effect the charged acts have upon children, not what conclusions can be drawn therefrom by adults (People v. Miller, 145 Cal.App.2d 473, 477, 302 P.2d 603). It should also be remembered that it is the defendant's conduct in the *presence* of the children that is the gist of the action. A good statement of the rule is found in the concurring opinion of Mr. Chief Justice Angellotti in People v. Bergotini, 172 Cal. 717, 722–724, 158 P. 198, 200, where he said: "It is entirely fair and permissible to construe it [the statute] as referring exclusively to acts or omissions done or made directly with relation to the minor child. No case has been cited, and I have been able to find none, involving any other kind of an act or omission. For instance, one willfully commits lascivious acts in the presence of a child capable of comprehension, or toward such a child, or has immoral relations with a child, or does with relation to the child any of the very numerous things that may directly cause, tend to cause, or contribute to, its dependency; such acts or omissions are clearly within the scope of the statute. But something done solely with relation to somebody else, in no way directly affecting the child, may not fairly be held within its scope. And it can make no difference in this connection whether the thing so done is immoral, as in the case at bar, or absolutely free from blame."

[3] Taking all the evidence as true together with all the inferences to be drawn therefrom, it appears as a matter of law that the only conduct committed in the presence of the eight-year-old child consisted of Dr. Bernstein's presence in the home, his being on the bed with the child's mother when the lights were probably on, and being seen on his way to the shower dressed in his underclothing and shoes. It cannot be said that this conduct falls within the rule set forth in People v. Mitchell, 148 Cal.App.2d 733, 734, 307 P.2d 411, 412, where it was said that "A case is made out when the evidence proves acts on the part of the defendant which tend to cause or encourage a minor to lead an * * * immoral life." In People v. Deibert, 117 Cal.App.2d 410, 419, 256 P.2d 355, it was held that an "immoral life" is not confined to sexual matters but is something that is inimical to good order, against the welfare of the general public

and contrary to good morals. Even if we assume that the relationship between Dr. Bernstein and Mrs. Enns was contrary to good morals, the crime charged is whether their conduct, as committed in the presence of the children, would cause or tend to cause the children to lead idle, lewd, dissolute or immoral lives. We think it appears as a matter of law that it would not, and that the trial court was correct in setting aside the information for that reason. There is no evidence that the acts of the defendant committed in the presence of the child had any untoward effect whatsoever upon the child. And that is the crime with which we are here concerned.

[4] There is no merit to the People's argument that the trial court substituted its judgment for that of the committing magistrate. It is the duty of the trial court when, in its judgment, there is, as a matter of law, no evidence which tends to prove the offense charged in the information, to set it aside.

There is no merit to the People's argument that if the information "inadequately" described the acts of Dr. Bernstein and Mrs. Enns, the trial court should have "permitted amendment" rather than dismissing the information. In this connection the People rely upon section 1009 of the Penal Code which provides in part that an amended complaint "may be filed" by the prosecuting attorney without leave of court or that the court "may order or permit an amendment" of an information. It is apparently the People's position that if the information was insufficient, it was the duty of the court to order the prosecuting attorney to amend it even though no effort was made on behalf of the People to do so. But we are not here concerned with the problem of whether the information states a public offense, but whether the evidence presented at the preliminary examination is sufficient to establish probable cause that the offense charged in the information was committed by defendant. We agree with the trial judge that probable cause was not shown, and there was, therefore, no basis for the order holding the defendant to answer on which the information was based.

The order appealed from is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



51 Cal.2d 640

SELECT BASE MATERIALS, INC. (a Corporation), Appellant,

v.

BOARD OF EQUALIZATION of the State of California, Respondent.

L.A. 24742.

Supreme Court of California,

In Bank.

Feb. 20, 1959.

Rehearing Denied March 18, 1959.

Action to recover sales taxes paid under protest. The Superior Court of Los Angeles County, John J. Ford, J., denied the relief sought and plaintiff appealed. The Supreme Court, Spence, J., held, inter alia, that where taxpayer's customers were only interested in "delivered price" of granite, agreements required taxpayer to deliver granite to places designated by customers, customers had no control over independent truckers chosen by taxpayer for the hauling, and truckers were paid by taxpayer according to rates fixed by Public Utilities Commission, in view of evidence reflecting parties' intention that title to granite would not pass until delivery, transportation charges preceded the transfer of title and were therefore correctly included as part of taxpayer's "gross receipts" for computation of the sales tax.

Affirmed.

McComb, J., dissented.

Opinion, 329 P.2d 65, vacated.

1. Statutes ⇐181(1)

The fundamental rule of statutory construction is that court should ascertain intent of Legislature so as to effectuate the purpose of the law.

2. Statutes ⇐223.1

Every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.

3. Statutes ⇐206

If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of legislative purpose.

4. Statutes ⇐183

The legislative purpose will not be sacrificed to a literal construction of any part of the act.

5. Licenses ⇐15.1(5)

Under Revenue and Taxation Code defining a "sale" as any transfer of title of tangible personalty for a consideration, which definition is substantially the same as that used in Uniform Sales Act, Legislature intended the basic definition of the word "sale" to govern its interpretation in connection with "gross receipts" for computation of sales tax. West's Ann.Rev. & Tax.Code, §§ 6006(a), 6012; West's Ann.Civ.Code, § 1721.

6. Statutes ⇐223.2(18)

The subdivisions of section 6006 of the Revenue and Taxation Code containing basic definition of "sale" and setting forth other specific transactions which would be taxable must be co-ordinated and harmonized with section 6012 for purpose of application of the Sales Tax Act. West's Ann.Rev. & Tax.Code, §§ 6006(a–g), 6012.

7. Statutes ⇐212.6

It is not to be presumed that Legislature used language in a sense which would render nugatory important provisions of the statute.

8. Licenses ⇐29

In determining whether transportation of granite occurred before or after sale on question whether transportation charges were includable for sales tax purposes, fact that taxpayer elected to discharge its responsibility for delivery by use of independent truckers and pay them according to rates fixed by Public Utilities Commission was immaterial. West's Ann.Rev. & Tax.Code, §§ 6006(a), 6012.

9. Licenses ⇐29

Where taxpayer's customers were only interested in "delivered price" of granite, agreements required taxpayer to deliver granite to places designated by customers, customers had no control over independent truckers chosen by taxpayer for the hauling and truckers were paid by taxpayer according to rates fixed by Public Utilities Commission, in view of evidence reflecting parties' intention that title to granite would not pass until delivery, transportation charges preceded the transfer of title and were therefore correctly included as part of taxpayer's "gross receipts" for computation of the sales tax. West's Ann.Rev. & Tax.Code, §§ 6006(a), 6012.

See publication Words and Phrases, for other judicial constructions and definitions of "Gross Receipts".

10. Statutes ⇐219

While contemporaneous administrative construction of Sales Tax Act by State Board of Equalization is not necessarily controlling, it is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. West's Ann.Rev. & Tax.Code, § 6012.

11. Licenses ⇐29

Charges for transporting decomposed granite by use of independent truckers were not precluded from being included as part of seller's "gross receipts" for computation of sales tax on theory that double taxation would result, since independent truckers would likewise be required to include such charges in computing their gross receipts from trucking operations, since the sales tax and trucking tax are excise and not property taxes and each is a well-de-

fined privilege tax, and though each tax is measured by gross receipts, separate and distinct privileges are involved. West's Ann.Rev. & Tax.Code, §§ 6006(a), 6012, 9606.

12. Automobiles ⇐97

Licenses ⇐1

The sales tax and trucking tax are excise and not property taxes and each is a well-defined privilege tax, one for privilege of selling tangible personal property at retail and the other for privilege of using the public highways for hauling services, and though each tax is measured by gross receipts, separate and distinct privileges are involved. West's Ann.Rev. & Tax. Code, §§ 6012, 9606.

William J. Clark, Los Angeles, for appellant.

Charles C. Stratton, Sterling S. Clayton, Trippet, Yoakum, Stearns & Ballantyne, Oscar A. Trippet and David Freeman, Los Angeles, amici curiae on behalf of appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann, Jay L. Shavelson and James C. Maupin, Deputy Attys. Gen., for respondent.

SPENCE, Justice.

Plaintiff sought to recover certain sales taxes paid under protest. The disputed taxes were based upon transportation charges made by plaintiff for materials delivered to its customers during the period from May 1, 1951, through September 30, 1953. Plaintiff claimed that by virtue of its method of doing business, the transportation costs were incurred *after* the sale and therefore should have been excluded from the computation of its gross receipts. The court ruled otherwise and accordingly entered judgment denying plaintiff any relief. We have concluded that such judgment must be affirmed.

During the period involved plaintiff was in the business of mining and selling decomposed granite from its lands. It did not stockpile any material but upon receiving an order, it mined the granite and placed it directly on trucks to be hauled to the place designated by the buyer. Plaintiff did not own any trucks but contracted with independent truckers. The hauling charges, which plaintiff paid, were those fixed by the Public Utilities Commission according to the delivery zone.

Practically all orders received by plaintiff were made by telephone. When a new customer called, he would ask the price and then after he gave the address for delivery of the materials, he would be quoted the "price of the granite plus the haul." With an old customer, there would be no discussion as to price but the order would be taken with notation of the place for delivery. No statement was made to any customer concerning who would do the hauling. The trucker's delivery ticket, a form prepared by plaintiff, contained the following notation: "Our drivers will make every effort to place materials where customer designates, but the shipper assumes no responsibility for damages inside the curb line."

On its books plaintiff always segregated the charges so as to state separately the price for the material, the sales tax thereon, and the transportation cost. However, the invoices sent to the customers varied: some set forth the transportation cost as a separate item while others lumped the material price and hauling charge together, with the "tax on material only" shown separately. The transportation cost would be a matter of computation on the latter form. Plaintiff's office manager testified that the customers' sole concern was the cost of the load at the place designated for delivery, not "the cost of the freight [separate] from the cost of the granite." Defendant called several of plaintiff's customers as witnesses, all of whom agreed that the "delivered price" was the basis of their orders of plaintiff's materials.

The court found that all transportation charges made by plaintiff to its customers during the period involved were for trans-

portation of materials prior to sale; that no sale took place until delivery to the customers; and that plaintiff's bills to its customers included a charge for both the materials and transportation. From these findings the court concluded that the transportation charges were part of the sales price of the property sold by plaintiff (Rev. & Tax.Code, § 6011) and were properly includable within plaintiff's gross receipts for sales tax purposes. Rev. & Tax.Code, § 6012. Plaintiff contends that the evidence does not support the findings.

Section 6051 of the Revenue and Taxation Code imposes a tax upon retailers for the privilege of selling tangible personal property at retail. The tax is measured by the retailer's gross receipts from sales. Section 6012 defines "gross receipts" as the total amount for which tangible personal property is sold, including the cost of transportation of property *prior to its sale to the purchaser* but excluding "transportation charges separately stated" if the transportation occurs *after the sale of the property is made to the purchaser.* Section 6011 similarly defines "sales price" as the total amount for which tangible personal property is sold, with like distinction for inclusion and exclusion of the transportation charges as part of the sale. Accordingly, the principal question here is whether the transportation occurred before or after the sale.

Under the Uniform Sales Act (Civ.Code, §§ 1721–1800), a sale is "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." Civ.Code, § 1721. Defendant maintains that since plaintiff's agreements with its customers cast upon it the obligation to deliver the granite to the points designated by the customers, the intent of the parties as to the time and place where title should pass is governed by section 1739, rule 5. It provides: "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." Plaintiff, on the other hand, maintains that the question of its tax liability on the transportation charges is governed by subdivision (b) of section 6006 of the Sales Tax Act. Rev. & Tax.Code, §§ 6001–6095. Under section 6006, a sale "means and includes: (a) Any transfer of title or possession * * * of tangible personal property for a consideration. * * * (b) Any withdrawal * * * of tangible personal property from the place where it is located for delivery to a point in this State for the purpose of the transfer of title or possession * * * of the property for a consideration. * * *" Plaintiff contends that all the transactions here in question fell within subdivision (b) of the above section, which was effective during the period here in question, excepting the last fifteen days thereof. The trial court held this subdivision (b) to be inapplicable, and apparently resolved the parties' basic dispute under the Uniform Sales Act as coordinated with subdivision (a) of section 6006 and section 6012 of the Revenue and Taxation Code. Accordingly, it held that the evidence showed that the parties intended, as defendant argued, that the transfer of title to the granite should pass when it reached the place of delivery, rather than, as plaintiff argued, when it was placed upon the trucks of the independent carriers. The transportation charges therefore occurred prior to the sale and their inclusion in plaintiff's gross receipts for sales tax purposes was proper.

[1–4] The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. California Toll Bridge Authority v. Kuchel, 40 Cal.2d 43, 53, 251 P.2d 4; County of Alameda v. Kuchel, 32 Cal.2d 193, 199, 195 P.2d 17; Dickey v. Raisin Proration Zone No. 1, 24 Cal.2d 796, 802, 151 P.2d 505, 157 A.L.R. 324; 82 C.J.S. Statutes § 321 p. 560; 45 Cal.Jur.2d Statutes, § 126, p. 634. Moreover, "every statute should be construed with reference to the whole system

of law of which it is a part so that all may be harmonized and have effect." Stafford v. Los Angeles County Employees' Retirement Board, 42 Cal.2d 795, 799, 270 P.2d 12, 14. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. People v. Western Air Lines, Inc., 42 Cal.2d 621, 638, 268 P.2d 723. Such purpose will not be sacrificed to a literal construction of any part of the act. People v. Ventura Refining Co., 204 Cal. 286, 292, 268 P. 347, 283 P. 60; H. S. Mann Corp. v. Moody, 144 Cal.App.2d 310, 320, 301 P.2d 28; 45 Cal.Jur.2d Statutes, § 130, p. 637. Applying these principles, it must be concluded that plaintiff cannot prevail here.

[5] Subdivision (a) of section 6006 of the Revenue and Taxation Code sets forth the principal definition of "sale" as "any transfer of title * * * of tangible personal property * * * for a consideration." It coincides with the common-law definition of a "sale" and is substantially the same as that used in the Uniform Sales Act. Civ.Code, § 1721; 77 C.J.S. Sales § 4, pp. 587–588. It is reasonable to assume that the Legislature intended the basic definition of the word "sale" to govern its interpretation in connection with "gross receipts" for computation of the sales tax. Rev. & Tax.Code, § 6012. As a further refinement for purposes of the Sales Tax Act, subdivision (b) of section 6006 declared a taxable event to take place when there is any "withdrawal * * * of tangible personal property from the place where it is located for delivery to a point in this State for the purpose of the transfer of title * * * of the property for a consideration." This provision was obviously engrafted into the Sales Tax Act in 1939 to enable the state to tax retail transactions that would not otherwise be taxable, as where goods were shipped from one point in this state for sale within territory which had been ceded by the state to the United States without reservation of the right of taxation, such as the military reservation known as "The Presidio" in San Francisco. See Standard Oil Co. v. People of State of California, 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775, decided in 1935. Manifestly, there would be no necessity for such provision where delivery as well as withdrawal of the goods takes place within the state's boundaries, for title would pass and the sale would be determinable under subdivision (a). Subdivision (b), making the act of withdrawal "in this State" a taxable event, remained in effect until September 15, 1953, although by federal statute (4 U.S.C.A. § 105) the state was in 1940 granted authority to levy sales taxes in any federal area. While there was an extended delay in the elimination of the subdivision as part of the Sales Tax Act, its continuance as part of the law did no harm and the Legislature may have postponed its removal to cover the situation in the event that the cited federal legislation did not continue in effect. At any rate, when subdivision (b) was repealed in 1953, subdivision (a) was left unchanged as expressing the basic definition of a "sale."

[6, 7] Plaintiff argues that the language of subdivision (b) is clear and unambiguous so as not to permit the application of rules of construction for its interpretation. But section 6006, as it read at the time here involved, had seven subdivisions, with subdivision (a) containing the basic definition of "sale" and the succeeding six, (b) to (g), setting forth other specific transactions which would be taxable. These subdivisions must be coordinated and harmonized with section 6012 for the purpose of application of the Sales Tax Act. If, as plaintiff contends, a taxable sale occurred the moment the granite was removed from the mine, constituting a "withdrawal" under subdivision (b), then all transportation must occur after the sale and sections 6011 and 6012 of the Revenue and Taxation Code, distinguishing between transportation costs before and after the sale for purposes of computing the sales tax, would become meaningless. It is not to be presumed that the Legislature used language in a sense which would render nugatory important provisions of the statute. Clem-

ents v. T. R. Bechtel Co., 43 Cal.2d 227, 233, 273 P.2d 5. Rather by confining subdivision (b) to its limited purpose as declaring a taxable event under prescribed conditions relating to the federal law, each part of the statute is given meaning.

[8, 9] Since subdivision (a) thus becomes the applicable part of section 6006 in determining when the sale occurred in relation to the transfer of title to the goods, defendant properly relies on the record to sustain inclusion of the transportation charges in computing plaintiff's sales taxes. As appears from the evidence, plaintiff's customers were only interested in the "delivered price" of the granite, and plaintiff's agreements required it to deliver the granite to the places designated. The customers had no control over the independent truckers chosen by plaintiff for the hauling, and the truckers were paid by plaintiff. The fact that plaintiff elected to discharge its responsibility for delivery by the use of independent truckers and paid them according to the rates fixed by the Public Utilities Commission is immaterial. In view of the evidence reflecting the parties' intention that title to the granite would not pass until delivery, we conclude that the trial court properly held that the transportation charges preceded the transfer of title and were therefore correctly included as part of plaintiff's "gross receipts" for computation of the sales tax.

[10] In the administration of the Sales Tax Act, defendant has consistently taken the position that the transfer of title is the proper test for application of section 6012 of the Revenue and Taxation Code, and that the intent of the parties to the sale controls. Sales and Use Tax Ruling No. 58, Calif.Admin.Code, Tit. 18, § 2028. While this contemporaneous administrative construction is not necessarily controlling, it "is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 921, 156 P.2d 1, 2; see also Richfield Oil Corp. v. Crawford, 39 Cal.2d 729, 736, 249 P.2d 600. The same reasoning was employed in O'Kelley-Eccles Co. v. State of California, 160 Cal.App.2d 60, 324 P.2d 683, where the propriety of including delivery charges in the computation of the seller's gross receipts from sales for purposes of the sales tax was determined on the basis of "when title passed" in the sales involved (160 Cal.App.2d at page 63, 324 P.2d at page 685), and the "intent of the parties" (160 Cal.App.2d at page 64, 324 P.2d at page 686) was held to be governed by rule 5 of section 1739 of the Uniform Sales Act. See also Meyer v. State Board of Equalization, 42 Cal.2d 376, 382, 267 P.2d 257.

[11, 12] Nor does it avail plaintiff to argue that double taxation will result if it is held liable for the transportation charges as part of its gross receipts from sales and the independent truckers employed by it are likewise required to include such charges in computing their gross receipts from trucking operations. Rev. & Tax.Code, § 9606. The sales tax and the trucking tax are excise and not property taxes. Each is a well-defined privilege tax: one for the privilege of selling tangible personal property at retail and the other for the privilege of using the public highways for hauling services. Though each tax is measured by gross receipts, separate and distinct privileges are involved. The imposition of such taxes therefore presents no problem of double taxation. Cf. Douglas Aircraft Co., Inc. v. Johnson, 13 Cal.2d 545, 549, 90 P.2d 572.

In view of the above conclusions, it becomes unnecessary to determine the parties' further dispute as to whether the transportation charges met the statutory requirement of separate statement in relation to the computation of gross receipts from sales. Rev. & Tax.Code, § 6012.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SCHAUER, JJ., concur.

McCOMB, Justice.

I dissent. I would reverse the judgment for the reasons stated by Mr. Justice Nourse in the opinion prepared by him for the District Court of Appeal in Select Base Materials, Inc. v. Board of Equalization, 329 P.2d 65.

Rehearing denied; McCOMB, J., dissenting.



51 Cal.2d 620

PEOPLE of the State of California, Respondent,

v.

Charles Evan TURVILLE, Jr., Appellant.

PEOPLE of the State of California, Respondent,

v.

Lamar MITCHELL, Appellant.

Cr. 6224, 6249.

Supreme Court of California, In Bank.

Feb. 18, 1959.

Rehearing Denied in Cr. 6224 March 18, 1959.

Defendants were convicted of murder in the first degree and from judgments of the Superior Court, Los Angeles County, Ralph K. Pierson, J., the defendants appealed. The Supreme Court, McComb, J., held that the evidence sustained conviction; that requested instructions were properly refused; that confessions were properly admitted; that argument of the district attorney was not improper; that the trial judge was not guilty of misconduct; and that a defendant was not denied equal protection when he received the death penalty and his codefendant because of his age, received life imprisonment.

Judgments and order affirmed.

1. Homicide ⇐235

Evidence sustained conviction for first-degree murder where evidence disclosed that the victim was killed in the perpetration of robbery and in an effort to extort from victim the combination to his safe and that he was tortured with the specific intent that he should suffer. West's Ann.Pen. Code, § 189.

2. Homicide ⇐18(1)

A killing, intentional or otherwise, committed in perpetration of a felony enumerated in the statute constitutes murder in the first degree. West's Ann.Pen.Code, § 189.

3. Homicide ⇐22(2)

When a killing is perpetrated by torture, the means used is conclusive evidence of malice and premeditation and the crime is murder of the first degree. West's Ann. Pen.Code, § 189.

4. Homicide ⇐22(1)

It is murder by torture where the intent of the defendant was to inflict grievous pain and suffering upon the victim for the purpose of persuasion so as to sustain conviction of murder in the first degree. West's Ann.Pen.Code, § 189.

5. Homicide ⇐253(4)

An intent that the deceased should suffer may be inferred from the condition of the deceased's body and the admissions of defendant so as to sustain conviction of murder in the first degree by torture. West's Ann.Pen.Code, § 189.

6. Criminal Law ⇐829(21)

In murder prosecution, failure to give requested instructions on the degree of the crime was not error in view of the instructions given by the court.

7. Homicide ⇐308(3)

In murder prosecution, instructing that either the murder was in the first degree or defendants were entitled to an acquittal was not error under the evidence.

8. Homicide ⇐308(3)

Where the evidence pointed indisputably to a homicide committed in the act of robbery and in torturing the victim with intent that he suffer, court properly advised the jury that defendants either were innocent or were guilty of first-degree murder. West's Ann.Pen.Code, § 189.

9. Homicide ⇐294(2)

In murder prosecution, refusing an instruction on intoxication was not error where there was no evidence thereof.

10. Criminal Law ⇐774

Mere fact that a defendant may have been drinking prior to the commission of a crime does not establish intoxication or require the giving of an instruction thereon.

11. Criminal Law ⇐824(1)

In murder prosecution against two defendants, failure to instruct jury on the court's own motion that the case against one defendant ended when he rested was not error where defendant made no such request for an instruction.

12. Criminal Law ⇐770(2), 824(4)

Generally, in a criminal case, a jury should be instructed on general principles of pertinent law, but the rule is not applicable to specific points developed during trial, and unless instructions as to those matters are requested by the defendant, the court need not give such instructions on its own motion where the jury is otherwise fully and fairly instructed on general principles of law involved.

13. Homicide ⇐311

In murder prosecution, instructing that a prisoner sentenced to either death or life imprisonment may be pardoned or have his sentence reduced and that a prisoner serving a life sentence may be paroled, but not until he has served at least seven years, was proper.

14. Criminal Law ⇐823(11)

Instructing that if a jury found that a confession or an admission was false in any particular it nevertheless remained evidence for the consideration of the jury in connection with all other evidence was proper in view of other instructions.

15. Criminal Law ⇐1172(2)

Instructing that notwithstanding a jury determines a confession to be false, it remains evidence to be considered under instructions to be given subsequently concerning false statements made by an accused, is not reversible error, where a subsequent instruction clearly explains the evidentiary value of false statements and there is ample evidence of guilt apart from confession.

16. Criminal Law ⇐786(2)

Instruction that testimony of a defendant is not to be weighed or deliberated upon differently from that of any other witness was properly refused.

17. Criminal Law ⇐531(3)

In murder prosecution against two defendants, admitting the confession of one defendant was not improper on the ground that defendant claimed that he was denied due process of law and that his confession was illegally obtained by FBI agents in New York, where evidence established that the confession was free and voluntary and that defendant was taken without unnecessary delay before a federal commissioner in New York. U.S.C.A.Const. Amend. 14.

18. Criminal law ⇐404(4)

In murder prosecution, admitting in evidence as against one defendant the victim's watch, ring, pistol, bloody pants, shoes and other things found in possession of the codefendant was not error where they were material to the people's case against both defendants.

19. Criminal Law ⇐1036(1)

Where defendant presented no objection in the trial court to the introduction in evidence of exhibits, he could not for the first time on appeal urge error therein.

20. Criminal Law ⇐517(1)

In murder prosecution, admitting confession of defendant was proper where its voluntariness was established.

21. Criminal Law ⇐673(4)

In murder prosecution, receiving in evidence the confession of the codefendant was proper where the jury was adequately admonished that it related only to such defendant and was not to be considered against the other defendant.

22. Criminal Law ⇐713

In murder prosecution, record did not establish that the district attorney was guilty of misconduct in his argument to the jury.

23. Criminal Law ⇐720(1)

District attorney may use appropriate epithets which are warranted by evidence

in argument to the jury without being chargeable with prejudicial misconduct.

24. Criminal Law ⇐1037(1)

Defendants could not object on appeal to argument of the district attorney where no objection was made in the trial court.

25. Criminal Law ⇐1171(1)

In murder prosecution, argument of district attorney in respect to the length of time of service for life imprisonment on the penalty phase of the case as to the defendant was not prejudicial error where the district attorney correctly stated the law. West's Ann.Pen.Code, § 190.1.

26. Constitutional Law ⇐203
Criminal Law ⇐1206(1)

The statute respecting penalty for an offense in which the alternative is death or life imprisonment is not unconstitutional as ex post facto as to a defendant prosecuted and convicted for a crime committed prior to the effective date of the statute. West's Ann.Pen.Code, § 190.1.

27. Criminal Law ⇐864

In murder prosecution, the trial judge was not guilty of misconduct in commending the jury at the conclusion of its deliberations on the issue of guilty, where the comments of the trial judge were fair and did not indicate any preference or belief concerning the penalty to be imposed.

28. Constitutional Law ⇐250

In murder prosecution, a defendant was not denied equal protection because he received the death penalty and his codefendant because of his age received life imprisonment. U.S.C.A.Const. Amend. 14.

29. Statutes ⇐72

The statute respecting determination of penalty where offense is punishable by death or life imprisonment is not invalid as violating the Constitution, providing that all laws of a general nature shall have a uniform operation. West's Ann.Pen. Code, § 190.1; West's Ann.Const. art. 1, § 11.

30. Statutes ⇐72

The Legislature may classify persons by their age for the purpose of determining the punishment to be inflicted for crimes committed, and when the classification is reasonable there is no constitutional bar thereto. West's Ann.Const. art. 1, § 11.

31. Constitutional Law ⇐48

The presumption is that an act of the Legislature is constitutional.

32. Constitutional Law ⇐250

Where all other persons in the same class as the defendant are subjected to like punishment, there is no denial of equal protection of the laws. U.S.C.A.Const. Amend. 14.

33. Criminal Law ⇐1087

Defendant was not entitled to complain of an alleged incomplete record on the appeal where he failed to direct the attention of the Supreme Court to any instance where the record on appeal was not correct.

34. Criminal Law ⇐1127

Record did not establish that the defendant was denied the right of counsel of his choice on his motion to correct the reporter's transcript.

Morris Lavine, Los Angeles, and William L. White, Long Beach, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., William B. McKesson, Dist. Atty., Los Angeles, Lynn Compton and Jack Kirschke, Deputy Dist. Attys., Long Beach, for respondent.

McCOMB, Justice.

Defendant Turville, aged 22, was found guilty of first degree murder, and the jury fixed the penalty at death. His appeal is automatic, pursuant to section 1239, subdivision (b), of the Penal Code.

Defendant Mitchell, aged 17, was found guilty of first degree murder and sentenced to life imprisonment. He appeals from the judgment and the order denying his motion for a new trial.

Viewed in the light most favorable to the People, the record discloses the following facts:

On August 26, 1957, the victim, Milo S. Smith, was an attorney in San Pedro. His practice dealt with criminal cases to a certain extent, and a number of his clients were Negroes. He was well known in the San Pedro area, having practiced there for over 30 years. At the time of his death he was 55 years old, 5 feet 8½ inches in height, and weighed about 197 pounds.

His suite of offices was located on the second floor of a two-story building on Pacific Avenue. An alley ran along the back of the building, with a parking area in the rear. There were doors and stairways in both the front and rear of the building giving access to the second floor.

The suite consisted of several rooms. One was a large room known as the workroom or library, where Mr. Smith and his secretary, Mrs. Knutson, worked. Adjoining this at one end was a room known as the "morgue," in which were filing cabinets, a refrigerator and a closet. In this closet Mr. Smith kept his entire wardrobe, including a number of ties which hung from a rack on the inside of the door. Thirty-five to forty-five pairs of shoes were kept on top of the filing cabinets. Adjoining the workroom at the other end were a combination kitchen and bar, and a restroom.

Across the hall from the workroom were three other rooms, including Mr. Smith's private office, or consultation room, with windows overlooking Pacific Avenue. This office contained, among other things, a desk, a large table, and an upright safe.

Mr. Smith wore bifocal glasses. Even with his glasses, he could not see the dial to open the safe, and, to the knowledge of his secretary, he had not opened the safe during the nine years she had been in his employ. In September 1956 the combination to the safe had been changed, and his secretary had typed the new combination on a small slip of paper, which he carried in his billfold.

Mr. Smith was in the habit of carrying large sums of money on his person. In his hip pocket he carried a billfold containing identification cards and from $1,000 to $2,000 in large bills. In his front pants pocket he carried a leather money clip, which ordinarily contained bills of $20 or less. He also carried in his inside coat pocket a secretary-type wallet containing a note pad and pencil, but his secretary had never known him to carry money in it.

After locking the office at approximately 5:15 p. m. on August 26, 1957, Mr. Smith and Mrs. Knutson went to a nearby cocktail lounge, where they remained for about an hour. Smith was wearing a dark blue suit and a white short-sleeved shirt. Before leaving the office he had removed his tie and placed it in his pocket. Mrs. Knutson observed that Smith was wearing his wrist watch and a diamond ring and that he had a substantial amount of money in his money clip, including several $50 bills. His name was engraved on the back of his wrist watch.

About 6:30 p. m. Mrs. Knutson and Smith separated. He drove to the home of a client, Mrs. Helen Seal, in the Palos Verdes area of Los Angeles County. Subsequently, in the company of Mrs. Seal's son Michael, he returned to the San Pedro area, where the two of them visited several bars. Around 2 a. m. on August 27, 1957, they met defendants on the corner of Fifth and Beacon Streets in San Pedro. Smith gave defendant Turville $20 to purchase a bottle of whiskey for him. Turville returned and said he could not get any liquor and offered the bill back to Smith, but Smith told him to keep it. Defendants suggested that it would be wiser to drive around in Smith's car than to stand on the street. Smith, Seal and defendants then drove to Smith's office in his car.

On arriving at the office, they parked the car in the rear of the building, and the four entered Smith's offices by the rear door and stairway. Smith showed the party through the offices and after some conversation gave defendant Mitchell some shoes. He then called a cab driver friend, who brought a bottle of whiskey to the office. He invited the driver to the office for a drink, but the invitation was declined.

After some drinking and conversation in the office, Seal departed, driving Smith's car, and returned to his home, where he arrived about 3:20 a. m. Shortly before this time, Smith telephoned Mrs. Seal to inquire about his car. About 3:30 a. m. he again called Mrs. Seal, and learning that his car was at her home, he instructed her that it be left in the driveway and said he would pick it up later. About 4:57 a. m. he called for a cab to be sent to his office. The cab was dispatched but returned without a fare.

About 5:20 a. m. the dispatcher of the cab company received another call asking that a cab be sent to Smith's office, but the person who made this call was not Mr. Smith.

About 5:21 a. m. Chester Burns, a cab driver, drove up in front of Smith's office and observed lights in the office. He honked his horn, got out of the cab, entered the front of the building, and went to the door of Smith's office. While outside the door, he heard someone opening and closing desk drawers, but when he knocked on the door the noise ceased. No one answered the door and he departed. As he left the building, he stumbled over two or three pairs of Smith's shoes at the foot of the front stairs. While getting into his cab, he looked up at the windows of the office and observed a person who appeared to be watching him. This person was not Smith.

At 7:50 a. m. Mrs. Knutson entered the building through the rear door and stairway and came into the office through the "morgue" room. She observed that the closet door was open and that the ties had been disturbed. She went to Smith's private office and found his body lying face upward with a necktie around his throat. The necktie was the one he had taken off and put into his pocket the preceding evening. The blue pants and coat that he had been wearing were cast to one side on the floor, and his billfold was lying open and empty on the table back of his desk. His glasses were lying on a shelf in another room some distance from the body. A .45 automatic, which was kept in the desk in his private office, was missing. The facing was broken off the drawer of the secretary's desk, and five pairs of Smith's shoe were gone.

The police entered the building through the front entrance at approximately 8 a. m. At the foot of the stairs they found a soiled towel but no shoes. They observed a souvenir rifle, broken in two parts, lying near the body. A telephone, with the receiver broken but resting in the cradle, was on the floor. Smith's secretary-type wallet was lying on the floor behind the desk, and a paper containing the combination to the safe was on the floor.

The investigating officers found a bloody footprint near the safe, blood on the safe, and a bloody mark in front of it, as if someone with blood on his knee had knelt there. A small saucepan of water was sitting by the victim's head, and there was a small wooden gavel partially under the body. Blood and water were mixed on the carpet. The blood was the same type as Smith's. When the officers turned Smith's body over, they found that his hands were tied behind his back with a necktie. There was broken glass on the floor of the workroom, but aside from the fact that the telephone in the room where the body was found was broken, there was no evidence of a struggle in the offices. Smith's money, watch and ring were missing.

Fingerprints and palm prints of both defendants were found throughout the offices, specifically on the broken telephone, the top of the desks, the filing cabinets, and the closet door.

The autopsy surgeon testified that in his opinion the victim had died between 4:47 and 6:47 a. m. on August 27, 1957, and that the cause of death was massive internal hemorrhage from a rupture of the mesentery. There were 55 external wounds or groups of wounds on the body, the entire rib cage was fractured and compounded externally, and the ligature around the neck had been applied with sufficient force to fracture the hyoid bone and to produce discoloration in the skin of the neck. In the autopsy surgeon's opinion, Smith had been garroted and his injuries were extremely

painful and had been inflicted after his hands had been tied behind his back and apparently while he was conscious.

On August 29, 1957, defendant Turville was arrested at the home of his aunt in Brooklyn, New York, by two agents of the FBI. At the time of his arrest he was wearing Smith's watch and ring. He was taken to the New York office of the FBI, where he orally confessed to the murder and then signed a 12-page written confession containing the same matters as the oral confession. Before he was questioned by the agents of the FBI, he was advised of his constitutional rights. On the following morning he was arraigned on a federal warrant before the United States Commissioner.

In his confession Turville stated that he and Mitchell had gone to Smith's office during the early morning hours of August 27 at Smith's invitation. Smith had given Mitchell a couple of pairs of shoes, which Mitchell subsequently placed at the foot of the front stairs of the office. Afterward he and Mitchell returned to the suite of offices, and when Smith went to the restroom, they agreed to rob him and force him to open the safe.

Turville further stated that the two of them forced Smith to the floor and removed the money from his pockets. They then carried him into Smith's private office and set him opposite the safe and ordered him to open it. When he refused, the two of them administered "judo chops" to his sides, and when Smith tried to crawl out of the office, Mitchell struck him across the head with the rifle. They revived him with water, placed a gag in his mouth, and told him to write the combination to the safe on a piece of paper. When Smith refused, they beat him some more and went through his wallets, finding a couple of combinations, which they tried on the safe without success. When Smith appeared to be dead and they were unable to revive him, Mitchell endeavored to wipe their fingerprints from the office with a towel, and Turville took Smith's watch and ring.

Turville further stated that the two men then left the office by way of the front stairs, picked up the shoes at the foot of the stairs, and walked to downtown San Pedro, where they separated. Before separating Mitchell gave him two $100 bills, half of the four $100 bills taken from Smith's pockets.

He further stated that he met Betty Lou Page on the street in San Pedro, and she drove him to Palm Springs, where he endeavored to get a plane to New York. Failing this, he returned to International Airport in Los Angeles and on the following morning flew to New York City and went to the home of his aunt.

Following his confession to the FBI agents, Turville directed them to his luggage, which contained the clothing he had worn on the night of the murder. From the luggage the agents recovered a pair of pants with a large bloodstain on the knee, blood on the cuff, and blood inside the pockets. The blood was type *O*, which was the same blood type as that of the victim. The agents also recovered the .45 automatic that had been taken from Smith's office.

Thereafter, in New York, Turville repeated to an officer of the Los Angeles Police Department and a representative of the Los Angeles County District Attorney's office the statements he had made to the FBI agents. In addition, he stated that during the course of the robbery he had taken Smith's pants off so that he would not run into the street and call the police.

On September 3, 1957, he was taken before a Supreme Court judge of the State of New York, where he was again advised of his constitutional rights. He waived extradition proceedings and was returned to Los Angeles on September 4, 1957. There he repeated his confession to Lt. Weyant of the Los Angeles Police Department.

Defendant Mitchell was arrested in Los Angeles on the night of August 29, 1957. At that time he had in his possession $290, which included two $100 bills that he had attempted to conceal in the waistband of his trousers.

Shortly after his arrest, there was a conversation between Mitchell and police officers at the police station in San Pedro. His statements were made freely and voluntarily and without the use of any threats or force or any promise of reward or immunity. He stated that the money in his possession had been saved from his earnings, or he had won it at a poolhall in Watts, where he had been playing for $25 a game, and that on the evening of August 26 and the early morning of August 27, 1957, he had been at home. He was then informed that his father had told the officers that he had left home around 8 o'clock in the evening on August 26 and had not returned until the following morning around 7 or 8 o'clock, and that other witnesses had seen him on Beacon Street that evening and early morning in the company of two white persons, one being Milo Smith, and another colored fellow. In response to this statement, Mitchell said, "Yes, I was with him, but I went home early."

Mitchell then related occurrences on the evening of August 26 and the early morning of the 27th. He admitted meeting two "white studs," an older one "between 45–50" and a young one introduced as "Mike, Jr." who appeared to be 18 or 19. He said that another colored fellow, known to him as Johnny Blessay (defendant Turville), joined them and they went to Smith's office on Pacific Avenue.

He further stated that after Mike Seal had departed, Smith called home in regard to his car and said he would be there in a cab to pick it up. Smith then started to dial for the cab company, and he (Mitchell) put his finger on the button on the phone to stop him from calling. When asked why he did that, he stated: "Well, I thought this guy was the police, all evening long. When we first met these guys, I had an idea they were the police and I was going to wind up in jail." Mitchell then obtained the number of the cab company from Information, dialed the cab company, and permitted Smith to order a cab. Turville at that time was listening in on another telephone. After waiting a while, Mitchell walked down to see whether the cab was coming. When it did not arrive, he returned to the office, again telephoned for a cab, and waited a while longer. When the cab did not arrive, he and Turville left the office about 3:18 a.m.

Mitchell was told that he was not telling the whole truth about the matter and that Turville had been picked up in New York and had implicated him. He was shown a newspaper indicating that Milo Smith's murderer had been arrested in New York.

Mitchell then said he would tell the whole truth and stated that his codefendant had taken a tie, grabbed Smith, forcing him to the floor, and went through his pockets. His codefendant pulled out Smith's wallet and the money out of his money clip and handed them to him. His codefendant then got Smith on his feet, took him to the other room, and tried to get him to open the safe. This was done by his codefendant's giving Smith "judo chops" and hitting him all over the head and body and kicking him in the stomach and chest. He (Mitchell) gave Smith artificial respiration and told his codefendant to let him alone. While his codefendant was still trying to get Smith to write down the combination to the safe, Mitchell went out to the refrigerator, and when he came back Smith was lying face down on the floor. His codefendant was pounding Smith's face against the floor, pounding his head with the telephone, and hitting him with the gavel to persuade him to open the safe. Mitchell heard the cab pull up and went to the windows to see whether the cab had gone.

He further stated that Smith lost consciousness more than once as a result of the choking. After breaking into one of the desks in another room, Mitchell returned to the private office, where Turville, who had found the combinations to the safe in Smith's wallet, was trying to open the safe. Smith was lying on the floor on his back with his eyes open, and he (Mitchell) thought he was all right, but when he listened he could not hear him breathing. He did not know whether Smith was dying or not, and he and Turville then left. He said

that Turville had given him the two $100 bills which he was carrying at the time of his arrest, but that the remainder of the money he had was his.

[1] *Questions:* First. *Was the evidence sufficient to support the verdicts finding defendants guilty of murder in the first degree?*

Yes. The following rules are here applicable:

(1) Murder which is perpetrated by means of torture or committed in the perpetration or attempt to perpetrate robbery is murder in the first degree. (Pen.Code, § 189.)

[2] (2) A killing, intentional or otherwise, committed in the perpetration of one of the felonies enumerated in section 189 of the Penal Code constitutes murder of the first degree. (People v. Osborn, 37 Cal.2d 380, 383, 231 P.2d 850.)

[3] (3) When a killing is perpetrated by means of torture, the means used is conclusive evidence of malice and premeditation, and the crime is murder of the first degree. (People v. Misquez, 152 Cal.App. 2d 471, 480 [9], 313 P.2d 206.)

[4] (4) It is murder by torture where the intent of the defendant was to inflict grievous pain and suffering upon the victim for the purpose of persuasion. (People v. Daugherty, 40 Cal.2d 876, 886 [7], 256 P.2d 911.)

[5] (5) An intent that the deceased should suffer may be inferred from the condition of the deceased's body and the admissions of the defendant. (People v. Misquez, supra, at page 480 [10] of 152 Cal.App.2d at page 211 of 313 P.2d.)

Applying the foregoing rules to the evidence set forth above, it is disclosed that the victim was killed in the perpetration of robbery and in an effort to extort from him the combination to his safe and that he was tortured with the specific intent that he should suffer. Therefore, there is ample support for the verdicts of the jury that defendants were guilty of murder in the first degree.

[6] Second. *Did the trial court err in failing to give requested instructions on the degree of the crime?*

No. The trial court instructed the jury as follows: "Although there are two degrees of murder, the evidence in this case is such that either the defendants are innocent of the charge of murder or one or both of them is guilty of murder in the first degree." In addition, the jury was instructed on justifiable homicide in self-defense and the law concerning murder in the perpetration of robbery or attempt to perpetrate robbery.

[7] Turville contends that the trial court erred in instructing the jury that either the murder was in the first degree, or defendants were entitled to an acquittal. This contention is unsound, for the reason that the evidence clearly indicates that there was no tenable theory presented to the court requiring that instructions be given on any lesser degree of homicide. Turville's theory was that he struggled with Smith in defense of his life but that he did not kill him, and that someone else entered the premises after his departure, tied the victim, and killed and robbed him. The theory of the defense presented to the jury was aimed at pointing the finger of suspicion on at least three other persons, Mrs. Knutson, Mike Seal, or a person or persons unknown. This was developed through the cross-examination of Mrs. Knutson, Mr. Seal, and Mr. Pinker and by calling one of the deputy district attorneys to the witness stand to establish that he was a neighbor of Mike Seal. Concerning this theory presented by Turville, who was the only defendant who testified or presented evidence in his own defense at the trial, on direct examination he stated that the victim was alive when he left and that his hands were not tied. His testimony was that his codefendant could have been the one tying them, because he himself did not do it. However, he testified that his codefendant left before he did.

[8] The evidence pointed indisputably to a homicide committed in the act of com-

mitting a felony (robbery) and in torturing the victim with intent that he suffer, so that property could be extorted from him. Under such a state of facts, it was proper for the court to advise the jury that defendants either were innocent, or were guilty of first degree murder. (People v. Riser, 47 Cal.2d 566, 581 [18], 305 P.2d 1; People v. Rupp, 41 Cal.2d 371, 382 [11a], 260 P.2d 1; People v. Sanford, 33 Cal.2d 590, 595 [2], 203 P.2d 534.)

[9, 10] Third. *Did the trial court err in not giving an instruction on intoxication, requested by defendant Turville?*

No. The testimony presented to the jury, including that of defendant Turville, the only defendant to testify, clearly established that there was no evidence requiring such an instruction. The mere fact that a defendant may have been drinking prior to the commission of a crime does not establish intoxication or require the giving of a requested instruction thereon. (People v. Price, 207 Cal. 131, 133 [1] et seq., 277 P. 316.)

[11] Fourth. *Did the trial court err in failing to instruct the jury, on its own motion, that the case against defendant Mitchell ended when he rested?*

[12] *No.* Mitchell contends that the trial court, on its own motion, should have instructed the jury that the case against him ended when he rested. Mitchell made no request for such an instruction. It is the general rule that in a criminal case a jury should be instructed on general principles of law pertinent to the case. However, this rule is not applicable to specific points developed during the trial, and unless instructions as to these matters are requested by the party desiring them, it is not incumbent on the court to give such instructions on its own motion where the jury is otherwise fully and fairly instructed on the general principles of law involved in the case. (People v. Klor, 32 Cal.2d 658, 662 [3], 197 P.2d 705; People v. Bender, 27 Cal.2d 164, 175 [2], 163 P.2d 8.)

[13] Fifth. *Did the trial court err in instructing the jury as follows: "A prisoner sentenced to either death or life imprisonment may be pardoned or may have his sentence reduced by the Governor. A prisoner serving a life sentence may be paroled but not until he has served at least seven calendar years"?*

No. The foregoing instruction was proper. (People v. Ward, 50 Cal.2d 702, 711 [7], 328 P.2d 777; People v. Riser, 47 Cal. 2d 566, 583 [21], 305 P.2d 1; People v. Friend, 47 Cal.2d 749, 754 et seq., 306 P.2d 463.)

[14] Sixth. *Did the trial court err in instructing the jury as follows: "If you should find that a confession or an admission was false in any particular, it remains, nevertheless evidence for your consideration in connection with all other evidence in the case, to be given such significance and weight as your judgment may determine"?*

No. In addition to the above instruction, the trial court instructed the jury: "Evidence, if any, that a defendant, on one or more occasions other than from the witness stand, made false, contradictory or misleading statements concerning the charge against him which is now being tried, may be considered by the jury as a circumstance tending to prove a consciousness of guilt, but is not sufficient of itself to prove guilt. The weight to be given to such a circumstance, and the significance, if any, to be attached to it, are matters for the jury to determine."

[15] It is not reversible error to instruct that notwithstanding a jury determines a confession to be false, it remains evidence to be considered under instructions to be given subsequently concerning false statements made by an accused, where a subsequent instruction clearly explains the evidentiary value of false statements and there is ample evidence of guilt apart from the confession, as in the instant case. (People v. Chessman, 38 Cal.2d 166, 180 [9], 238 P.2d 1001; People v. Woods, 35 Cal.2d 504, 510–511 [8], 218 P.2d 981.)

[16] Seventh. *Did the trial court err in refusing to grant defendant Turville's*

request for the following instruction: "The Court instructs the jury that the testimony of a defendant is not to be weighed or deliberated upon differently from that of any other witness; and you must weigh and deliberate as to his testimony by the same rule and in the same manner that you would the testimony of any other witness, in the case"?

No. Defendant Turville argues that because the court gave an instruction on a defendant who did not testify, his requested instruction should have been given. However, it is proper to refuse an instruction that a defendant, having taken the stand in his own behalf, should have his testimony judged by the same rules as the testimony of any other witness. (People v. Hightower, 40 Cal.App.2d 102, 108 [4], 104 P.2d 378; cf. People v. Albrexstondare, 71 Cal.App. 339, 349 [8] et seq., 235 P. 87.)

Eighth. *Did the trial court err in receiving in evidence the confession of defendant Turville?*

[17] *No.* Turville contends that he was denied due process of law guaranteed by the fourteenth amendment, in that his confession was illegally obtained by FBI agents in New York. The record discloses ample evidence to sustain the jury's finding that the confession was freely and voluntarily made without promise of immunity or hope of reward and that he was taken without unnecessary delay before a United States Commissioner in New York. Under such circumstances, his confession was properly received in evidence. (Rogers v. Superior Court, 46 Cal.2d 3, 10 [13] et seq., 291 P.2d 929.)

[18, 19] Ninth. *Did the trial court err in receiving in evidence as against defendant Mitchell the victim's watch, ring, pistol, pair of bloody pants, shoes, ammunition and clip, which were found in the possession of defendant Turville?*

No. The jury was fully apprised of the facts concerning the recovery of these items, and they were properly admitted into evidence under the charge contained in the information. They were material to the People's case against both defendants, the evidence revealing that there was a joint criminal venture between them. Further, defendant Mitchell presented no objection in the trial court to the introduction into evidence of these exhibits, and therefore may not for the first time on appeal urge that it was error for the trial court to have received them in evidence. (3 Cal.Jur.2d (1952), Appeal and Error, § 143, p. 609.)

[20] Tenth. *Was it error, as to defendant Mitchell, for the trial court to receive in evidence (a) his confession and (b) the confession of his codefendant?*

No. (a) From the facts set forth above, the confession of defendant Mitchell was admissible, since its voluntariness was properly established.

[21] (b) As to defendant Turville's confession, the record discloses that the jury was adequately admonished that this testimony related only to Turville and was not to be considered against Mitchell. It must be presumed that the jury heeded this admonition.

Eleventh. *Was the district attorney guilty of misconduct in his argument to the jury?*

[22–24] *No.* The record discloses that the district attorney was properly urging his points vigorously to the jury. He may use appropriate epithets which are warranted by the evidence, as in the instant case, without being chargeable with prejudicial misconduct. (People v. Wein, 50 Cal.2d 383, 396 [7], 326 P.2d 457.) Further, defendants are not in a position to object on appeal to the argument of the district attorney, since no objection was made in the trial court. (See People v. Hampton, 47 Cal.2d 239, 240 [3], 302 P.2d 300; People v. Byrd, 42 Cal.2d 200, 208 [3], 266 P.2d 505.)

[25] Twelfth. *Did the district attorney commit prejudicial error in arguing to the jury the length of time of service for life imprisonment on the penalty phase of the case as to defendant Turville?*

No. Turville alleges that it was error for the district attorney to argue, on the

penalty phase of the trial, that life imprisonment did not necessarily mean imprisonment for life. This argument was proper, since the district attorney was correctly stating the law and arguing the facts to the jury under the provisions of section 190.1 of the Penal Code. (See People v. Morlock, 46 Cal.2d 141, 147 [7], 292 P.2d 897.)

[26] Thirteenth. *Is section 190.1 of the Penal Code unconstitutional?*

No. Defendant Turville contends that the provisions of section 190.1 of the Penal Code * are ex post facto as to him, in that the crime which he committed occurred prior to the effective date of this section. This contention has been held to be without merit. (See People v. Ward, supra, 50 Cal.2d 702, 710 [4] et seq., 328 P.2d 777.)

[27] Fourteenth. *Was the trial judge guilty of misconduct in commending the jury at the conclusion of its deliberations on the issue of guilt?*

No. Defendant Turville claims that he was denied a fair trial in that at the close of the case on the issue of innocence or guilt, and after the verdict of guilty of murder in the first degree was returned, the trial judge expressed to the jury his appreciation for their services and for their conscientious efforts to arrive at a fair and just verdict. The comment of the trial judge was fair. It did not indicate any preference or belief concerning the penalty to be imposed, which was the only

* Section 190.1 of the Penal Code provides:

"The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

"If the defendant has pleaded not guilty by reason of insanity at the time of commission of the offense, the trier of fact, after the determination of the penalty, shall thereupon determine whether or not defendant was sane at the time of commission of such offense. The provisions of this section shall prevail over any other provision of law with respect to the time of determining the sanity of defendant at the time of commission of the offense. However, if at any time during the trial of defendant, doubt arises as to the sanity of defendant at such time, the question of defendant's sanity shall be determined as provided in Chapter 6 (commencing at Section 1367) of Title 10, Part 2 of this code.

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact on the issue of penalty and the issue of sanity, if any, shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty, or the issue of sanity or both such issues, as the case may be.

"On such further proceedings on the issue of penalty, any evidence concerning the commission of the crime admissible in the trial determining the guilt of the defendant may be admitted.

"In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, and the issue of sanity, if any, but the issue of guilt shall not be retried by such jury."

remaining phase of the trial for the jury to consider. In addition, the judge admonished the jury not to consider his comments and informed them that he was not in the slightest degree indicating to them what the penalty should be.

[28] Fifteenth. *Was defendant Turville denied equal protection of the laws when he received the death penalty and his codefendant, because of his age, received life imprisonment?*

[29] *No.* Turville argues that since section 190.1 of the Penal Code excludes from the possibility of the infliction of the death penalty persons under the age of 18 years at the time of the commission of a crime, it denies him equal protection of the laws, as guaranteed by the Fourteenth Amendment of the United States Constitution, and violates the provisions of section 11, article I, of the California Constitution, which provides that all laws of a general nature shall have uniform operation.

[30, 31] There is no merit in this contention. It is established that the legislatures of the several states may classify persons by their age for the purpose of determining the punishment to be inflicted for crimes committed. When the classification is reasonable, as in the present case, and not arbitrary or capricious, there is no constitutional bar to the classification. The presumption is that an act of the Legislature is constitutional. (In re Spencer, 149 Cal. 396, 400, 86 P. 896.)

[32] It is likewise settled that where all other persons in the same class as the defendant are subjected to like punishment, there is no denial of equal protection of the laws. (People v. Finley, 153 Cal. 59, 62, 94 P. 248; cf. People v. Smith, 218 Cal. 484, 488 [5], 24 P.2d 166.) In the present case, all persons in the class of defendant Turville (that is, over the age of 18 years) were equally subject to the imposition of the extreme penalty. The exemption of those under the age of 18 years is reasonable and in accord with well-established legislative policy to treat youthful offenders in a different way. The choice of the age of 18 was within the determination of the legislative function. Therefore, defendant Turville was not denied equal protection of the laws.

[33] Sixteenth. *Is there any validity to defendant Turville's contention that the present record on appeal is incomplete and incorrect?*

No. Turville fails to direct our attention to any instance wherein the record on appeal is not correct.

[34] Seventeenth. *Was defendant Turville denied the right to have counsel of his choice on his motion to correct the reporter's transcript?*

No. Turville asserts that the trial court committed prejudicial error in denying him counsel of his choice on his motion to correct the reporter's transcript. The record reveals that Turville was not denied any right to which he was entitled. His mother engaged private counsel to represent him on the proceedings in question. This attorney was rejected by Turville. The court then made arrangements to have three members of the bar in the area talk with him, with the option in defendant to decide which one the court would appoint. He informed the court that he did not "desire" to make the decision at that time, and the court determined the attorney to represent him by drawing one of the three names from a box.

Mr. Albert C. S. Ramsey, an experienced trial lawyer, was selected. The matter of the corrections was set over to give counsel sufficient time to prepare. At the later date counsel stated he had read the record and was sufficiently acquainted with defendant's position and the contents of the transcript to represent him and proceed. Turville then produced a copy of a "petition for a writ," which he declared he had submitted to the Supreme Court. He also stated that he refused present counsel, claiming that counsel had said he was not interested in representing him in that phase of the case and had known Milo Smith for 20 years.

Mr. Ramsey was sworn and stated that he had been acquainted with the deceased and had known him as a practicing attorney but had had no financial or social relations with him. The record discloses excellent qualifications of Mr. Ramsey to represent Turville, and it is clear that the latter was not denied anything to which he was entitled. (Cf. People v. Tabb, 156 Cal.App. 2d 467, 471 [1], 319 P.2d 656.)

The judgments and order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



168 Cal.App.2d 336

Lee LYON, Plaintiff and Appellant,

v.

Anthony H. GIANNONI; Louis D. Giannoni; Dixon Real Estate Company, a copartnership; Oscar Graeser; and H. E. Rattenbury, Defendants and Respondents.

Civ. 9546.

District Court of Appeal, Third District, California.

March 3, 1959.

Vendor brought action against purchasers and against vendor's real estate broker. The first cause of action sought to recover damages for alleged breach of contract by purchasers, and the second cause of action sought to recover damages from broker because broker returned down payment to purchasers without consent of vendor, and third cause of action sought to recover damages from broker on ground that broker, in breach of agency contract with vendor to use best efforts to sell vendor's realty, allegedly persuaded purchasers to purchase other property. The Superior Court, Solano County, Harlow V. Greenwood, J., entered judgment sustaining general demurrers to each cause of action, and the vendor appealed. The vendor dismissed the appeal as to the purchasers. The District Court of Appeal, Warne, J. pro tem., held that where purchasers agreed to purchase realty and vendor agreed to sell on terms and conditions therein stated, a contract arose, and there was more than a mere option to purchase, though agreement gave purchasers a right to have well tested by reliable pump company to determine amount of water available, and provided that deposit made by purchasers would be returned to purchasers if test was not satisfactory to them, and that appeal as to broker was not required to be dismissed, on ground that issues had become res judicata and were moot because of the dismissal of the appeal as to the purchasers.

Broker's motion to dismiss appeal denied, and judgment reversed.

1. Vendor and Purchaser ⇐3(4)

Where purchasers agreed to purchase realty and vendor agreed to sell on terms and conditions therein stated, a contract arose, and there was more than a mere option to purchase, though agreement gave purchasers a right to have well tested by reliable pump company to determine amount of water available, and provided that deposit made by purchasers would be returned to purchasers if test was not satisfactory to them.

2. Contracts ⇐282

A contractual provision for performance to the satisfaction of one of the parties to a contract for purchase and sale of realty ordinarily calls for such performance as will be satisfactory to a reasonable person.

3. Brokers ⇐37

If vendor and purchasers entered into binding contract for purchase and sale of realty, and vendor's real estate broker returned down payment made by purchasers to the purchasers without consent of the vendor, then broker was bound to account to vendor.

4. Brokers ⇐38(1)

If vendor's real estate broker breached broker's agency contract with vendor to

use broker's best efforts to sell vendor's realty by persuading purchasers to purchase other property, vendor was entitled to recover damages.

5. Appeal and Error ⇐790(1)

Where vendor's first cause of action sought to recover damages from purchasers for breach of contract to purchase realty, and second cause of action sought to recover from real estate broker down payment, which broker had returned to purchasers without consent of vendor, and third cause of action sought to recover damages from broker, on ground that broker breached agency contract with vendor to use broker's best efforts to sell vendor's realty and persuaded purchasers to purchase other property, and Superior Court entered judgment sustaining general demurrers to the three causes of action, and vendor appealed, fact that vendor dismissed appeal as to purchasers did not require dismissal of appeal as to broker, on ground that issues had become res judicata and were moot.

6. Brokers ⇐7

Contract between vendor and real estate broker was separate and apart from contract between vendor and purchasers, and one did not depend on the other.

7. Brokers ⇐60

In action by broker against vendor for commission for procuring a purchaser, broker's cause of action does not depend on the completion of the deal by the vendor with the purchaser.

8. Judgment ⇐540

In determining validity of plea of res judicata, three questions are pertinent, namely, was issue decided in prior adjudication identical with one presented in action in question, was there a judgment on the merits, and was party against whom plea is asserted a party or in privity with a party to prior adjudication.

Pierce & Brown, Sacramento, for appellant.

G. Douglas Thompson, Vacaville, for respondents Giannoni.

Joseph W. Raftery, Dixon, for other respondents.

WARNE, Justice pro tem.

Appellant appeals from a judgment of dismissal in favor of respondents entered after the sustaining of general demurrers to the second amended complaint (hereinafter referred to as the complaint) without leave to amend. On the date set for presenting oral argument herein, appellant by a written stipulation dismissed the appeal as to the purchasers Giannoni.

The complaint sets forth three causes of action, the first of which is an action on the contract against Anthony H. Giannoni and Louis D. Giannoni for the purchase price of certain land. The material facts alleged are as follows: Through respondent, Dixon Real Estate Company, a copartnership composed of respondents Oscar Graeser and H. E. Rattenbury, hereinafter referred to as the "realtor," Anthony H. Giannoni and Louis D. Giannoni, hereinafter referred to as the "purchasers," offered to purchase a ranch owned by appellant for the sum of $64,000 and made a deposit of $6,400 with said realtor to be applied on the purchase price thereof. The offer was not acceptable to appellant, but after further negotiations carried on through the realtor the parties executed a contract in the form of a "deposit receipt" which recited that the purchasers agreed to purchase and the appellant agreed to sell the described property for the sum of $80,000. The receipt of $6,400 was acknowledged. The balance was to be paid within 30 days as follows: "An additional $25,600.00 upon acceptance of deal. The balance or $48,000.00 to be paid in 10 equal annual payments of $4,800.00 or more plus interest at 5%. Purchaser to have right to have well tested by a reliable pump company to determine amount of water available. If test is not satisfactory to buyers their deposit of $6,400.00 will be returned to them." Plaintiff alleges repudiation by the purchasers and offer to perform by plaintiff after breach.

The second cause of action is directed against the respondent realtor and alleges

that contemporaneously with the repudiation of said contract by the purchasers and their notification thereof the appellant had demanded of the respondent realtor the $6,400 which had been deposited with said realtor, but which deposit the realtor without authority or consent of appellant had returned to the purchasers. Appellant therefore claims that said realtor is indebted to appellant for said sum.

[1, 2] A third cause of action seeking damages against the realtor alleges that the realtor in breach of its agency contract with appellant to use its best efforts to sell appellant's property persuaded the Giannonis to purchase other property; and as a result of the realtor's failure to perform the obligations of said agency contract, appellant suffered damages. The trial court sustained general demurrers to each cause of action stating: "that there is no contract here; that it was simply an option * * *" The plaintiff appealed, as heretofore stated, from the judgment of dismissal. Apparently the trial court interpreted the contract to be an option only because of the satisfaction clause giving the purchasers the right to have the well tested by a reliable pump company to determine the amount of available water and the right, if the test was not satisfactory to the purchasers, to refuse to go ahead with the deal and to have their deposit of $6,400 returned to them. That provision in the contract does not constitute a condition to the existence of a contract. The whole purchase receipt, and the particular clause, must be read as merely making plaintiff's performance dependent upon the obtaining of "satisfactory tests for water available." Here we have an agreement whereby the purchasers agreed to purchase, and the seller agreed to sell, certain land upon the terms and conditions therein stated. It was more than a mere option to purchase. A contract arose and the buyers were given the privilege to terminate it in the event that the tests for water available were not satisfactory. The general view is that deposit receipts are binding and enforceable contracts. Mattei v. Hopper, 51 Cal.2d 119, 330 P.2d 625. Furthermore, the clause giving the purchasers the right to have the well tested by a reliable pump company to determine the amount of water available and specifying that the $6,400 deposit will be returned to the buyers if the test is not satisfactory to them, being contained in an otherwise enforceable contract to buy and sell, did not make the purchasers' obligation illusory. As stated in Collins v. Vickter Manor, Inc., 47 Cal.2d 875, at page 882, 306 P.2d 783, at page 788: "* * * the buyer could not withdraw from the contract at his pleasure. (Cf. Shortell v. Evans-Ferguson Corp. (1929), 98 Cal.App. 650, 659 et seq. (5, 6), 277 P. 519; 12 Cal.Jur.2d 317, § 114.) A contractual provision for performance to the satisfaction of one of the parties ordinarily calls for such performance as would be satisfactory to a reasonable person. (Thomas Haverty Co. v. Jones (1921), 185 Cal. 285, 296(7), 197 P. 105.)" As also held in Collins v. Vickter Manor, Inc., supra, if acceptance or rejection of the result of a test made by a reliable pump company for water available depended upon the purchasers' uncontrolled caprice, then they would be the sole judges of their own satisfaction and could withdraw from the contract without regard to the reasonableness of their decision. See also, Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, 702–704, 182 P. 428, 6 A.L.R. 1493. The contract here did not afford the purchasers the right to withdraw from the contract at their unrestricted pleasure. Further, as stated in Mattei v. Hopper, supra [330 P.2d 626], "* * * [I]n those contracts where a condition calls for satisfaction as to commercial value or quality, operative fitness, or mechanical utility [in the instant case water available for row crops], dissatisfaction cannot be claimed arbitrarily, unreasonably or capriciously (citing cases), and the standard of a reasonable person is used in determining whether satisfaction has been received." In the instant case purchasers did not even exercise their right to have the well tested by a reliable pump company.

[3, 4] We have read the cases upon which respondents rely and find none of them controlling. For example, Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 308–309, 266 P.2d 856, was disapproved by the court in the Mattei v. Hopper case, supra, insofar as the language represented a departure from the established rules governing "satisfaction" clauses. We conclude that the contract here was neither illusory nor lacking in mutuality of obligation and that the trial court erred in sustaining the demurrer of the purchasers. We also hold the court erred in sustaining the demurrer addressed to the counts against the realtor. The money the realtor received belonged to the principal, the seller, and if, as alleged, the same was returned to the purchasers without the consent of the seller, the realtor was bound to account. Holloway v. Thiele, 116 Cal.App.2d 68, 253 P.2d 131. The third count sufficiently alleges breach of the realtor's agential duty and damages resulting therefrom.

[5] The respondent realtor contends that the appeal should be dismissed on the ground that the issues which are presented thereby have become res adjudicata and are now moot by reason of appellant having dismissed as to the purchasers. We do not agree.

Neither the issues nor the parties to the first cause of action are the same as to the second and third causes of action. The three causes of action present issues which are separate between parties who are separate and not at all in privity. As contended by appellant, the first cause of action is between appellant and the Giannoni brothers, the purchasers. It alleges a written contract of purchase and sale of real property under the conditions as hereinabove stated. The complaint alleges the repudiation of the contract by the purchasers, the refusal of the appellant seller to accept such repudiation and demand for the purchase price.

The second cause of action involves a contract between the appellant and the respondent realtor and is addressed solely to the realtor. This is a separate contract although embodied in the same written instrument as the contract between the appellant seller and the purchasers. Under that contract the seller agrees to pay the agent realtor the sum of $4,000 or one-half the deposit in case the same is forfeited by the purchasers, provided the same shall not exceed the full amount of the commission. The purchasers had deposited $6,400 with the realtor under the provisions of their contract which authorized the seller to retain the sum deposited in the event of their repudiation of the contract. The complaint alleges that the purchasers did repudiate their contract and that notwithstanding the fact that plaintiff (appellant) had refused to accept said repudiation, said realtor without the consent or authority of the appellant seller repaid said deposit to the purchasers, and that the seller was thereby damaged in the sum of $6,400.

[6, 7] The contract with the realtor is separate and apart from the contract between appellant seller and the purchasers and one does not depend upon the other. This is evidenced by the rule that in an action by the broker against the seller for his commission this cause of action does not depend upon the seller having completed the deal with the buyer. Fry v. George Elkins Co., 162 Cal.App.2d 256, 327 P.2d 905. Appellant was not compelled to sue the purchasers at all. Without pursuing any action against them, he would have had his cause of action against the realtor. Holloway v. Thiele, supra.

The third cause of action is merely a cause of action by a principal against his agent, in this case a real estate broker, for violation of the fiduciary obligation owed by the realtor to him. It is obvious that it is wholly separate and apart from the first cause of action.

[8] Although the judgment is now final as to the Giannonis, it is not final as to the other respondents since the issue adjudicated by the judgment in favor of the Giannonis are not identical with the issues presented in the causes of action against

the realtor. As stated in Bernhard v. Bank of America, 19 Cal.2d 807, at page 813, 122 P.2d 892, at page 895: "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

Respondents' motion to dismiss the appeal is denied, and the judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



168 Cal.App.2d 215

DEPARTMENT OF MENTAL HYGIENE of the State of California, Plaintiff and Appellant,

v.

Marian MANNINA, Administratrix of the Estate of Albina Serdock, aka Albina Serdoc, Deceased, Defendant and Respondent.

Civ. 18143.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1959.

Rehearing Denied March 27, 1959.

See 337 P.2d 219.

Proceedings on claim against decedent's estate. The Superior Court, Santa Clara County, Harold Holden, J., made findings favorable to the claimant, but thereafter granted a new trial, and claimant appealed. The District Court of Appeal, Dooling, J., held that director of mental hygiene was bound by probate court's implied finding that payment of more than monthly amount fixed by court order would deplete estate of incompetent to point where, if discharged, she might be likely to become a burden on community, but held that neither by seeking nor by acceding to such determination could director be said to have reduced, remitted or cancelled balance legally due for care, support and maintenance of incompetent in state institution of which she was an inmate, and held that when her death removed possibility that she might, if discharged, become burden on community, state was entitled to be reimbursed out of deceased incompetent's estate for balance incurred for her care but legally uncollectable in her lifetime.

Order granting new trial reversed.

1. Mental Health ⇐244

Under Code section making estate of mentally ill person liable for her care, support and maintenance in state institution, liability was unconditional and not dependent on ability to pay. West's Ann. Welfare & Inst.Code, § 6650.

2. Mental Health ⇐244

Director of mental hygiene was authorized to fix and determine montly rate to be paid for care, support and maintenance of mentally ill person in state institution. West's Ann.Welfare & Inst.Code, §§ 6651, 6655.

3. Mental Health ⇐245

Under Code, liability for care, support and maintenance of inmate in state institution is to be enforced against incompetent's estate to extent of estate unless probate court determines that there is a likelihood of the incompetent's recovery and that payment will reduce estate to such extent that incompetent will likely become burden on community if discharged. West's Ann.Welfare & Inst.Code, §§ 6651, 6655.

4. Mental Health ⇐256

Probate court, ordering payment of $10 per month instead of $20 determined by director to be proper charge for care, support and maintenance of mentally ill person in state institution, could only legally do so by impliedly finding that to pay more than $10 per month would reduce estate of incompetent to condition that in the event

of her discharge she would be likely to become a burden on community; and order did not affect liability but merely limited present payments from estate, on account of total liability, to amount fixed by order. West's Ann.Welfare & Inst.Code, §§ 6651, 6655.

5. Mental Health ⇐256

Orders determining amounts to be paid by guardian to department of mental hygiene for care and maintenance of incompetent were not res judicata of extent of liability for such care and maintenance or a bar to collecting additional sum from estate of deceased mental incompetent. West's Ann.Welfare & Inst.Code, §§ 6651, 6655.

6. Executors and Administrators ⇐205(1)
Mental Health ⇐256

Director of mental hygiene was bound by probate court's implied finding that payment of more than monthly amount fixed by court order would deplete estate of incompetent to point where, if discharged, she might be likely to become a burden on community, but neither by seeking nor acceding to such determination could director be said to have reduced, remitted or cancelled balance legally due for care, support and maintenance of incompetent in state institution of which she was an inmate, and when her death removed possibility that she might, if discharged, become burden on community, state was entitled to be reimbursed out of deceased incompetent's estate for balance incurred for her care but legally uncollectable in her lifetime. West's Ann.Welfare & Inst.Code, §§ 6651, 6655.

Stanley Mosk, Atty. Gen., Wiley W. Manuel, Deputy Atty. Gen., for appellant.

Machado, Feeley & Machado, John H. Machado, San Jose, for respondent.

DOOLING, Justice.

Plaintiff, Department of Mental Hygiene, appeals from an order granting a new trial.

On March 3, 1942, Albina Serdock was committed to a State hospital as an insane person and remained so hospitalized until her death on May 18, 1956. Her estate is in probate and appellant filed with the administratrix a creditor's claim for $4,521.17 for the balance claimed to be due for her care and maintenance. The administratrix approved the claim for $120 only and this suit upon the claim was then filed.

The records of appellant introduced in evidence establish that the charges fixed by appellant for the care and maintenance of the decedent pursuant to section 6651, Welfare and Institutions Code, were as follows: $90 per month for the period January 1, 1951, to February 28, 1953; $100 per month from March 1, 1953; $111 per month from March 1, 1954; $118 per month from January 1, 1955; and $122 per month from January 1, 1956.

In June 1944 the probate court on petition of the Department of Institutions made an order directing the guardian of the estate of Albina Serdock to pay $279.35 for board, care, maintenance and medical attention previously furnished to the incompetent at the State hospital and to pay $10 per month thereafter until the further order of the court. On December 21, 1953, an order was made directing the guardian to pay $30 per month for such support and maintenance.

The trial court found that the monthly charges hereinabove listed were determined by the Director of Mental Hygiene and that said charges at the rates so determined were made continuously for every month that the incompetent was a patient of a State hospital. It was found that, after deducting payments actually received, the balance due on said charges was $3,901.17 of which $1,670.36 was barred by the statute of limitations and judgment was entered for the balance of $2,230.81.

The only defenses urged, and hence the only grounds presented in support of the granting of the motion for new trial, are: 1. That the orders determining the amounts to be paid by the guardian to appellant for the care and maintenance of the incompe-

tent are *res judicata* of the extent of the liability for such care and maintenance; 2. That by submitting the question to the probate court in the guardianship proceeding and by failing to appeal from the orders made therein the appellant has reduced, remitted and cancelled any liability in excess of the amounts allowed by the probate court in the guardianship proceeding.

The Argument of Res Judicata.

[1–5] During all of the times here in question section 6650, Welfare and Institutions Code, made the estate of the mentally ill person liable for her care, support and maintenance in the State institution of which she was an inmate. This liability was unconditional and not dependent on ability to pay. Dept. of Mental Hygiene v. McGilvery, 50 Cal.2d 742, 749–751, 329 P.2d 689. At all times here in question section 6651 authorized the Director of Mental Hygiene or his predecessor, Director of Institutions, to fix and determine the monthly rate to be paid for the care, support and maintenance of such persons. Estate of Perl, 110 Cal.App.2d 8, 242 P.2d 101. At all such times section 6655 provided that:

> "If any person committed to a State mental hospital has sufficient estate for the purpose, the guardian of his estate shall pay for his care, support, maintenance, and necessary expenses at the mental hospital *to the extent of the estate.* Such payment may be enforced by the order of the judge of the superior court where the guardianship proceedings are pending. On the filing of a petition therein by the department, showing that the guardian has failed, refused or neglected to pay for such care, support, maintenance, and expenses, the court, by order, shall direct the payment by the guardian. * * *
>
> "Payment * * * shall not be exacted, however, if there is likelihood of the patient's recovery or release from the hospital and payment will reduce his estate to such an extent that he is likely to become a burden on the community in the event of his discharge from the hospital. * * *" (Emphasis ours.)

The net effect of this legislation is: 1. that the obligation of the estate of the incompetent is unconditional and not dependent on ability to pay; 2. this unconditional liability shall be enforced against the incompetent's estate "to the extent of the estate"; unless 3. the probate court determines that there is a likelihood of the incompetent's recovery and that payment will reduce his estate to such an extent that he is likely to become a burden on the community if discharged.

The petition of the Department in 1944 alleged that $20 per month had been determined as the charge, that the guardian had not paid this amount and that such payment "will not reduce the estate of said incompetent to the condition that in the event of her discharge * * * she would be likely to become a burden on the community."

When the probate court in acting on this petition ordered the payment of $10 per month, instead of the $20 then determined by the Director acting under the statute to be the proper charge, it could only legally do so by impliedly finding that to pay more than $10 per month would reduce the estate of said incompetent to the condition that in the event of her discharge she would be likely to become a burden on the community. This must be so because in the absence of such finding the probate court was legally bound by section 6655 to order the payment of such expenses "to the extent of the estate."

It is clear from this that all that the probate court could decide in the order directing payment was, not that the $20 per month claimed was not proper or a legal charge against the estate, but only that to then enforce its payment beyond $10 per month would reduce the estate of the incompetent to the condition that if later discharged she would be likely to become a burden on the community. When the amount payable was increased by the later order to $30 per month the power of the

court, and so the effect of its order, could be no greater.

Since the liability of the estate was not dependent on ability to pay these orders did not affect the liability. Their only effect was to limit the *present* payments from the estate on account of the total liability to the amounts fixed by the orders of the court in the guardianship proceeding.

The Argument of Reduction or Remission.

Section 6651, Welfare and Institutions Code, provides:

> [6] "The Director of Mental Hygiene may reduce, cancel, or remit the amount to be paid by the estate * * * on satisfactory proof that the estate * * * [is] unable to pay the cost of such care, support, and maintenance."

It is argued that by accepting $10 per month under the first order and seeking and accepting $30 per month under the second order the Director reduced the charge to those amounts and cancelled and remitted the balance. No formal reduction, cancellation or remission was proved, nor can any such be claimed by implication. The appellant was bound by the implied finding of the court that the payment of more than the monthly amount fixed in each order would deplete the estate of the incompetent to a point where if discharged she might be likely to become a burden on the community. Neither in seeking nor acceding to such a determination can the Director be said to have reduced, remitted or cancelled the balance legally due.

There is no reason in law or logic why the appellant should not be reimbursed to the extent of the decedent's estate for a balance incurred for her care by the appellant, and which could not be legally collected in her lifetime from her estate only because to do so would make it likely that if discharged she would become a burden on the community. Her death has removed that possibility and with her death the only legal ground for not requiring full reimbursement for her care from her estate no longer exists.

Order granting new trial reversed.

KAUFMAN, P. J., and DRAPER, J., concur.



168 Cal.App.2d 110

SUNRU CHANG, Plaintiff and Respondent,

v.

CARSON ESTATE COMPANY, a corporation, Defendant and Appellant.

Civ. 23185.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1959.

Civil action. From an order of the Superior Court of Los Angeles County, Eugene Breitenbach, J., setting aside a judgment of dismissal and permitting plaintiff to file a third amended complaint, the defendant appeals. The District Court of Appeal, Fox, P. J., held that where the third amended complaint failed to state a cause of action, it was an abuse of discretion to vacate the dismissal and permit the filing of such amended complaint.

Order vacating the dismissal reversed.

Opinion 333 P.2d 184, vacated.

1. Appeal and Error ⇐78(4)

An order of dismissal is a "final judgment".

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

2. Appeal and Error ⇐82(3)

An order setting aside a prior dismissal was a special order made after judgment and appealable. West's Ann.Code Civ.Proc. § 963.

3. Appeal and Error ⇐957(1)

A motion to set aside a default judgment or dismissal rests in the sound dis-

cretion of the trial court and will not be disturbed in the absence of a clear showing that there has been an abuse of discretion.

4. Dismissal and Nonsuit ⇐81(7)

An affidavit of merits is not required on a motion to set aside an order of dismissal where a verified amended complaint is filed prior to or with the filing of a notice of the motion.

5. Appeal and Error ⇐982(1)

While the question of sufficiency of verified complaint is for the trial and not the appellate courts, if it unquestionably appears that no cause of action is stated, trial court's granting of a motion to set aside a dismissal will be considered as an abuse of discretion.

6. Judgment ⇐713(2)

Where defendant declined to renew lease of plaintiff and recovered judgment for possession in an unlawful detainer proceeding, if plaintiff's reliance on defendant's oral representations in renewing the lease amounted to an estoppel, such was a matter which could have been litigated in the unlawful detainer proceeding and hence was res judicata in subsequent proceeding.

7. Appeal and Error ⇐837(4)

On appeal from an order setting aside a judgment of dismissal and permitting plaintiff to file a third amended complaint, the appellate court in determining whether the instant pleading stated a cause of action, could look to the allegations contained in earlier pleadings but omitted from the present complaint.

8. Pleading ⇐252(2)

If any verified pleading contains an allegation rendering a complaint vulnerable, the defect cannot be cured simply by omitting the allegation, without explanation, in a later pleading.

9. Dismissal and Nonsuit ⇐81(5)
Pleading ⇐225(2)

Where demurrer was sustained to a second amended complaint on ground that no cause of action was stated and a comparison of the second and third amended complaints revealed that they were identical, and third amended complaint failed to state a cause of action, it was an abuse of discretion to vacate a judgment of dismissal and to permit the filing of such amended complaint. West's Ann.Code Civ.Proc. §§ 473, 963.

Herbert Gall, Glen A. Duke, Edward Fitzpatrick, Los Angeles, for appellant.

Aaron B. Rosenthal, Los Angeles, for respondent.

FOX, Presiding Justice.

This is an appeal by defendant from an order made under section 473, Code of Civil Procedure, setting aside a judgment of dismissal and permitting plaintiff to file a third amended complaint.[1]

On September 18, 1957, the court sustained defendant's demurrer to plaintiff's second amended complaint and gave ten days in which to file an amended complaint. On that same date a substitution of attorneys was executed by which plaintiff undertook to represent herself. No amended complaint having been filed in the time allowed, counsel for defendant served notice (together with an affidavit and points and authorities) that on November 7, 1957, he would make a motion to dismiss the action. Plaintiff thereupon employed Ven O. Fahrney, Esq., to represent her, and delivered to him the notice of motion and papers in relation thereto. Fahrney arranged with counsel for defendant for a continuance of one week with the understanding that the latter would appear on the 7th and make necessary arrangements with the court for the continuance. Fahrney relied on this arrangement and was not present on November 7 for the hearing. Upon returning to his office on November 12 Fahrney had a letter from defendant's attorney to

1. The order inadvertently allows plaintiff to file her "Answer." This was due to the error of plaintiff's then counsel in referring in his notice of motion to the proposed pleading as an answer rather than as the third amended complaint, which designation it bore. No one was misled.

the effect that due to the court's refusal to continue the matter unless it was to a date early in December, the matter was submitted and that an opportunity would be afforded him to take action prior to decision. The court, on Friday, November 15, granted defendant's motion to dismiss. On Monday, November 18, Fahrney apparently without any knowledge of the court's action, filed plaintiff's third amended complaint, points and authorities, and affidavit in opposition to defendant's motion to dismiss.

Thereafter, on November 27, plaintiff filed notice of motion, pursuant to section 473, Code of Civil Procedure, which was accompanied by an affidavit and points and authorities, to set aside the order of November 15 dismissing the action. She also sought permission to file the pleading theretofore submitted, viz., the third amended complaint. The motion was based on the attached affidavit, points and authorities, and on the records and files in the case. On December 3 plaintiff filed an amended notice of motion. Counsel for defendant filed an affidavit and points and authorities in opposition to plaintiff's motion. On December 9 the court granted plaintiff's motion and allowed defendant ten days to plead. It is from the order granting plaintiff's motion that defendant appeals.

[1, 2] Plaintiff contends that the order under review is nonappealable. As the order of dismissal was a final judgment (Jeffers v. Screen Extras Guild, Inc., 107 Cal. App.2d 253, 254, 237 P.2d 51; Colby v. Pierce, 15 Cal.App.2d 723, 724–725, 59 P.2d 1046, the order of December 9, 1957, setting aside the prior dismissal is clearly a special order made after judgment and is therefore appealable. Code Civ.Proc. § 963; Colby v. Pierce, supra.

[3] It is well settled that a motion to set aside a default judgment or dismissal rests in the sound discretion of the trial court and an appellate court will not disturb the trial court's determination in the absence of a clear showing that there has been an abuse of discretion. Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148; In re Estate of McCrae, 133 Cal.App.2d 634, 636–638, 284 P.2d 914; Fickeisen v. Peebler, 77 Cal.App.2d 148, 151, 174 P.2d 883.

It is the defendant's position that the trial court abused its discretion in that plaintiff's notice of motion was not accompanied by an affidavit of merits and that plaintiff's complaints, including her proposed third amended complaint, fail to state a cause of action.

[4, 5] An affidavit of merits is not required where a verified amended complaint is filed prior to or with the filing of the notice of motion. Waybright v. Anderson, supra, at p. 380; Sampanes v. Chazes, 54 Cal.App. 612, 613–614, 202 P. 462. While it is generally true that the question of the sufficiency of the verified complaint is for the trial and not the appellate courts (Waybright v. Anderson, supra; Sheehan v. Pioneer Lucky Strike Gold Mining Co., 11 Cal. App.2d 530, 531–532, 54 P.2d 72), yet if it unquestionably appears that no cause of action is stated, the trial court's granting of the motion will be considered as an abuse of discretion. Doyle v. Rice Ranch Oil Co., 28 Cal.App.2d 18, 21, 81 P.2d 980. The court, in the Doyle case, stated at page 21 of 28 Cal.App.2d, at page 982 of 81 P.2d that "notwithstanding the general rule that the power of the [trial] court should be liberally exercised with regard to proceedings so as to dispose of cases upon their merits and without unreasonable delay, nevertheless the rule does not appear to go to the extent of permitting the opening of a default for the purpose of filing an amended complaint that states no cause of action."

For reasons more fully set forth below, we are of the opinion that plaintiff's third amended complaint clearly states no cause of action and, therefore, it was an abuse of discretion requiring a reversal for the trial court to grant her motion to set aside the dismissal.

Plaintiff, for many years, leased certain real property from the defendant. The leases were for a term of one year, and were renewed each year by the parties over

a period of 17 years. Defendant declined to renew the lease for 1957, having returned plaintiff's check for the rental in December, 1956, and, thereafter in June 1957, recovered a judgment for possession of the premises at the conclusion of an unlawful detainer proceeding.

The concluding paragraphs of plaintiff's third amended complaint allege as follows: "That defendant Carson Estate Company has prosecuted and taken to final judgment an action * * * for Unlawful Detainer and that pursuant to said judgment, plaintiff, Sunru Chang, has been forcibly removed from the premises described above and her personal property left upon the land, due solely to the fact that she did not receive sufficient notice of the intention of the defendant not to renew her lease, and as a result thereof, plaintiff's property has been sold for sums representing only a fraction of the true value of said items, to plaintiff's damage in the sum of Eight Thousand Dollars, to wit: [plaintiff here lists various items of property including boxes, a gas stove, a tractor, a two wheel trailer, et cetera].

"That due solely to the fact that defendant Carson Estate Company did not give plaintiff sufficient notice of their intention not to renew her lease of the premises described above, and allowed her to remain on said lease for a period of sixty (60) days before receiving notice to quit, which was a period equal with that which plaintiff had enjoyed in the past before signing her new lease, plaintiff was not able to properly harvest her crops planted prior to the date she did receive such notice, and as a result of which she has been damaged in the sum of Twenty Thousand Dollars ($20,000), the reasonable value of her crops."

Plaintiff also alleged that it was orally represented to her that defendant would renew the lease from year to year for a total of twenty years and that plaintiff relied on such oral representation.

[6] The third amended complaint shows on its face that the defendant's right to possession was judicially determined and that upon the defendant's refusal to enter into a new lease the plaintiff had no right to further possession of the premises covered by the prior lease. The mere fact that defendant exercised its legal right not to renew the lease and did not give plaintiff as much notice as she felt was proper, does not in itself make defendant responsible for any loss plaintiff may have suffered by reason of her not harvesting the crops planted prior to the time she did receive notice of defendant's intention not to execute a new lease. If plaintiff's reliance on defendant's oral representations or prior course of conduct in renewing the lease for 17 years did or could have amounted to an estoppel, this was a matter which either was or could have been litigated in the unlawful detainer proceeding (see Schubert v. Lowe, 193 Cal. 291, 295, 223 P. 550) and is therefore res judicata. See Fairchild v. Bank of America, Nat. Trust & Sav. Ass'n, 165 Cal.App.2d 477, 332 P.2d 101.

With respect to the sale of the personal property for which plaintiff seeks damages, her first amended complaint alleged "that defendant has commenced an action for Unlawful Detainer * * *; that the complaint alleges termination of the term for which the premises were leased, demand in writing for possession by defendant within three days, failure of plaintiff to surrender possession, and a prayer for possession and Thirty-seven Dollars and Fifty Cents ($37.50) per month as rental; * * *. On June 13, 1957, Judgment was entered in favor of defendant; that on July 17, 1957, the Marshall of Los Angeles County has noticed a sale for July 23, 1957, pursuant to a writ of execution, of every article and all improvements on said Lease No. 9.

"If defendant is not restrained and enjoined from holding said sale and further taking advantage of said judgment in the Municipal Court, and plaintiff is not allowed a reasonable time in which to vacate said premises, plaintiff will be damaged irreparably, in that plaintiff will have no means of harvesting plaintiff's crop; that plaintiff will lose the value of seventeen years of labor, and the value of all of the

improvements placed by plaintiff upon said land * * *."

It is clear that if the allegation in the first amended complaint, to the effect that the personal property was executed upon and was to be sold by the marshal pursuant to a writ of execution, had been included in the third amended complaint no cause of action would be stated as to this property. This is true for plaintiff would be seeking to impose liability for alleged damages arising from the lawful sale of property pursuant to a final and valid judgment while in no manner attacking any aspect of the transaction other than indirectly questioning the wisdom of the unlawful detainer judgment which plaintiff alleges in her third amended complaint to be a final judgment.

[7] The only question, then, is whether we can, in reviewing the instant pleading, look to allegations contained in earlier pleadings but omitted from the present complaint. That such may be done is supported by adequate authority.

[8] In Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 716, 128 P.2d 522, 524, 141 A.L.R. 1358, the court stated: "If any verified pleading contains an allegation which renders a complaint vulnerable, the defect cannot be cured simply by omitting the allegation, without explanation, in a later pleading." In Neal v. Bank of America, 93 Cal.App.2d 678, 682, 209 P.2d 825, 827, the court stated: "Facts once alleged, however, cannot be withdrawn from consideration by merely filing an amended pleading omitting them without explanation. (Citations.) Accordingly, in determining defendant's motion, the court was fully justified in examining and considering the original complaint. (Citations.) So considered, the 'amended' complaint was no better than the original complaint." See also Harrison v. Hanson, 165 Cal.App.2d 370, 331 P.2d 1084.

[9] Therefore, plaintiff states no cause of action as to her personal property for the complaints affirmatively show that such property was sold by the marshal pursuant to a writ of execution following a final judgment, the validity of which was never questioned.

As previously noted, a demurrer was sustained to plaintiff's second amended complaint on the ground that no cause of action was stated. A casual comparison of the second and third amended complaints reveals that they are in all material respects identical.[2] As it is apparent that the third amended complaint clearly failed to state a cause of action, it was an abuse of discretion to vacate the dismissal and permit the filing of such amended complaint.

The order vacating the dismissal is reversed.

ASHBURN and HERNDON, JJ., concur.

2. Paragraphs I, II, III, VII and X are identical. The remaining paragraphs in the second and third amended complaints are the same except for the following allegations which appear in the latter pleading only: "pursuant to said agreement that the lease would be renewed year to year for a period of twenty (20) years" (added to para. IV); "that the lease would be renewed from year to year for a period of twenty years" (added to para. V); "to wit, twenty (20) years from July 1, 1946" (added to para. VI); "for a period of Twenty (20) years from July 1, 1940" (added to para. VIII); "but no demand was made to deliver up the leased premises" (added to para. IX); "and allowed her to remain on said lease for a period of sixty (60) days before receiving notice to quit, which was a period equal with that which plaintiff had enjoyed in the past before signing her new lease" and "the reasonable value of her crops." (added to para. XI).

168 Cal.App.2d 158

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Carolyn V. DILLARD, Defendant and Appellant.

Cr. 6211.

District Court of Appeal, Second District, Division 1, California.

Feb. 24, 1959.

Rehearing Denied March 24, 1959.

Hearing Denied April 22, 1959.

Defendant was convicted of a violation of the narcotics law and from a judgment of the Superior Court of Los Angeles County, Albert E. Wheatcroft, J., the defendant appeals. The District Court of Appeal, White, P. J., held that the record did not establish that the entry of the officers into the apartment of the defendant during her absence was in violation of her constitutional rights against an illegal search and seizure and that the defendant waived her motion for a new trial.

Judgment affirmed.

1. Searches and Seizures ⇐7(1)

It is not every search or seizure that is prohibited by the constitution, but only unreasonable searches and seizures are denounced.

2. Arrest ⇐63(4), 71

Where officers had received reliable information that defendant was using narcotics and had a quantity thereof in her possession, and knew that the defendant previously had been convicted upon a narcotics charge and the officers went to the defendant's apartment and knocked and received no answer, and then went to the manager who admitted them to the apartment and the officers found narcotics on the defendant's bed, and when defendant returned two hours later she was placed under arrest, arrest of the defendant was made on reasonable cause and searches made were lawful, though made without a warrant. West's Ann.Pen.Code, § 836.

3. Arrest ⇐63(4)

An arrest is legal where the basis therefor consists of information supplied by a reliable confidential informant to the officers, and the arresting officer need only convince the trial judge of the reliability of the informant.

4. Criminal Law ⇐1028

Where defendant failed to raise issues at the trial, the defendant could not present them for first time on appeal.

5. Criminal Law ⇐905

A motion for new trial in a criminal case is a statutory right and may be made only on the grounds enumerated in the statute exclusive of all others. West's Ann. Pen.Code, § 1181.

6. Criminal Law ⇐909

Where record showed that defendant's counsel spoke of preparing a motion for a new trial, and that he would like to make a motion but at the time designated made no motion, and at no time did counsel specify the grounds upon which he intended to or did rely, motion for a new trial was waived. West's Ann.Pen.Code, §§ 1181, 1202.

7. Criminal Law ⇐949(1)

While all of the grounds contained in the Code section respecting a motion for new trial must be utilized, the motion must actually be made and the grounds upon which reliance is placed must be brought to the attention of the court. West's Ann. Pen.Code, § 1181.

Ettinger & Deutsch, Warren L. Ettinger, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with a violation of Section 11500, Health and Safety Code, in that on or about February 19, 1957, she unlawfully had in her possession flowering tops and leaves of Indian Hemp (cannibis sativa). It was further alleged that on September 28, 1954 defendant suffered a

prior felony conviction for violation of Section 11500 of the Health and Safety Code. Defendant pleaded not guilty and denied the prior conviction. Trial by jury was duly waived and the cause submitted on the transcript of the preliminary examination, each side reserving the right to offer additional evidence, and that all exhibits received at the preliminary examination be deemed received in evidence at the trial, subject to the court's rulings thereon. Defendant was adjudged guilty as charged. Although no evidence was offered by the prosecution as to the prior conviction, on cross-examination, defendant admitted the same. While the court made no finding as to the prior, it appears that defendant was on probation therefor, and at the time judgment was rendered sentencing defendant to state prison, the court revoked the probation granted her on the previous conviction, and sentenced her to state prison, the sentence to run concurrently with the one pronounced in the instant action. From the judgment of conviction in the present case, defendant prosecutes this appeal.

The factual background surrounding this prosecution as revealed by the record is that at approximately 12:30 a. m. on the morning of February 19, 1957, Officers V. Jones and Douglas Roy MacGregor of the Los Angeles Police Department went to the residence of defendant, an apartment at 947 North Vendome Street, in the city of Los Angeles. Officer MacGregor testified that "I received information from a confidential source that the defendant was using narcotics and had a quantity of narcotics in her possession."

"Q. In your opinion was that information reliable? A. It has proven so in the past.

"Q. What do you mean by that, by past? A. I have used this informant on prior occasions.

"Q. Successfully? A. And the information has proved reliable; yes, sir.

"Q. All right. Was the defendant also know to you? A. Yes, sir.

"Q. In what way other than being a dancer, I take it? A. I have known the defendant for a period of approximately two years and I have known her as a narcotic user.

"At that particular time it was heroin."

When they arrived at defendant's apartment, the officers knocked several times on the door of the apartment but received no answer. They were able to observe that the wall fireplace was "going full blast" and formed the opinion that someone was in the apartment. They went to the manager's apartment, identified themselves, explained the circumstances of the visit and asked him whether he would admit them to the apartment. The manager opened the apartment and the officers entered it in his company. A quantity of marihuana seeds was found on the bed. The officers left the apartment and awaited the return of defendant. The latter returned at 2:40 a. m. and was placed under arrest when she reached the front door of the apartment. The officers and appellant entered the apartment and a further search was made. When shown the marihuana seeds defendant asked, "What are they?" Subsequently she stated that some friends of hers had brought the marihuana to her apartment, "Manicured" it, and smoked it and left some for her own use. When questioned about a pipe she stated that she had not used it to smoke marihuana "for a couple of years". She indicated a quantity of marihuana concealed in the toe of a slipper hanging on the closet door.

Officer MacGregor testified further that he had known defendant for some two years prior to the arrest here in question, that when she arrived at her apartment he placed her under arrest. The officer also testified as follows:

"Q. And you put the handcuffs on her and told her she was under arrest? A. I did.

"Q. And did you at that time demand the key to the apartment? A. From her?

"Q. Yes. A. Yes, sir.

"Q. *She asked you if you had a warrant?* A. *Yes, sir.*

"Q. *And that she would not let you in unless you had a warrant: is that correct?* A. *That is correct.*

"Q. What did you do after that when she refused to let you into the apartment? A. I told her that if she refused to open the door to her apartment that we would only secure the key from the manager.

"Q. And did you go to the manager? A. My partner did, sir.

"Q. And you or your partner opened the door and you went inside? A. I don't recall whether it was myself or my partner. One of us did; yes, sir.

"Q. *But all this time the defendant was demanding that you show a warrant before going into the apartment; is that correct?* A. *Yes, sir.*" (Emphasis added.)

Sworn as a witness in her own behalf, defendant denied knowledge of the presence of the marihuana seeds on the bedspread and denied that she showed the officers any marihuana concealed in a slipper, denying all knowledge of its presence in her apartment.

Don William Andre who was with defendant at the time of her arrest corroborated her testimony concerning her demands that the officers show her a warrant and of their refusal to do so.

Defendant's estranged husband Joseph Hamilton Dillard testified that on the night here in question he visited her at her apartment and that, "I had a big argument and fight with her about 8:30. I came over there to borrow a few dollars and she was going out to dinner with some friends, so she wouldn't give me the money, and I yanked the purse out of her hand and everything, and she ended up giving me a couple of dollars—in fact, she ended up giving me about $5 and the landlord came up and broke the scene up and—you want me to go on with the whole story?" Then the following ensued:

"Q. No. I wanted to know what time it was when you came back the second time. A. The second time—well, she went downtown and I was pretty juiced up. I am not an alcoholic—

"Q. But you were under the influence, you think? A. Yes.

"Q. What did you do while she was downtown? A. Well, I used to work on Main Street for a year and a half down there at the Tip Top. I know a lot of people down there. So I went down there and I kept on staggering around until I ran into somebody and purchased some marijuana and then I went and planted it.

"Q. What do you mean you planted it? A. Well, I went back through the window—I had been through that window a couple of times before. It's covered and pull the curtains down like that and I went in and spread a little bit around and then just took the rest and put it in a container and shoved it into one of her shoes. I did that with the pure intentions, believe me, of just getting her to go back to me. She said, 'You are goofing off too much and when you straighten out, okay.'

And I got drunk—stone drunk—and I did it.

"Q. Did you later go to the Police Department to tell them? A. I certainly did.

"Q. When was that? A. That was after the preliminary. I couldn't know she was going to get into all this trouble over that. I came back to recuperate all the stuff and to see if she had made up her mind and she wasn't there, and so I just went downtown—after I saw what happened on the preliminary, I went and told Officer O'Grady and Mr. Jones that I wanted to confess, that I done it, and that I

was sorry, and I was slightly intoxicated.

"Q. How many times did you go to the Police Department to tell them? A. That was the first time. They said, 'Fine, we can't accept it,' and they took me by the hand and gave me a merry heigh-ho and said, 'Come back tomorrow with Carolyn.'

"So I came back with Carolyn and her mother and the landlord and that displeased them completely so they yanked us out in the car—they put us out in the hall and they wouldn't let the witnesses talk and they had three officers and he says to me, 'Well, we are not going to accept your testimony,' and he says, 'Shut your mouth or I'll shove you through the wall.'

"Q. Which officer told you that? A. That was Officer O'Grady and he grabbed my arm and shoved me down and he says they can't accept my confession."

As her first ground for reversal appellant urges that the entry of the officers into her apartment during her absence was in violation of her constitutional rights and that the evidence produced against her was obtained through an illegal search and seizure. In this regard, as heretofore set forth, when the officers arrived at appellant's apartment they knocked on the door several times and receiving no response they approached the manager who in response to their request opened the door for them. When they entered they discovered the marihuana seeds on the bed. Appellant does not contend that the manager had no authority to enter the apartment, and the manager testified that he voluntarily permitted the officers to enter. On the occasion of the first visit of the officers to appellant's apartment, there was no search. The contraband was plainly visible when the officers entered. The situation here presented is analogous to that existing in People v. Ambrose, 155 Cal.App.2d 513, at page 523, 318 P.2d 181, at page 188, wherein we said:

"The officers asked the hotel manager for authority to enter the room whereupon he opened the door and let them in. The question of consent is to be determined by the trier of fact (citing cases). Upon the authority of People v. Gorg, 45 Cal.2d 776, 783, 291 P.2d 469, and People v. Caritativo, 46 Cal.2d 68, 73, 292 P.2d 513, we are persuaded that appellant's contention must be rejected. In the cited case it is held that where the officers have acted in good faith with the consent of a homeowner or landlord in conducting a search, and the latter believed they had joint control over the premises, and the right to enter them, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner or landlord's authority. See also People v. Silva, 140 Cal.App. 2d 791, 794–795, 295 P.2d 942.

[1, 2] "In the case now engaging our attention, we therefore conclude that it was reasonable for the trier of facts to conclude that the hotel manager believed, as he testified at the trial, that he possessed the authority to give consent to the officers to enter appellant's room and that it was equally reasonable for the court to hold that the officers acted in good faith and with the belief that the manager possessed the authority asserted. Therefore, the objects found in appellant's room were admissible in evidence. (Citing cases.)"

It is not every search or seizure that is prohibited by the Constitution. It is *unreasonable* searches and seizures that are denounced. In the case now engaging our attention, the police officers received information from a reliable confidential informant that appellant was using narcotics and had a quantity thereof in her possession. The officers were acquainted with appellant and knew she had previously been convicted upon a narcotics charge. Information previously given by this in-

formant had proved reliable. The officers went to appellant's apartment. They knocked but received no answer. They observed that the wall fireplace was in use and reasoned that someone was in the house. Thereupon they went to the manager's apartment and asked him to admit them to appellant's apartment. The manager did so. When they entered the apartment with the manager, the officers found marihuana seeds on appellant's bed. The officers returned to the manager's apartment and waited for appellant. She returned approximately two hours later and was placed under arrest. A further search was conducted and an additional quantity of marihuana was discovered in the toe of a slipper in appellant's closet.

[3] The case of Trowbridge v. Superior Court, 144 Cal.App.2d 13, 17, 19, 23, 300 P.2d 222, holds that an arrest is legal where the basis therefor consists of information supplied by a reliable confidential informant. See also People v. Vice, 147 Cal.App. 2d 269, 272, 305 P.2d 270; People v. Gonzales, 141 Cal.App.2d 604, 606, 297 P.2d 50. Since the arresting officer need only convince the trial judge of the reliability of the informant (People v. Dean, 151 Cal. App.2d 165, 167, 311 P.2d 85; Lorenzen v. Superior Court, 150 Cal.App.2d 506, 510, 310 P.2d 180), we are satisfied that the trial judge could reasonably find, on the basis of the testimony herein, that the arrest of appellant was made on reasonable cause and that the searches made precedent and subsequent to the arrest were lawful searches and seizures. An arrest may be made under certain circumstances without a warrant (Penal Code, sec. 836), and a search may be lawful though it precedes a legal arrest (People v. Vice, supra, 147 Cal. App.2d 273, 305 P.2d 272; People v. Simon, 45 Cal.2d 645, 648, 290 P.2d 531).

[4] Appellant urges that the prosecution failed to meet the burden of establishing justification for the search of appellant's home through reliance upon information obtained from a reliable and confidential informant in that "(1) It made no showing as to where the officers received their information; whether it was days, weeks or months before the search was made. (2) It made no showing as to the reliability of the informant, that is, on how many occasions had the officers received information relating to others previous to the information concerning appellant." In the instant case, Officer MacGregor did testify that the informer had provided accurate information in the past, that in his opinion the informer was a reliable source of information. Appellant herein made no attempt on cross-examination to elicit either the name of the informer, the number of previous cases in which the officer relied upon information furnished by this informer, nor the accuracy of such information. The only reference to an informer which appears in the cross-examination of the officer is as follows:

> "Q. Now, wasn't it a fact, Officer MacGregor, that at that time that you first saw the defendant you told her that you had received the address from one Del Ray, a girl friend of hers—or a friend of hers? A. No, sir.
>
> "Q. Did you mention anything about any woman giving you the address of the defendant? A. No, sir."

Having failed to raise any of these issues at the trial, appellant cannot on appeal, present them for the first time. Appellant relies heavily upon the case of People v. Carswell, Cal.App., 328 P.2d 842. However, the Supreme Court has granted a hearing in that case.

Finally, appellant urges that she is entitled to a new trial because the court below neglected to rule upon her motion for a new trial within the statutory time specified in Section 1202 of the Penal Code. Appellant asserts that on December 30, 1957, she made a motion for a new trial as reflected by the clerk's transcript which records that "A motion for a new trial is made". However, the reporter's tran-

script sets forth the proceedings of December 30, 1957 as follows:

"Mr. Durkee (appellant's counsel): I would like to make an oral application for probation at this time and also for the purpose of preparing a motion for a new trial.

"The Court: Do you waive time for probation and sentence at this time?

"Mr. Durkee: We waive time for probation and sentence.

"The Court: All right. Probation and sentence will be January 24th at 9:00 o'clock a. m. The defendant will remain on bail, and as I understand it, you are making a motion for a new trial at this time?

"Mr. Durkee: Well, I would like to make the motion—

"The Court: All right, you can make the motion and you can argue it at that time.

"Mr. Durkee: Thank you, your Honor."

At the proceedings which took place on January 24th, to which time the matter was continued as above indicated, appellant's counsel made no reference to any "motion". As shown by the reporter's transcript, the following occurred:

"The Court: Is arraignment for judgment and sentence waived?

"Mr. Durkee (counsel for appellant): Yes, your honor.

"The Court: I have before me case No. 189104. Is there any legal cause why judgment should not now be pronounced and sentence imposed?

"Mr. Durkee: None, your honor."

Thereupon, appellant's counsel discussed the facts of the instant case and the previous case in which appellant had been placed on probation, and with a violation of the terms of which probation she was charged. Counsel then indicated his intention to file a notice of appeal and requested a reduction in the amount of bail pending appeal. No mention whatever was made of any motion for a new trial.

[5] It is well established in this state that a motion for new trial in a criminal case is a statutory right and may be made only on the grounds enumerated in Section 1181 of the Penal Code, exclusive of all others. People v. Amer, 151 Cal. 303, 305, 306, 90 P. 698; People v. Boren, 139 Cal. 210, 216, 72 P. 899; People v. Fry, 137 Cal.App. 525, 529, 31 P.2d 204. In the case at bar, appellant concedes "that the grounds for said motion were not detailed". As was said in People v. Ah Sam, 41 Cal. 645, 650, 651, regarding a motion for a new trial, "The attention of the Court must be called to it. The Court must be moved to grant the order". And, in the case of People v. Beatcher, 136 Cal.App. 337, 338, 339, 28 P.2d 943, 944, wherein the record reflected that counsel for the accused said, "At this time, may it please the court, I desire on behalf of the defendant, and defendant does, to make oral motion for new trial, on all the statutory grounds, and I submit it without argument", whereupon the court announced, "Motion denied", Mr. Presiding Justice Conrey in a concurring opinion made the cogent statement, "I would not here contend that upon a motion for new trial thus presented, the court would have been without jurisdictional authority to grant that motion and order a new trial. But when the defendant appeals from an order denying such motion, it is incumbent upon him to show affirmatively that in the trial court's consideration of the motion and decision thereon there was some abuse of discretion. The bald statement to the trial court that the defendant made his motion for new trial 'on all the statutory grounds,' without argument and without suggestion of any definite reason for granting the motion, *did not fairly and reasonably call for decision upon any indicated question in the case.* Essentially, it failed to bring to the attention of the court any one reason why a new trial should be granted. The motion was just a general appeal to the world of legal possibilities. Although courts of appeal are created to review and correct errors of trial courts,

the law intends (so I believe), that upon a motion for a new trial, the trial court shall be given an opportunity to consider and determine some definite question or claim on which the motion depends, before a court of appeal will be required to review an order denying the motion. In this case if, by critical examination of the complicated and very long record, it could be demonstrated that the evidence was not sufficient to prove that any crime was committed, the facts relied upon, and the results to which they point, should have been brought to the attention of the court below." (Emphasis added.)

[6] Under the facts present in the case now before us we are satisfied that the right of the appellant to move for a new trial was waived. There is nothing in the reporter's transcript on appeal in this case to show that appellant ever actually made a motion for new trial. During the proceedings of December 30, 1957, appellant's counsel spoke of "preparing a motion for a new trial", and in response to a statement by the court, "* * * and as I understand it, you are making a motion for a new trial at this time?", appellant's counsel replied, "Well, I would like to make the motion". Thereupon the court stated, "All right, you can make the motion and you can argue it at that time (January 24, 1958)". On January 24th, as heretofore pointed out, appellant's counsel made no mention of a motion for new trial. All that is here indicated is that counsel intended to make a motion for new trial, and at no time did he specify the grounds upon which he intended to or did rely. Even though it be conceded that appellant's counsel by his statements, gave notice of his intention to move for a new trial, there was in fact no motion made for a new trial on any grounds specified in Section 1181 of the Penal Code, and the notice of motion is not sufficient to require the court to pass upon it (People v. Rothrock, 8 Cal.2d 21, 24, 63 P.2d 807).

What we have just said answers appellant's contention "* * * that the moving party is entitled to a ruling merely by virtue of the making of the motion. Since the court has the *power* to grant such a motion when made 'on all statutory grounds', it follows that it has the *power* to grant it where the defendant merely moves for a new trial".

[7] While all of the grounds contained in the code section may be utilized, nevertheless, the motion must be actually made and the grounds upon which reliance is placed must be brought to the attention of the court. Such a rule we feel is supported by the general tenor of the cases cited by appellant herself. In People v. Prudencio, 93 Cal.App. 241, 246, 269 P. 698, it is simply held that an accused has a right to have his motion for new trial heard and determined by the trial judge when presented *in the manner* and within the time provided by law. In the case just cited it is manifest that the specific grounds for the motion were brought to the attention of the court. And, in People v. Beatcher, supra [136 Cal.App. 337, 338, 339, 28 P.2d 943], also relied upon by appellant, the defendant therein made the motion specifically "on all statutory grounds". Based on that case, appellant argues that if the court has the authority to grant a motion made "on all statutory grounds", it necessarily follows that it has power to grant it where the defendant merely moves for a new trial. However, the very concurring opinion in the case last cited and relied upon by appellant, from which we have hereinbefore quoted, holds that language much more specific than that used by appellant herein, "did not fairly and reasonably call for decision upon any indicated question in the case * * *". Here, appellant's counsel merely spoke of "preparing for a motion", "I would like to make the motion", and on the date set by the court for making and presenting argument on the motion, appellant's counsel made no reference to a motion for new trial. We are satisfied that the court was entitled to conclude that no

motion for new trial was made or pending before it.

For the foregoing reasons, the judgment is affirmed.

FOURT and LILLIE, JJ., concur.



168 Cal.App.2d 277

Irene May ZIEGLER, Plaintiff and Appellant,

v.

SANTA CRUZ CITY HIGH SCHOOL DISTRICT, a Municipal Corporation, and Santa Cruz City Elementary School District, a Municipal Corporation, Defendants and Respondents.

Civ. 17954.

District Court of Appeal, First District, Division 1, California.

March 2, 1959.

Hearing Denied April 29, 1959.

Action for death of student who fell from railing on which he was sitting when a fellow student either pushed or attempted to push him. The Superior Court, Santa Cruz County, Gilbert B. Perry, J., rendered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Bray, J., held that evidence was sufficient to take case to jury on theory of negligent failure to supervise.

Reversed.

1. Negligence ⇐28

A dangerous or defective condition is one from which it reasonably would be anticipated that injury would occur to those coming into contact with condition, and actual use of property may create dangerous or defective condition even though property was not originally so designed as to be inherently dangerous in its ordinary and customary use.

2. Schools and School Districts ⇐89.5

Where leaning against or sitting on railing was not ordinary or customary use thereof, its occasional use for that purpose to knowledge of school people did not render the railing a "dangerous and defective one", so as to authorize recovery under Public Liability Act for death of student who fell from railing. West's Ann.Gov. Code, § 53051.

3. Schools and School Districts ⇐122

In action for death of student who fell from railing on which he was sitting when a fellow student either pushed or attempted to push him, evidence was sufficient to take case to jury on theory of negligent failure to supervise. West's Ann.Education Code, § 1007.

4. Schools and School Districts ⇐89.5

If death of student, who fell from railing on which he was sitting when a fellow student either pushed or attempted to push him, was of same general type likely to occur in absence of safeguards, fellow student's intervening act was no more than concurring cause.

5. Schools and School Districts ⇐89.11

School authorities have duty to supervise at all times conduct of children on school grounds, and school district may be liable for failure of its officers or employees to use ordinary care in that regard.

6. Negligence ⇐10

It is not necessary to prove that the very injuries which occur must have been foreseeable but only that a reasonably prudent person would foresee that injuries of same general type would be likely to occur in absence of adequate safeguards.

7. Schools and School Districts ⇐89.11

To render school district liable because of lack of supervision, there must be a proximate causal connection between inadequacy of supervision and accident.

8. Schools and School Districts ⇐122

Whether school district was negligent with regard to providing adequate supervision is ordinarily a question of fact.

9. Schools and School Districts ⇐89.11

In action for death of student who fell from railing on which he was sitting

when a fellow student either pushed or attempted to push him, it was not necessary, in order to make school liable, that school people should have foreseen particular accident that occurred, and it would be enough if general danger was foreseeable and if supervision necessary to avoid that general danger would reasonably have prevented accident in question.

Dent E. Snider, J. Frank Murphy, Eugene J. Adams, Santa Cruz, for appellant.

Lucas, Wyckoff & Miller, Santa Cruz, for respondents.

BRAY, Justice.

Plaintiff appeals from judgment of nonsuit in favor of defendants in an action for damages for the death of plaintiff's minor son on school property. The complaint contained two grounds for recovery, one based upon the Public Liability Act (Gov.Code, § 53051, dangerous and defective condition of public property); the other based on alleged negligence in failing to adequately supervise their students.

Questions Presented.

Was the evidence insufficient to show (1) a dangerous and defective condition; (2) negligent supervision?

Evidence.

The school building houses elementary and junior high school students. The playground areas and the exits to them are separate for each group. The accident occurred at the rear entrance to the junior high school, where the doors open onto a landing from which 9 steps lead down to the playground area. The landing and steps are guarded by an iron handrail on each side. The handrail is 33 inches high and 2¼ inches wide at the top. It is supported by bars arising from each step. Adjacent to the stairs and railing on one side is a concrete stairwell leading to the basement of the building. The distance from the top of the railing to the bottom of the stairwell is 12½ feet.

Leonard Evans, plaintiff's deceased son, was 13 years, 7 months old and in the 8th grade of the junior high school. On the day in question he had attended a dance in the school and during the dance the school principal, Mr. Miller, observed Leonard in horseplay with a 9th grade student, Richard. Leonard poked Richard in the ribs a few times. When the students were dismissed, Leonard proceeded out onto the stair landing where he placed his right buttock on the railing adjacent to the stairwell with one foot on the landing and one foot dangling. At this time Richard came out on the landing. Two 8th graders testified that Richard raised his arms as though to push Leonard. It is not clear from the evidence whether Richard actually pushed Leonard over or that, in endeavoring to avoid Richard, Leonard leaned backward and lost his balance. Leonard fell over the railing and into the stairwell. Leonard died from the injuries received in the fall.

1. Was There A Dangerous Or Defective Condition?

[1, 2] The court having granted a nonsuit, our duty is to determine whether there is any substantial evidence, or any reasonable inferences from the evidence, which would have supported a judgment in favor of plaintiff. There was nothing inherently dangerous or defective about the railing, the landing or the steps, if the landing and steps were used for the purposes for which they were intended; namely, exit from and entrance to the building. Although the landing and the stairway were heavily trafficked by students coming and going in the building, they were perfectly safe if used in the normal and customary way. According to Mrs. Prince, one of the teachers who had taught at the school for the past 10½ years, no one had ever fallen over the railing. The railing was of standard construction under the Uniform Building Code. Apparently it was a railing of the type used in many schools which have steps leading into a building or even steps from one floor of a building

to another floor. There was evidence that to the knowledge of the school people during a period of about 2 years the railing had been occasionally used by students for partially sitting on and leaning against. The principal and Mrs. Prince both testified to having seen students doing so. The principal had directed teachers and students to keep the area clear, although there was no specific cautioning against sitting on the railing. Two students testified to the occasional practice of sitting on the railing. One of them stated that he had once seen in the daily bulletin a warning against doing so.

Plaintiff contends that this occasional use to the knowledge of the school people constituted the railing a dangerous and defective one. We do not agree. A dangerous or defective condition is one from which it reasonably would be anticipated that injury would occur to those coming into contact with the condition. Jones v. City of Los Angeles, 1951, 104 Cal.App. 2d 212, 215, 231 P.2d 167. This interpretation is not limited to property originally so designed as to be inherently dangerous in its ordinary and customary use. Its actual use may cause the property to constitute a dangerous or defective condition. Thus, in Bauman v. San Francisco, 1940, 42 Cal. App.2d 144, 108 P.2d 989, the court held that a dangerous condition existed where the defendant permitted baseball to be played on its playground without erecting a barrier for the protection of small children playing in an adjacent sandbox. "There can be no doubt that a dangerous or defective condition can be created by the use or general plan of operation of government operated property, as well as by a structural defect." 42 Cal.App.2d at page 153, 108 P.2d at page 995. The court pointed out that no hard and fast rule can be laid down as to what constitutes a dangerous or defective condition but that each case must depend upon its own state of facts. It further stated that it is well settled that as a general rule the question is one of fact for the jury to determine.

In Gallipo v. City of Long Beach, 1956, 146 Cal.App.2d 520, 304 P.2d 106, a small boy fell from a pipeline, about a foot in diameter, adjacent to a bridge over a railroad right of way. No walkway had been provided for pedestrians on the bridge. Paths appeared to lead from the highway to the pipeline. The city knew that children were crossing on the pipeline and that the only action taken to guard against this practice was to set up a kind of barricade at a halfway point along this route. In holding that the manner in which the city operated and maintained the bridge constituted a dangerous or defective condition, the court stated that the use of the pipeline as a crossing was so closely connected with or in such proximity to the bridge as to make the city liable for that use. "Additionally, where children of tender years are exposed to hazard by the manner of operation or maintenance of a municipal facility, the failure of the City to provide a barrier to prevent injury at the point or from the source of danger has been held to constitute a dangerous condition within the statute." 146 Cal.App.2d at page 528, 304 P.2d at page 111. See Teilhet v. County of Santa Clara, 149 Cal. App.2d 305, 307, 308 P.2d 356, for discussion of the rule that the use of public property may constitute a dangerous or defective condition of the property. However, in those cases the use which made the property dangerous was more than the occasional use proved in this case. As conceded by plaintiff at oral argument, the use being made of the railing by Leonard would not have been dangerous were it not for the pushing or the attempted pushing by his fellow student. The situation is similar to that in Woodman v. Hemet Union High School District, 136 Cal.App. 544, 29 P.2d 257, 261, where the dilapidated truck which the boys were allowed to use was in a defective condition, yet the court held that under the Public Liability Act "a public agency should only be held liable for damages resulting from the defective condition of its property in its

ordinary, usual, and customary use * *". In Howard v. City of Fresno, 22 Cal.App. 2d 41, 70 P.2d 502, a trash burning area was maintained in close proximity to the children's playground. The court pointed out that there was no evidence that any person prior to the accident in question had ever been injured or burned there, and the area was not intended for children to play in. The court said that the burning area was safe for the purpose for which it was intended—the burning of trash by park employees—and that "the question of the dangerous character of a defective condition depends largely on the intended lawful use of the property." 22 Cal.App.2d at page 45, 70 P.2d at page 503. In Betts v. City and County of San Francisco, 108 Cal.App.2d 701, 239 P.2d 456, a boy climbed over a picket fence and descended the concrete spillway to get a drink of water from a pipe emptying into it. The main theory of the case was that an attractive nuisance was being maintained. The court held that that theory did not apply nor was the defendant liable under the Public Liability Act. It quoted from Beeson v. City of Los Angeles, 115 Cal.App. 122, 132, 300 P. 993, to the effect that the Legislature intended in passing that act to limit the liability of a public agency for damages resulting from defective property to "' * * damages suffered in the ordinary, usual and customary use thereof.'" 108 Cal. App.2d at page 704, 239 P.2d at page 458. In Ford v. Riverside School Dist., 121 Cal.App.2d 554, 263 P.2d 626, an elementary school pupil was pulling thorns from a palm tree on the school premises. In doing so he caused a thorn to enter the eye of a fellow pupil. It was known to the school people that pupils occasionally played in this area, although they had been frequently notified not to do so. The court reviewed a number of cases on the subject and reiterated the rule above expressed, that to constitute a dangerous or defective condition under the Public Liability Act, the property must be dangerous or defective when considered in its ordinary and customary use. In our case leaning against or sitting on the railing was not the ordinary or customary use of the railing.

The following cases in which it was held that the Public Liability Act did not apply are somewhat analogous in that in each the property was not inherently dangerous, but, as in our case, only became dangerous when used in other than the customary and ordinary way: Hough v. Orleans etc. School Dist., 1943, 62 Cal.App.2d 146, 144 P.2d 383, where a student ran into a bolt projecting from a flagpole on school grounds; Schmidt v. City of Vallejo, 122 Cal.App. 5, 10 P.2d 107, minor fell off a playground slide; Luna v. Needles etc. School Dist., 154 Cal.App.2d 803, 316 P.2d 773, where a pupil's finger was pinched in a gate swung by a fellow pupil. Reithardt v. Board of Education, 43 Cal.App.2d 629, 111 P.2d 440, also cited by defendant, did not involve the Public Liability Act. It involved a charge of negligent supervision in allowing students to sit on a window ledge which was about 3½ feet above the floor. A student pulled a fellow student off the window and on to the floor, injuring her. The evidence showed that students customarily sat on the window ledges and the evidence showed that they were not hazardous or dangerous places to sit. The uncontradicted evidence was that students sitting there were securely seated and could not fall. The court said "* * * we do not believe that an ordinary school window of the type here involved is a condition which is a sign of danger, nor do we believe that defendants could reasonably anticipate that one high school pupil would seize another who was sitting upon the ledge and drag her suddenly to the floor." 43 Cal.App.2d at pages 634–635, 111 P.2d at page 443.

2. Supervision.

[3–9] The complaint additionally alleged negligent maintenance, control and supervision of the premises and the students.

Section 1007, Education Code, permits recovery from a school district for injury to person or property "arising because of the negligence of the district, or its officers, or employees. * * *" In addition to the evidence hereinbefore set forth, the prin-

cipal testified that because the landing and stairway was a heavily trafficked area, he had directed teachers and students to keep the area clear, although there was no specific cautioning against sitting on the railing. Mrs. Prince testified that she had warned students about leaning against the railing. Two students testified that occasionally they had observed students sitting on the railing. One had never been warned against it by a teacher, although he had heard from other students that there had been warnings. The other had seen a warning once in the bulletin. Three teachers were assigned to supervisory duty in the area, one in the hall and two in the school yard. One of these teachers was in the hall at the time of the accident. The evidence fails to show where the other teachers who were assigned to yard duty were.

There was sufficient evidence from which a jury could have concluded that, with the knowledge the school had of the fact that students occasionally sat and leaned against the railing, the foreseeability of this type of accident was reasonable and it would be for the jury to determine whether to guard against such an accident the school warnings were sufficient and whether or not there should have been supervision of the students as they left the building and went down the stairway. While Leonard had been sitting on the railing an appreciable length of time, Richard's action, which caused the accident, was a sudden one. It was a jury question whether proper supervision would have stopped Leonard from sitting on the rail and would reasonably have prevented the accident. If the jury should find that Leonard's injury was of the same general type likely to occur in the absence of safeguards, Richard's intervening act would be no more than a concurring cause.

School authorities have a duty to supervise at all times the conduct of children on the school grounds. A school district may thus be liable for failure of its officers or employees to use ordinary care in this respect. It is not necessary to prove that the very injuries which occurred must have been foreseeable; merely that a reasonably prudent person would foresee that injuries of the same general type would be likely to occur in the absence of adequate safeguards. Taylor v. Oakland Scavenger Co., 1941, 17 Cal.2d 594, 600, 110 P.2d 1044. However, there must be a proximate causal connection between the inadequacy of the supervision and the accident. Forgnone v. Salvador U. E. School Dist., 1940, 41 Cal.App.2d 423, 426, 106 P.2d 932. Whether or not a school district is negligent in providing adequate supervision is ordinarily a question of fact. Rodrigues v. San Jose Unified School Dist., 1958, 157 Cal.App.2d 842, 845, 322 P.2d 70. Courts have said that no liability devolves on a school district for personal injuries arising from the unlawful or wilful misconduct or negligence of a fellow student.

The fact that the principal did not anticipate any student falling over the railing and therefore in his directives to keep the landing clear he had in mind only the facilitating of the flow of traffic and even though no accident had theretofore occurred are not conclusive on the foreseeability which the jury might have reasonably determined he should have had. Defendant refers to Wright v. City of San Bernardino School Dist., 1953, 121 Cal.App.2d 342, 263 P.2d 25, which held that no negligent lack of supervision is shown where the accident is such that it could occur equally as well in the presence of a supervisor as in his absence. That principle is not applicable here, for the jury reasonably could have concluded that had a supervisor been where he could have observed the students using the landing and stairway as they left the dance, he would have instructed Leonard to get off the railing.

The situation differs from that in Reithardt v. Board of Education, supra, 43 Cal. App.2d 629, 111 P.2d 440. In reversing a judgment in favor of the plaintiffs and an order denying a motion for judgment notwithstanding the verdict, the court said that the school people could not reasonably anticipate that one high school pupil would seize another who was sitting safely on the ledge and drag her suddenly to the floor. In our case the railing was not a safe place

to sit and it was a jury question whether knowing that students did occasionally sit on or lean against the railing and knowing the heavy traffic at this point, and the propensity for students gathering on the landing (the principal testified that students would gather on the landing and he had issued directives to keep that area clear) it was not reasonably foreseeable that a student sitting on the railing might be jostled or might lose his balance. To make the school liable it is not necessary that the school people could have foreseen the particular accident that occurred, that is, that a student would push or attempt to push another over the railing, if a general danger was foreseeable and if the supervision necessary to avoid that general danger would reasonably have prevented the accident in question. As said in Charonnat v. San Francisco Unified School Dist., 56 Cal.App.2d 840, 844, 133 P.2d 643, 645, where during a recess the plaintiff on the school ground got into an altercation with a fellow student during the course of which the latter twisted and broke plaintiff's leg, "Nor is it necessary that the very injury which occurred must have been foreseeable by the school authorities or the yard supervisor in order to establish that their failure to provide adequate protection constituted negligence. 'Their negligence is established if a reasonably prudent person would foresee that injuries of the same general type would be likely to happen in the absence of such safeguards.'" The court also stated (56 Cal.App.2d 844, 133 P.2d at page 645): "'* * * the purpose of the law requiring supervision of pupils on the playgrounds and on the school property during school hours is to regulate their conduct so as to prevent *disorderly and dangerous* practices which are likely to result in physical injury to immature scholars under their custody.' (Italics ours.) And in Buzzard v. East Lake School Dist., 34 Cal.App.2d 316, 93 P.2d 233, it was held that improper supervision of pupils on the school grounds may create a liability on the part of the school district for injuries received by one pupil on account of the recklessness of a fellow student while they were engaged in recreation on the premises during an intermission."

In the present case the evidence is such that the jury could have found that there was a negligent omission on the part of defendants to provide adequate supervision of the conduct of the pupils and that had a supervisor seen Leonard sitting on the railing some serious injury would have been reasonably anticipated.

Had the only ground of liability pleaded been that of alleged dangerous condition of the premises, the nonsuit would have been properly granted for failure to prove facts sufficient to prove such ground. However, under the second ground pleaded, namely, negligent supervision, the facts proved were sufficient to require submission to the jury and hence the nonsuit should not have been granted. The case will have to be remanded for retrial of the issue of alleged negligent supervision.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; PETERS, J., not participating.



168 Cal.App.2d 309

Ruth GOTTLIEB, Petitioner and Plaintiff,

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent,

Robert J. Gottlieb, Real Party in Interest and Defendant.

Civ. 23645.

District Court of Appeal, Second District, Division 1, California.

March 2, 1959.

Divorce action, wherein the Superior Court of Los Angeles County, Victor J. Hayek, J. pro tem., adjudged wife to be in contempt of court, and she appealed. The District Court of Appeal, Nourse, J. pro

tem., held that provision of property settlement agreement that neither party should molest or annoy the other was too uncertain and ambiguous to be enforced by contempt proceedings, even if obligation not to molest or annoy constituted a duty imposed upon husband and wife within meaning of interlocutory decree of divorce ordering both parties to perform all duties imposed upon them by agreement, and that portion of interlocutory decree requiring performance of duties imposed by agreement might be interpreted as applying only to terms of property settlement between the parties and not to agreement not to molest or annoy.

Judgment annulled.

See also 155 Cal.App.2d 715, 318 P.2d 763.

1. Divorce ⇐269(2)

Court acted in excess of its jurisdiction in adjudging that because former wife allegedly interfered with relationship between divorced husband and his tenants in violation of property settlement agreement that neither party would molest or annoy the other, she was in contempt of divorce decree ordering both parties to perform duties imposed upon them by agreement.

2. Injunction ⇐219

Acts allegedly constituting contempt of an order of court must be clearly and specifically prohibited by terms of injunction.

3. Injunction ⇐219

Party bound by injunction must be able to determine from its terms what he may and may not do and he cannot be held guilty of contempt for violating an injunction that is uncertain or ambiguous.

4. Divorce ⇐269(1)

Provision of property settlement agreement, incorporated in interlocutory decree of divorce, that neither party should molest or annoy the other was too uncertain and ambiguous to be enforced by contempt proceeding, even if obligation not to molest or annoy constituted a duty imposed upon the parties within meaning of injunctive portion of decree that each party should perform the duties imposed upon him by agreement.

5. Divorce ⇐269(1)

Provision of property settlement agreement that neither party should molest or annoy the other, though incorporated in interlocutory decree of divorce, was not enforceable by contempt proceedings, since agreement not to molest or annoy had no connection with property rights of the parties or marital obligations of support, child custody, etc., as to which the parties contracted, and portion of decree ordering both parties to perform duties imposed upon them by agreement might be interpreted as applying only to terms of property settlement and not to agreement not to molest or annoy.

6. Contempt ⇐20

Any ambiguity in decree must be resolved in favor of party charged with contempt thereof.

7. Contracts ⇐129(4)

As a contract, provision of property settlement agreement that neither party should molest or annoy the other or compel or attempt to compel the other to cohabit or dwell with him by legal or other proceedings for restoration of conjugal rights was contrary to public policy and void, since the import of such agreement was that neither party would invoke the jurisdiction of court of conciliation pursuant to statute. West's Ann.Code Civ.Proc. § 1730 et seq.

8. Injunction ⇐210

A court of equity has power to modify or dissolve an injunction that is continuing and of a preventive nature.

9. Contempt ⇐66(7)

In reviewing proceedings on a charge of constructive contempt, the charge, evidence, findings, and judgment are to be strictly construed in favor of accused and no intendments or presumptions may be indulged in aid of their sufficiency.

10. Divorce ⇐286

Where final decree of divorce did not incorporate by reference injunction con-

tained in interlocutory decree against violation of provision of property settlement agreement that neither party should molest or annoy the other, though other provisions of interlocutory decree were expressly incorporated in final decree, court must assume, in reviewing adjudication that wife was in contempt of injunction against molesting or annoying divorced husband, that such injunction granted by interlocutory decree was dissolved by final decree.

11. Divorce ⇐255, 269(1)

Obligations of husband and wife under property settlement agreement not to molest or annoy each other were contractual, and the character of such obligations as contractual obligations was not changed by being merged into interlocutory decree of divorce ordering both parties to perform all duties imposed upon them by agreement, and hence injunction against molestation or annoyance, not being in aid of judgment, was not enforceable by contempt proceedings.

Hahn, Ross & Saunders, Los Angeles, for petitioner and plaintiff.

Gottlieb & Whitehill, Los Angeles, for defendant and real party in interest.

NOURSE, Justice pro tem.

By her petition herein, petitioner seeks to review the proceedings through which she was held in contempt of the respondent court and to annul the judgment of contempt.

The relevant facts shown by the return to the writ heretofore issued are: On November 5, 1952, petitioner commenced an action for divorce against her husband Robert, upon the ground of mental cruelty. By her complaint she prayed for a divorce, a division of community property, alimony, support for the minor children of the parties; that in the event "a property settlement agreement" should be arrived at with her husband, the same be approved by the court and incorporated in any decree entered in the action and that her husband be restrained from annoying, harming or threatening her. The defendant did not appear in this action and his default was entered. On March 13, 1953, petitioner and her husband entered into an agreement denominated "Property Settlement Agreement."

By paragraph 21 of this agreement the parties agreed that it was their intent to make a full and final adjustment "of all their property rights, interests and claims." By paragraph 23 it was agreed that the agreement should be presented to the court for its approval in the above mentioned action brought by the wife for divorce, but if not so presented should, nevertheless, be effective as a contract between the parties. By paragraph 24 it was agreed that the contract should not be altered, amended or modified save by an instrument in writing executed by the parties. Paragraph 26 of the agreement reads as follows: "Neither of the parties shall molest or annoy the other, or compel or attempt to compel the other to cohabit or to dwell with him or her, as the case may be, by any legal or other proceedings, for restoration of conjugal rights or otherwise."

On April 22, 1953, the action for divorce brought by petitioner was heard as a default matter and on the 24th of April an interlocutory judgment of divorce was entered. This judgment, in addition to decreeing that plaintiff was entitled to a divorce from Robert, decreed "the *property settlement agreement* dated March 13, 1953, * * * is hereby approved and incorporated in this decree in all its terms and provisions in haec verba, and It Is Ordered And Decreed that the plaintiff and defendant fully perform their respective rights and duties vested in and imposed upon them under and by virtue of the *said property settlement agreement* as follows:" (Italics ours.) The entire agreement above referred to is then set forth in haec verba.

Thereafter, on May 6, 1954, a final decree of divorce was entered. This final decree did not purport to continue in effect any injunction or restraining order contained in

the interlocutory decree but did expressly continue and make binding upon the parties all provisions for alimony, custody or support of the children and all provisions thereof as to the division of the property.

On October 6, 1958, upon the affidavit of the defendant Robert, an order issued from the respondent court requiring petitioner to show cause why she should not be held in contempt of the provisions of the interlocutory decree that "[n]either of the parties shall molest or annoy the other." After a hearing had upon this order to show cause, the court found that the petitioner was in contempt of the aforesaid order of the court in that she had annoyed the defendant by falsely representing to the tenants of Robert that she was a prospective purchaser of certain real property owned by him and by making inquiries as to the rentals paid by said tenants to Robert and by making representations with respect to future rentals. The court sentenced the plaintiff to serve two days in the county jail but suspended the sentence upon condition that the plaintiff refrain from further violation of the interlocutory decree and final decree in respect to annoyance and molestation.

[1–3] We have reached the conclusion that the court in adjudging petitioner to be in contempt acted in excess of its jurisdiction and that its judgment of contempt must be annulled. Before a party may be held in contempt of an order of the court, "the acts constituting the contempt must be clearly and specifically prohibited by the terms of the injunction," and the "party bound by an injunction must be able to determine from its terms what he may and may not do; he cannot be held guilty of contempt for violating an injunction that is uncertain or ambiguous." Weber v. Superior Court, 26 Cal.2d 144, at page 148, 156 P.2d 923, at page 925; City of Vernon v. Superior Court, 38 Cal.2d 509, at page 513, 241 P.2d 243, at page 245; Brunton v. Superior Court, 20 Cal.2d 202, at page 205, 124 P.2d 831, at page 834; Mattos v. Superior Court, 30 Cal.App.2d 641, at page 649, 86 P. 2d 1056, at page 1060.

[4] Assuming that the agreement between the parties not to molest or annoy the other, as set forth in paragraph 26 of the property settlement agreement, was a duty imposed upon the petitioner within the meaning of the injunctive portion of the decree that each party should perform the duties imposed upon him or her by the agreement, this paragraph is too uncertain and ambiguous to be enforceable through a proceeding in contempt. It is impossible to tell from a reading of this covenant of the parties whether they intended that the molestation or annoyance as to which they contracted was any molestation or annoyance objective or subjective, or molestation or annoyance by an attempt to compel the other to cohabit or dwell with the other, or whether the parties intended to contract only against one bringing a proceeding against the other for the restoration of conjugal rights. Inasmuch as the intent of the parties could not be ascertained from the language used by them the court could not find one of the parties in contempt for it could not find as a fact that the act done was one which the parties had contracted against.

[5–7] There is a further uncertainty in a portion of the decree in question. While paragraph 26 of the agreement was incorporated in the decree, it has no connection whatsoever with the property rights of the parties or the marital obligations of support and of child custody and support as to which the parties contracted. While the decree is subject to the interpretation that the parties were ordered to perform the duties imposed upon them under paragraph 26, it is likewise subject to the interpretation that it was only the terms of the property settlement between the parties that they were ordered to perform. Any ambiguity in the decree must be resolved in favor of the accused. Hotaling v. Superi-

or Court, 191 Cal. 501, at page 506, 217 P. 73, at page 75, 29 A.L.R. 127.[1]

[8–10] As we have pointed out, the final decree did not by reference incorporate the injunction against the violation of paragraph 26 of the property settlement agreement although it did expressly incorporate other provisions of the interlocutory decree. A court of equity has the power to modify or dissolve an injunction that is continuing and of a preventative nature. Woods v. Corsey, 89 Cal.App.2d 105, at page 113, 200 P.2d 208, at page 213. In reviewing the proceedings on a charge of constructive contempt "the charge, the evidence, the findings and the judgment are all to be strictly construed in favor of accused (citation) and no intendments or presumptions can be indulged in aid of their sufficiency." Hotaling v. Superior Court, supra, 191 Cal. 501, at page 506, 217 P. 73, at page 75. Applying this rule to the present record we must assume that the injunction granted by the interlocutory decree was dissolved by the final decree.

[11] There is still a further reason why the court was without jurisdiction in this matter. The injunction granted was, by its terms, one which enjoined the parties from the violation of a contractual obligation and the character of that obligation as a contractual obligation was not changed by its being merged into the decree. Plumer v. Superior Court, 50 Cal.2d 631, at page 637, 328 P.2d 193, at page 196.

There was no issue before the court at the trial of the action as to any breach or threatened breach of this agreement, nor was there any issue before the court of any threatened annoyance or molestation of the defendant by the plaintiff inasmuch as the defendant had defaulted. This being true and the injunction, insofar as the provisions of paragraph 26 of the agreement are concerned, not being in aid of the judgment of the court, the court was without power to determine that issue and its judgment as to it was in excess of its jurisdiction. Vasquez v. Vasquez, 109 Cal.App.2d 280, at page 283, 240 P.2d 319, at page 320, and cases there cited.

The judgment of the respondent court adjudging the petitioner in contempt is annulled.

FOURT, Acting P. J., and LILLIE, J., concur.

1. It is to be noted that the import of paragraph 26 is that neither party would invoke the jurisdiction of the Court of Conciliation pursuant to the provisions of Title XIA of the Code of Civil Procedure. As a contract it was therefore against public policy and void. Mannix v. Superior Court, 133 Cal.App. 740, at page 743, 24 P.2d 507, at page 508; Muldrow v. Norris, 2 Cal. 74, at page 78; Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880; Loveren v. Loveren, 106 Cal. 509, 39 P. 801; Beard v. Beard, 65 Cal. 354, 4 P. 229. It seems doubtful that the court intended to give vitality by its decree to such a contract.

168 Cal.App.2d 264

ESTATE of Martin F. DWYER, Deceased.

UNITED STATES of America, Appellant,

v.

Berta L. DWYER, former Administratrix of the Estate of Martin F. Dwyer, deceased, and Fidelity and Deposit Company of Maryland, Respondents.

Civ. 5960.

District Court of Appeal, Fourth District, California.

Feb. 26, 1959.

Hearing Denied April 22, 1959.

Proceeding with respect to accounting of administratrix who had been removed as such. From order and decree of the Superior Court of Orange County, Raymond Thompson, J., settling account United States appealed. The District Court of Appeal, Griffin, P. J., held that where administratrix, with authority of court continued

operation of decedent's business in order to complete performance of existing contracts and used amounts withheld from employee's wages for federal income taxes for paying wages and creditors and for general operation of business, there was violation of duty of administratrix to hold amount withheld from wages in trust for United States and she was accountable as such administratrix and should be surcharged with respect to those trust funds where no other assets remained in estate out of which indemnification could be had.

Reversed, and attempted appeal from minute order dismissed.

1. Executors and Administrators ⇐510(2)

Where previous to order approving former administratrix' account the court had made a skeleton minute order to the same effect omitting certain essential portions of a valid minute order, appeal did not lie from such minute order and attempted appeal therefrom should be dismissed. West's Ann.Prob.Code, §§ 572, 1240; West's Ann.Rules on Appeal, rule 2(a); 26 U.S.C.A. (I.R.C.1954) § 3102(a, b).

2. Internal Revenue ⇐1737

Where administratrix under direction and authorization of court continued decedent's business in order to complete existing contracts and from amount withheld from employee's wages for federal tax, administratrix paid wages, general creditors and other expenses of administration, regardless of finding of lack of fraud or gross neglect, there was a violation of administratrix' duty to follow federal statute requiring such withheld sums to be segregated in a special trust fund and such administratrix was accountable and should be surcharged as administratrix with respect to those trust funds where no assets remained in estate out of which indemnification could be had. West's Ann.Prob.Code, §§ 572, 1240; 26 U.S.C.A. (I.R.C.1954) §§ 3102(a, b), 3401(d), 3403, 6011(a), 7501(a).

3. Executors and Administrators ⇐534

Surety on bond of personal representative of an estate is not liable for default or misapplication by personal representative in connection with or of the assets of estate until liability of personal representative has been determined by order or decree of probate court, and such order or decree has become final.

4. Evidence ⇐318(3)

Where on proceeding for allowance of account of former administratrix who had used funds withheld from wages of employees continuing decedent's business under direction of court for payment of general creditors and other expenses, certified copy of accounts of taxpayer with respect to taxes due as reflected by public records of United States Bureau of Internal Revenue, Los Angeles District, would not be hearsay or inadmissible except for possible exception that certificate containing official seal of department, bore a purported rubber stamp signature of one under the title of District Director of Internal Revenue. West's Ann.Code Civ.Proc. §§ 1875, 1918, 1920, 1923, 1924.

Charles K. Rice, Asst. Atty. Gen., Lee A. Jackson, L. W. Post, Helen A. Buckley, Washington, D. C., Laughlin E. Waters, U. S. Atty., and Edward R. McHale, Asst. U. S. Atty., Los Angeles, for appellant.

Blodget, Gilbert & Cochran, John H. Gilbert, Jr., Santa Ana, Sims & Wallbert, and Maurice H. Wallbert, Los Angeles, for respondents.

GRIFFIN, Presiding Justice.

Decedent, Martin F. Dwyer, a painting contractor, died June 5, 1955. His wife, Berta L. Dwyer, was duly appointed administratrix of his estate on June 24, 1955, and was then authorized and directed by the court to continue the operation of his painting business and to complete the perform-

ance of existing contracts. Respondent Fidelity and Deposit Company of Maryland became her surety under the usual bond (Sec. 541 Probate Code). She continued to operate the business and employed a considerable number of employees in this work. In June, 1956, the administratrix filed U. S. Treasury Form No. 941 (Employees' Quarterly Federal Tax Return) without payment of the amount indicated. She listed the particular quarter included, covering the number of employees, wages paid, amount withheld, and the F.I.C.A. taxes withheld. Early in 1956 the administratrix became ill and was in a sanitarium. About April 16, 1957, she was removed as administratrix of the estate, she never having filed an inventory and appraisement. She was ordered to file her account. The United States of America filed a statement of claim for taxes due and entered written objections to her first account and petition for discharge which she filed on June 4, 1957. In summary, the account showed total debits of $133,730.19, and total credits of $134,669.72, resulting in a loss of $939.53 to the estate. There were no other assets indicated. It is conceded that the administratrix commingled all the funds she received, including the withholding and F.I.C.A. taxes she withheld from the wages of her employees and that such funds were "put back" to help pay the wages, creditors, and for the general operation of the business which resulted in the loss indicated.

[1] The court found generally in accord with these facts but specifically found that certain creditors had been paid; that the former administratrix conducted herself fairly and honestly in reference to the administration of said estate and was not guilty of fraud, dishonesty or gross negligence; that no state or federal statute creates any preference in favor of the United States of America as to payment of withholding taxes under the conditions described; that the monies withheld were held by her as "trustee" in trust for the United States of America, distinct and separate from her capacity as administratrix and were never held by her in her capacity as administratrix. Accordingly, the objections of the United States of America were overruled, her account was approved and allowed, and she was discharged as such former administratrix and her surety was exonerated. Appellant appealed from these orders. Previously, the court, on January 20, 1958, made a skeleton minute order to the same effect, omitting certain essential portions of a valid minute order from which appellant also, by way of precaution, attempts to appeal. It does not appear that an appeal lies from such a minute order as is here involved. In re Estate of Mills, 111 Cal.App.2d 83, 243 P.2d 889; Sec. 1240 Prob. Code; Rule 2, subd. (a) Rules on Appeal. The attempted appeal therefrom should be dismissed.

We will consider the points raised on the appeal from the signed order, which follows the findings of fact and conclusions of law prepared by the trial judge. Respondents argue that obligations incurred by the estate in favor of creditors who furnish goods and merchandise to the personal representative in connection with the operation of the business of a decedent by the personal representative, pursuant to valid court order, are not expenses of the administration of the estate, and are not entitled to priority in payment, citing such authority as In re Estate of Allen, 42 Cal.App.2d 346, 108 P.2d 973; In re Estate of Smith, 16 Cal.App.2d 239, 60 P.2d 574; and Probate Code Sec. 572. Respondents concede the withholding taxes were required to be deducted from wages owing to employees of the business, and that the withheld funds then became impressed with a trust in favor of the Government.

Section 3102, Internal Revenue Code, 1954, Chap. 21, Federal Insurance Contributions Act, Subchapter A, titled Tax on Employees, 26 U.S.C.A. § 3102, subd. (a) provides: "The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the

tax from the wages as and when paid." Subd. (b) "Every employer required so to deduct the tax shall be liable for the payment of such tax * * *"

Chapter 24, sec. 3401, subd. (d), 26 U.S.C.A. § 3401(d) defines employer as "For purposes of this chapter, the term 'employer' means a person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, * * *."

Section 3403, 26 U.S.C.A. § 3403 provides: "The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter * * *" Section 6011, subd. (a), 26 U.S.C.A. § 6011(a) states: "When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate * * *."

Section 7501, subd. (a), 26 U.S.C.A. § 7501(a) provides the general rule that "Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States * * *"

[2] Respondents claim in their brief that it may be true that in failing to pay the claim of the United States for taxes accruing in connection with the operation of the business here concerned, after the death of the decedent, respondent Dwyer committed an error of judgment and that it may be conceded that she made a mistake; but it cannot be said that her act in failing to pay such taxes amounted to fraud or gross carelessness or mismanagement. They accordingly argue that the personal representative of an estate who acts in good faith and is not guilty of fraud or gross negligence in connection with the operation of the business of a decedent pursuant to a court order, is not chargeable with losses flowing therefrom, citing such authority as In re Estate of De Rome, 175 Cal. 399, 165 P. 919; Barker v. Stanford, 53 Cal. 451; and In re Estate of Werfel, 116 Cal.App.2d 167, 253 P.2d 79.

The relationship of the United States in this probate proceeding, in respect to the monies withheld and required by law to be withheld by the employer, the administratrix, is not the same as that of a general creditor in respect to after-death claims. Berta L. Dwyer, in her capacity as administratrix of the estate, as distinguished from her personal capacity, was the employer, was obligated by law as such to withhold such funds and taxes from the pay of the employees, and while holding such funds she, as administratrix, and not in her personal capacity, was acting as trustee, and was required, under the law, to account to and pay over such funds to the United States. The undisputed evidence shows, as such administratrix and trustee, she failed to do so. Regardless of the finding of the trial court of lack of fraud or gross neglect, there was a violation of her duty as such administratrix to follow the law in this respect. Accordingly, she should be held accountable as such administratrix and should be surcharged as administratrix with respect to these trust funds, where no assets remain in the estate out of which indemnification can be had. (United States v. Lassiter, 48 A.F.T.R. 1219, 54-2 U.S.T.C. par. 9650; Standard Oil Co. of Kentucky v. Hawkins, 7 Cir., 74 F. 395; United States v. Sampsell, 9 Cir., 193 F.2d 154; Hercules Service Parts Corp. v. United States, 6 Cir., 202 F.2d 938.)

[3] It therefore appears that the orders under consideration should be reversed; that in face of the objections of the United States to the first account the former administratrix should be surcharged in the amount to be found due. The surety on the bond of a personal representative of an

estate is not liable for the default or misapplication by the personal representative in connection with or of the assets of the estate until the liability of the personal representative has been determined by an order or decree of the probate court, and such order or decree has become final. Nickals v. Stanley, 146 Cal. 724, 81 P. 117; Weihe v. Statham, 67 Cal. 84, 7 P. 143; Richardson v. Royal Indemnity Co., 21 Cal.2d 557, 134 P.2d 1; Burns v. Massachusetts Bonding & Insurance Co., 62 Cal.App.2d 962, 146 P.2d 24.

[4] Lastly, appellants complain because the trial court sustained an objection to an offer by appellant objector, United States, to the introduction in evidence of what purported to be a certified copy of the accounts of the taxpayer in respect to taxes due, as reflected by the public records of the United States Bureau of Internal Revenue, Los Angeles District. The certificate proffered fully conforms to the provisions of sections 1918, 1920, 1923, and 1924 of the Code of Civil Procedure and would not be hearsay or inadmissible, as contended by the trial court, except for the possible exception that the certificate bears a purported rubber-stamp signature of one "R. A. Riddell", under the title "District Director of Internal Revenue". The official seal of the department is affixed. Whether this form of signature is sufficient to conform to section 1923 of the Code of Civil Procedure where proper objection is taken thereto, is problematical. People v. Brussel, 122 Cal.App. Supp. 785, 7 P.2d 403; Sec. 1875, Code Civ. Proc. However, since the orders involved must be reversed, on a new hearing any deficiencies or questions that might arise in reference to its authenticity could be clarified to the satisfaction of the court by additional proof.

The attempted appeal from the minute order is dismissed. Orders reversed.

MUSSELL and SHEPARD, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

168 Cal.App.2d 298

Betty Mae HUNTLEY, James Huntley, Gerald Huntley, Sharon Huntley and Judie Mae Huntley, minors, by Betty Mae Huntley, their guardian ad litem, Plaintiffs and Respondents,

v.

COUNTY OF SANTA CLARA et al., Defendants.

Central Fire Protection District of Santa Clara County and Joseph Michael Aiello, Defendants and Appellants.

Civ. 17904.

District Court of Appeal, First District, Division 2, California.

March 2, 1959.

Action for wrongful death of motorist who was killed when his vehicle collided at nighttime with fire truck being backed along highway into garage. The Superior Court, County of Santa Clara, Byrl R. Salsman, J., granted plaintiffs' motion for new trial on ground of insufficiency of evidence to justify verdict, and county and fire protection district appealed. The District Court of Appeal, Draper, J., held that plaintiffs were entitled to benefit of presumption that deceased motorist had exercised due care and it could not be said that granting of new trial was an abuse of discretion.

Affirmed.

1. Appeal and Error ⇐1015(1, 3)

Order granting new trial on ground of insufficiency of evidence can be reversed only where there is no evidence which would support a judgment in favor of moving party, and weighing of evidence upon such motion is the exclusive province of trial court which may draw inferences opposed to those drawn at trial.

2. Death ⇐58(1)

Where action was brought to recover for death of motorist whose vehicle had collided at night with fire truck in an acci-

dent to which there were no eyewitnesses, plaintiffs were entitled to benefit of presumption that decedent had exercised due care and such presumption itself constituted evidence which could be dispelled only by uncontradicted, irreconcilable evidence produced by party relying upon presumption, and evidence of opposing party called for examination could not dispel presumption. West's Ann.Code Civ.Proc. § 2055.

3. New Trial ⇐70

In action for wrongful death of decedent motorist whose vehicle crashed at nighttime into fire truck being backed along highway into garage, record failed to disclose an abuse of discretion by trial court in awarding plaintiffs a new trial for insufficiency of evidence to support verdict. West's Ann.Code Civ.Proc. § 657, subd. 6.

Hoge, Fenton Jones & Appel, Edwin D. Jones, Jr., Joan A. Symon, San Jose, for appellants.

Boccardo, Blum, Lull, Niland & Teerlink, Edward J. Niland, Jr., San Jose, for respondents.

DRAPER, Justice.

Jury verdict in this wrongful death action was for defendants. Plaintiffs' motion for new trial was granted upon the ground of insufficiency of the evidence to justify the verdict. Code Civ.Proc. § 657, subd. 6. Defendants appeal from this order.

Decedent, husband and father of plaintiffs, died as the result of collision of his pickup truck with a fire truck of defendant district. The accident occurred a few minutes before 6 p. m. February 26, 1955, a rainy day. The truck, occupied only by driver Aiello, had returned from an alarm to the fire station located on the south side of the Los Gatos-Saratoga Road. Aiello stopped the truck east of the fire station and partly on the highway, the two eastbound lanes of which lie to the south of a planted divider strip. To back the truck into its stall in the station, Aiello turned his front wheels about a quarter turn to the right. He opened the left door and looked westward, seeing no vehicle between himself and the crest of the hill about 300 yards away, turned his view to the right rear-view mirror in order to maneuver the truck to its proper position, and back up at a speed of 2 to 3 miles per hour. Some 10–15 seconds after he began to back, he felt the impact of collision of decedent's eastbound pickup with the fire truck. There was no eyewitness. Position of the two vehicles immediately before the accident, speed of decedent's vehicle, and most of the other facts directly bearing upon the cause of the collision were the subject of inferences. Since the fire truck was moved slightly before measurements were made, there is even dispute as to the point of impact.

[1] An order granting new trial upon the ground of insufficiency of evidence can be reversed only where there is no evidence which would support a judgment in favor of the moving party. Hawk v. City of Newport Beach, 46 Cal.2d 213, 219, 293 P.2d 48; Richardson v. Ham, 44 Cal.2d 772, 775, 285 P.2d 269; In re Estate of Green, 25 Cal.2d 535, 542, 154 P.2d 692. Weighing of the evidence upon such motion is the exclusive province of the trial court, which may draw inferences opposed to those drawn at the trial. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689.

[2] Plaintiffs are entitled to the benefit of the presumption that decedent exercised due care, which presumption is itself evidence. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. This presumption can be dispelled only by uncontradicted "irreconciliable" evidence produced by the party relying upon the presumption. Scott v. Burke, 39 Cal.2d 388, 394–395, 247 P.2d 313. Evidence of an opposing party called under Code of Civil Procedure, section 2055 does not dispel the pre-

sumption. Leonard v. Watsonville Community Hospital, 47 Cal.2d 509, 517, 305 P.2d 36.

Since there is no testimony of any eyewitness, this case turns largely on inferences. Even as to the basic facts, there is dispute. The conflict is even greater as to the inferences to be drawn. In this situation, appellants cannot sustain the doubly heavy burden they have assumed in attempting to establish that the presumption of due care was dispelled by respondents' own witnesses and that the trial court has abused the broad discretion vested in it.

There is room for an inference that the fire truck blocked substantial portions of both lanes of the highway. There is conflict in the evidence and the inferences as to the extent to which the lights of the fire truck were illuminated. It could be inferred that there were other means of getting the fire truck into the station, without danger to passing traffic. If these issues were resolved in favor of respondents, an inference of appellants' negligence was reasonable.

The contention that contributory negligence is shown as a matter of law must also fail. There was no flagman to warn approaching traffic of the maneuvering of the fire truck, and the highway was not posted with warning signs. While decedent had often travelled this road, there was no evidence that he had ever known that fire trucks entered the station by backing along the highway. There was conflict in the evidence, and much more in the inferences to be drawn from it, as to visibility. From these and other facts, inferences negativing contributory negligence could be drawn.

We do not suggest that equally reasonable inferences to the contrary could not be drawn. Our function is not to determine preponderance of the evidence, but only whether inferences which are reasonable support the order granting new trial. We note, also, that the trial judge, with the jury, viewed the scene of the accident, and was entitled to consider what he saw in passing upon the motion. People v. Oliver, 86 Cal.App.2d 885–887, 195 P.2d 926.

Appellants rely strongly upon Heintz v. Southern Pacific Co., 63 Cal.App.2d 699, 147 P.2d 621, in which an order granting nonsuit was affirmed upon the ground that contributory negligence of a decedent was established as a matter of law. This decision seems to represent an extreme of the law. In any case, it is distinguishable on its facts from the case at bar. There decedent's automobile struck a freight car which was stationary and which was so placed as to leave ample room to pass it on either side of the roadway. Here the fire truck was in motion and there is a conflict as to whether it blocked both traffic lanes. More important, the Heintz case brought into play the rule requiring special care in crossing railroad tracks. Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788. The case does not govern here.

Appellants contend that the trial court erred in admitting testimony as to the existence, at time of trial, of other means of placing the truck in the station than that of backing across a portion of the highway. But there is also evidence relating to existence of this alternative method at time of the collision. Appellants attempt to argue that the trial court relied upon the inadmissible evidence, and nothing else, in granting the new trial. This view is most strained. It would require us to indulge in mere conjecture for the purpose of reversal.

[3] We are satisfied that the new trial was properly granted.

Order affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

168 Cal.App.2d 302

Regine SCHOENBACH, Plaintiff and Respondent,

v.

KEY SYSTEM TRANSIT LINES, Robert Shamoon and Yellow Cab Company of Alameda County, Defendants and Appellants.

Civ. 17974.

District Court of Appeal, First District, Division 2, California.

March 2, 1959.

Action against a bus company and a taxicab company for injuries to passenger in bus which stopped abruptly when taxicab had passed bus and turned in front of it. From a judgment of the Superior Court, County of Alameda, Richard H. Chamberlain, J., in favor of plaintiff the defendants appealed. The District Court of Appeal, Dooling, J., held, inter alia, that the taxicab company was not prejudiced by instructions given but that the bus company was prejudiced by instruction which placed upon the bus company the burden of proof.

Affirmed as to taxicab company and reversed as to other defendants.

1. Trial ⇐321½

An instruction that phrase "nine or more of the jurors shall agree upon a verdict" means either that nine or more of jurors agree that defendants are not liable, or that nine or more agree that plaintiff is entitled to recover, and nine of those same jurors who believe that plaintiff is entitled to recover agree upon amount of damage to which plaintiff is entitled correctly stated the law, that to arrive at a legal verdict at least nine identical jurors must agree to the entire verdict.

2. Jury ⇐31(3)

Instruction, read as a whole, that to arrive at verdict in personal injury action at least nine identical jurors must agree to the entire verdict and that until a complete verdict was arrived at all twelve jurors should continue to participate in deliberations was not improper as depriving defendant of right to trial by jury of twelve persons.

3. Appeal and Error ⇐1033(5)

A portion of instruction that presumption of negligence "may be overcome by other evidence showing that under all the circumstances surrounding the event the conduct in question was excusable and such as might reasonably have been expected from a person of ordinary prudence" was more favorable to defendant than the test approved by the Supreme Court in omitting qualification "who desired to comply with the law" and hence defendant could not complain of such instruction.

4. Trial ⇐256(1)

If a party desires a more detailed instruction than that given by court he must request it.

5. Appeal and Error ⇐1064(1)

In action for injuries to passenger in bus which stopped abruptly when defendant's taxicab passed the bus and turned in front of it, instruction that jury might assume that person of ordinary prudence would reasonably endeavor to obey the law and would do so unless causes which were not of his own "intended" making induced him without "moral fault" to do otherwise was not prejudicial to defendant as tending to confuse jury in considering statute prohibiting motorist from making turn unless such movement can be done with reasonable safety, particularly in view of fact that there was no evidence to support finding that if taxicab driver violated the law such violation was excusable. West's Ann. Vehicle Code, § 544.

6. Trial ⇐296(6)

In action for injuries to passenger standing in bus which stopped abruptly after defendant's taxicab had passed bus and turned in front of it causing passenger to be thrown to floor, taxicab owner was not prejudiced by inclusion of word "voluntarily" in instruction relating to assumption of risk by passenger voluntarily riding

in standing position in view of general instruction that amount of caution required by the law increases as does the danger that a reasonably prudent person would apprehend in the same situation.

7. Appeal and Error ⇐1048(6)

In action against bus company and taxicab owner for injuries to bus passenger who was thrown to floor when bus stopped abruptly because taxicab had turned in front of it, taxicab company was not prejudiced by court's alleged unduly restricting cross-examination of a witness produced by plaintiff where such witness was produced only against bus company and its driver and court several times instructed jury that his testimony was not to be considered against taxicab company.

8. Carriers ⇐316(1)

The burden of proof does not shift to a common carrier sued for injuries to passenger where a case for application of res ipsa loquitur doctrine appears from plaintiff's evidence since in such case carrier merely has burden of going forward with the evidence, that is, the burden of producing evidence sufficient to meet inference of negligence by offsetting or balancing it.

9. Appeal and Error ⇐1064(1)
Carriers ⇐321(21)

In action for injuries to standing passenger in bus who was thrown to floor when bus stopped abruptly, instruction that proof of injury to passenger raised legal inference that injury was caused by negligence of carrier and cast upon carrier the "burden of proving" that such injury was caused by some unavoidable casualty or by some other cause or by contributory negligence of passenger was, under circumstances, prejudicially erroneous.

Hardin, Fletcher, Cook & Hayes, Oakland, Cyril Viadro, San Francisco, of counsel, for appellant Key System.

Ricksen, Freeman, Hogan & Vendt, Oakland, Lewis P. May, Oakland, of counsel, for appellant Yellow Cab.

J. Adrian Palmquist, Oakland, Francis T. Cornish, Berkeley, for respondent.

DOOLING, Justice.

Defendants Key System Transit Lines (hereinafter called Key System), its bus operator Robert Shamoon and Yellow Cab Company (hereinafter called Yellow Cab) appeal from a judgment entered upon a verdict for plaintiff in an action for personal injuries.

Respondent boarded a Key System bus in Oakland. The evidence was conflicting as to whether there were any empty seats in the bus, but there is no dispute that respondent was a standing passenger. As the bus was moving at a speed of from 18 to 25 miles per hour, a taxicab operated by the appellant Yellow Cab Company passed it, cut in front and slowed down. The operator stopped the bus abruptly, throwing respondent to the floor and injuring her severely. Appellants do not question the sufficiency of the evidence to support the judgment.

The Appeal of Yellow Cab.

The court gave the following instruction:

"The phrase 'nine or more of the jurors shall agree upon a verdict,' means one of two things: Either that nine or more of you agree that the defendants are not liable, or on the other hand, that nine or more of you agree that the plaintiff is entitled to recover, and nine of those same jurors who believe that she is entitled to recover agree upon the amount of damages to which she is entitled.

"Until nine or more of the jurors have agreed upon a verdict which includes both liability and the amount of damages, all twelve of you should continue to participate in the deliberations."

Yellow Cab claims that this instruction deprived it of the right of trial by a jury of twelve persons.

[1, 2] The first paragraph of this instruction correctly states the law, that to arrive at a legal verdict at least nine iden-

tical jurors must agree to the entire verdict. Earl v. Times-Mirror Co., 185 Cal. 165, 182–186, 196 P. 57; Nelson v. Superior Court, 26 Cal.App.2d 119, 78 P.2d 1037; Balero v. Littell, 124 Cal.App. 190, 12 P.2d 41. The second part of the instruction expressly advises the jury that until a complete verdict is arrived at all twelve jurors should continue to participate in the deliberations. In the case of Carlin v. Prickett, 81 Cal.App.2d 688, 693, 184 P.2d 945, 947, the court, while leaving undecided whether it was error to instruct the jury "that only the nine people who voted in favor of the plaintiff could participate in fixing the amount of the verdict" said that if this was error "the error was cured by the court later telling the jury that all members could participate at all stages in arriving at the amount of the verdict and that they all had a right to enter into the discussion to help fix the amount." The instruction here given read as a whole falls squarely within the holding of this case.

Yellow Cab complains of the qualifying language in an instruction that the violation of certain sections of the Vehicle Code read to the jury constitutes negligence as a matter of law. The instruction was qualified in the following language:

"However, such a presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event the conduct in question was excusable and such as might reasonably have been expected from a person of ordinary prudence.

"In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law, and will do so, unless causes which are not of his own intended making induce him without moral fault to do otherwise."

This instruction, when given, had the approval of the Supreme Court. Combs v. Los Angeles Railway Corp., 29 Cal.2d 606, 609–611, 177 P.2d 293. Since the trial of this case, however, in Alarid v. Vanier, 50 Cal.2d 617, 623–624, 327 P.2d 897, the Supreme Court has criticized the last paragraph of the instruction above quoted and stated the true rule to be "whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." 50 Cal.2d at page 624, 327 P.2d at page 900.

[3] The portion of the instruction given by the court in this case that the presumption of negligence "may be overcome by other evidence showing that under all the circumstances surrounding the event the conduct in question was excusable and *such as might reasonably have been expected from a person of ordinary prudence*" is more favorable to Yellow Cab than the test set out in Alarid in that it omits the qualification "who desired to comply with the law."

[4, 5] The last quoted portion of the instruction is criticized by Yellow Cab, not on the ground that it prejudiced it in any defense that its violation of the law, if the jury found one, may have been excusable, but on the ground that the use of the terms "intended" and "moral fault" had a tendency to confuse the jury in its consideration of section 544, Vehicle Code. The argument is that while that section provides that "[n]o person shall turn a vehicle * * * unless and until such movement can be made with *reasonable safety*," the criticized instruction would lead the jury to believe that the section requires "unequivocal safety." The argument does not impress us. The code section including the words "with reasonable safety" was read to the jury. Yellow Cab asked for no instruction defining or elaborating on these words. If a party desires a more detailed instruction than that given by the court he must request it. Sarafini v. City & County of San Francisco, 143 Cal.App.2d 570, 576, 300 P.2d 44. In any event how the use of the words "intended" and "moral fault" would lead the jury to believe that the words "with reasonable

safety" mean "with absolute safety" is not apparent. We can find no prejudice in this case from the giving of the instruction particularly in view of the fact that Yellow Cab points to no evidence in the record, and we have found none, to support a finding that if its driver did violate the law such violation was excusable.

[6] The jury was instructed at the request of Key System:

"When a passenger upon a motorcoach voluntarily rides in a standing position rather than seated, such passenger assumes the natural and obvious risks, if any, resulting from riding in a standing position, and in the exercise of the due care required by law must take greater precautions for her own safety than if she were seated in the bus or motorcoach." There was a dispute in the evidence as to whether there were any vacant seats in the coach or whether they were all occupied and plaintiff was obliged to stand for that reason. The words *"voluntarily* rides in a standing position" were obviously directed to this question. Yellow Cab argues that the inclusion of the word "voluntarily" confuses the question of negligence with intent. The jury was generally instructed:

"Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care the amount of caution required will vary in accordance with the nature of the act and the surrounding circumtances. To put the matter in another way, the amount of caution required by the law increases as does the danger that a reasonably prudent person would apprehend in the same situation." Reading the instructions as a whole we can find no prejudice to Yellow Cab.

[7] Finally Yellow Cab complains that its cross-examination of a witness produced by plaintiff was unduly restricted. The witness was produced only against Key System and its driver and the court several times instructed the jury that his testimony was not to be considered against Yellow Cab. We must assume that the jury followed these instructions and that no prejudice to Yellow Cab resulted from the limitation of its cross-examination, which the court placed on the express ground that it was immaterial because "at your [counsel for Yellow Cab's] request I instructed this jury they were not to consider this gentleman's testimony as against the Yellow Cab."

The Appeal of Key System and Its Driver.

The jury was instructed:

"Proof of an injury to a passenger on the bus of a common carrier, caused by the operation of the bus, raises a legal inference that the injury was caused by the negligence of the carrier and casts upon the carrier the *burden of proving* that such injury was caused by some unavoidable casualty or by some other cause which human care and foresight could not prevent, or *by the contributory negligence* of the passenger, unless these facts be shown by evidence produced by the plaintiff." (Emphasis ours.)

[8] Key System and its driver correctly complain that the burden of proof does not shift to a common carrier where a case for the application of the *res ipsa loquitur* doctrine appears from the plaintiff's evidence. The burden of proof is not on the carrier; it "has merely the burden of going forward with the evidence, that is, the burden of producing evidence sufficient to meet the inference of negligence by offsetting or balancing it." Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 437, 260 P.2d 63, 66; Scarborough v. Urgo, 191 Cal. 341, 346–347, 216 P. 584; Dodge v. San Diego Electric Co., 92 Cal.App.2d 759, 766–767, 208 P.2d 37.

[9] Respondent argues that in view of the other instructions on the burden of proof the jury would not understand "the burden of proving" in this instruction to refer to the burden of proof. The argument overlooks the fact that the instruction couples the "burden of proving * * * unavoidable casualty or * * * some

other cause which human care and foresight could not prevent" with "the burden of proving * * * the contributory negligence of the passenger." The jury had been clearly instructed that the burden of proof of contributory negligence rested on the defendants. It does violence to common sense to ask us to assume that the jury would believe that the burden of proving contributory negligence in this instruction meant the burden of proof of contributory negligence, while the same term in the same instruction meant something less when applied to the burden of meeting the inference of negligence arising from the happening of the casualty.

The case was a close one against Key System and its driver and we cannot hold that the additional burden placed on them by this erroneous instruction was not prejudicial.

Judgment affirmed as to Yellow Cab Company. Judgment reversed as to Key System Transit Lines and Robert Shamoon.

KAUFMAN, P. J., and DRAPER, J., concur.



168 Cal.App.2d 323

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Cecil PEARSON et al., Defendants, Leonard Castilow, Appellant.

Cr. 2905.

District Court of Appeal, Third District, California.

March 2, 1959.

Defendant was convicted of burglary in the second degree and from the judgment of the Superior Court, San Joaquin County, George F. Buck, J., the defendant appealed claiming that the testimony of an accomplice was not sufficiently corroborated as required by West's Ann.Pen. Code, § 1111. The District Court of Appeal, Schottky, J., held that the evidence sufficiently corroborated the accomplice's testimony to warrant the conviction.

Affirmed.

1. Criminal Law ⇐512

Evidence sufficiently corroborated accomplice's testimony to warrant conviction of burglary in the second degree. West's Ann.Pen.Code, § 1111.

2. Criminal Law ⇐511(2)

Although corroborating evidence must raise more than a conjecture or suspicion of guilt, it is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the fact-finding body that accomplice is telling the truth. West's Ann.Pen.Code, § 1111.

3. Criminal Law ⇐511(1)

Evidence of inculpatory participation need not be direct nor extend to every fact and detail in order to constitute sufficient corroborating evidence. West's Ann. Pen.Code, § 1111.

4. Criminal Law ⇐511(2)

Circumstantial evidence is sufficient corroborating evidence even though slight, if it tends to connect defendant with commission of the crime. West's Ann.Pen. Code, § 1111.

Irvine P. Dungan, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

SCHOTTKY, Justice.

Defendant Leonard Castilow was found guilty by a jury of the crime of burglary in the second degree. He has appealed from the judgment entered upon the verdict.

Upon appellant's request this court appointed Irvine P. Dungan of the Sacramento Bar to represent him upon this ap-

peal. Mr. Dungan has informed this court that after an examination of the record and an interview with appellant it is his conclusion that there is no merit in the appeal. We have made a careful study of the record and agree with Mr. Dungan's conclusion.

The evidence discloses that sometime after 11:00 p. m., the evening of February 28, 1958, the Hoosier Inn in Stockton was forcibly entered. The burglars entered through a rear door. They ransacked part of the interior. The office of the business was also ransacked. The door of a desk which was padlocked was pried open. In prying open the desk door a deep mark was made in the wood which indicated that the mark was made with a tool with a round shaft. Two rolls of pennies, a roll of nickels, and a roll of dimes and an envelope containing three unsigned checks were missing after the burglary.

About 11:55 p. m. two Stockton police officers were driving on Center Street, in the City of Stockton, when one of the officers observed two men standing in the doorway of a grocery store which was closed. The officers drove around the block, and on their return they observed that the men were gone. The police checked the area and two blocks away they found Castilow and a Cecil Pearson. Two rolls of coin were found in Pearson's pocket. A crowbar was stuffed down his trousers. A screwdriver was tucked under Castilow's shirt. Pieces of torn coin wrappers were found in the gutter and on the floor of Pearson's car. Mixed among a handful of change which was found in the jacket of Castilow's pocket was a torn piece of paper which could have been from a wrapper. The screwdriver taken from Castilow fit into the pry mark on the desk.

Cecil Pearson, who was charged jointly with appellant and who pleaded guilty, testified that about 10:30 p. m. he and Castilow drove around in his (Pearson's) car. About 11:30 p. m. they drove to the rear of the Hoosier Inn and entered. He had a crowbar and Castilow had a screwdriver which he had taken from some tools in Pearson's car. They went into the room where the desk was located where Castilow started prying on the desk with the screwdriver. After the desk was opened, Pearson picked up the rolls of coin and the checks, and later he broke open a roll of nickels and gave some to Castilow.

Castilow testified on his own behalf. He denied complicity in the crime. He claimed he won the change found in his jacket pocket in a crap game. He also stated that he picked up the screwdriver during the game. He further testified that he was with Pearson at various times after 4:30 p. m. He met Pearson about 10:30 p. m. at a beer garden where they drank one or two beers. He claimed that the two left and rode out to a friend's home, but since he was not home they returned and then decided to drive out to another friend's house and on the way they stopped and were apprehended by the police.

[1] Pearson was the principal witness for the People, and the only question that merits consideration upon this appeal is whether or not the testimony of Pearson, who was an accomplice, was sufficiently corroborated. We are satisfied that it was. Castilow was found in possession of a tool which could have been used in the crime; coins were found in his pocket, plus a piece of paper which could have been a torn piece of coin wrapper; and his testimony as to his actions permits the inference that he was with Pearson at the time the crime was committed. We believe that this evidence tends to corroborate the testimony of Pearson that appellant aided in the commission of the burglary.

[2–4] As stated in People v. Henderson, 34 Cal.2d 340, at page 342, 209 P.2d 785, at page 786:

> "Section 1111 of the Penal Code requires corroboration of an accomplice's testimony by such other evidence as shall tend to connect the defendant with the commission of the offense, and provides that corroboration is not sufficient if it merely shows the com-

mission of the offense or the circumstances thereof.

"Although the corroborating evidence must raise more than a conjecture or suspicion of guilt, it is sufficient if it connect the defendant with the commission of the crime in such a way as reasonably to satisfy the fact finding body that the accomplice is telling the truth. People v. Trujillo, 32 Cal.2d 105, 110–111, 194 P.2d 681. The evidence of inculpatory participation need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend to connect the defendant with the commission of the crime. People v. Negra, 208 Cal. 64, 69–70, 280 P. 354; People v. Yeager, 194 Cal. 452, 473, 229 P. 40."

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.



168 Cal.App.2d 261

Matter of the ESTATE of Verne CUTLER, Deceased.

Oliver Wendell LLOYD, Lois Lloyd Stephens and Dorothy Lloyd Stephens, Petitioners and Appellants,

v.

Alphonse E. GANAHL, Mary Gertrude Cutler, Vernon Morgan Cutler and Jessie Larinda Cutler, Respondents.

Civ. 5957.

District Court of Appeal, Fourth District, California.

Feb. 26, 1959.

Will of testator was admitted to probate, and adult step-children of testator filed petition to revoke probate of will. Testator's children, who were beneficiaries under the will, and the executor made a motion to dismiss the petition to revoke the probate, on ground of want of prosecution of the petition to revoke the probate. The Superior Court of Riverside County, John G. Gabbert, J., entered an order granting the motion, and the step-children of the testator appealed. The District Court of Appeal, Griffin, P. J., held that where will, by which testator left his property to his children, was admitted to probate without contest on December 7, 1956, and letters testamentary were issued, and on June 6, 1957, one day before expiration of six-month limitation period, adult step-children of testator, without notice to children of testator and executor, filed petition to revoke probate of will, and for over nine months after filing of petition to revoke no action whatever was taken to serve citation or copy of petition on children and executor, and during such period of inaction realty was sold in the estate and it was ready for distribution, and children and executor claimed that petition to revoke was filed only for purpose of delay in effecting distribution of estate and thereby forcing a settlement, Superior Court was authorized to grant motion on March 13, 1958, to dismiss petition to revoke probate, on ground of want of prosecution of petition to revoke probate, though two years had not elapsed since filing of petition to revoke probate, and Superior Court did not abuse its discretion in granting the motion to dismiss the petition to revoke the probate.

Order affirmed.

Wills ⇐221

Where will, by which testator left his property to his children, was admitted to probate without contest, and one day before expiration of six-month limitation period, adult stepchildren of testator, without notice to children of testator and executor, filed petition to revoke probate of will, and for over nine months no action was taken to serve citation or copy of petition, and during such period of inaction realty was

sold in the estate and it was ready for distribution, and petition to revoke was allegedly filed only to delay distribution of estate and thereby force a settlement, Superior Court was authorized to grant motion to dismiss petition to revoke probate, on ground of want of prosecution, though two years had not elapsed since filing of petition, and Superior Court did not abuse its discretion in granting motion to dismiss petition. West's Ann.Prob.Code, § 380; West's Ann.Code Civ.Proc. §§ 581a, 583.

Roland Maxwell, Paul H. Marston, and Richard W. Olson, Pasadena, for appellants.

Ganahl, Ganahl & Seidler, by Alphonse E. Ganahl, Corona, for respondents.

GRIFFIN, Presiding Justice.

Verne Cutler, aged 76 years, died testate on November 19, 1956. On December 7, 1956, without contest, the will was admitted to probate and letters testamentary were issued. On June 6, 1957, one day before expiration of the six-month limitation period (Sec. 380, Probate Code), appellants herein, adult step-children of deceased, without notice to respondents, filed their petition to revoke probate of the will. The record indicates a citation was issued but never served or brought to the attention of respondents. About March 5, 1958, the executor received a letter from appellants' present attorney inquiring as to the status of the petition to revoke and wanted to discuss a possible settlement. For over nine months after filing such petition to revoke no action whatever was taken to serve a citation or copy of the petition on respondents, although their names and addresses, as well as the names and addresses of their attorney, were fully disclosed by the record and these persons were well known to appellants' then counsel. During said period of inaction real property was sold in said estate and it was ready for distribution, but due to the filing of said petition for revocation, distribution could not be made.

On March 13, 1958, without further action on the part of contestants, respondents moved to dismiss appellants' petition on the ground of want of prosecution. Appellants filed an affidavit in opposition claiming the delay was due to unfamiliarity of appellants' attorney with the proper procedure and claimed there was a delay in mail service. Respondents claim the petition to revoke was filed only for the purpose of delay in effecting the distribution of the estate and thereby forcing a settlement; that the beneficiaries are the only children of deceased by his first marriage and that contestants are his stepchildren by a second marriage, their mother having predeceased decedent. The trial court, after hearing the matter on its merits, granted the motion to dismiss.

Appellants argue that under section 583 of the Code of Civil Procedure, an action such as this may not be dismissed by the court for want of prosecution within two years of its filing, citing Estate of Morrison, 125 Cal.App. 504, 507, 14 P.2d 102; Wilson v. Barry, 119 Cal.App.2d 621, 624, 259 P.2d 991; and Hibernia Savings & Loan Society v. Lauffer, 41 Cal.App.2d 725, 729, 107 P.2d 494.

Respondents claim that the power of the trial court to dismiss an action for failure on the part of plaintiffs to prosecute it with diligence is an inherent power which exists independent of statutory provisions, and that the provisions of section 583, supra, and other related sections, including Section 581a, must be read in the light of the existence of such inherent power, and the main limitation on the court's exercise of the discretionary power to dismiss an action for want of prosecution is that the power be not abused, citing such authority as Netzley v. Hillstrom, 122 Cal.App.2d 417, 265 P.2d 57; Hibernia Savings & Loan Soc. v. Lauffer, 41 Cal.App.2d 725, 107 P. 2d 494; Bryson v. Harryman, 118 Cal.App. 588, 5 P.2d 665; Bernard v. Parmelee, 6 Cal.App. 537, 542, 92 P. 658; Gray v. Times-Mirror Co., 11 Cal.App. 155, 104 P. 481; Lieb v. Lager, 9 Cal.App.2d 324, 49 P.2d 886; Marks v. Keenan, 148 Cal. 161, 82 P. 772; and Romero v. Snyder, 167 Cal. 216, 138 P. 1002.

These authorities support generally this proposition of law and are particularly applicable to delay in probate matters pertaining to will contests, where no citation has been served within the time herein indicated, where the action has not been diligently prosecuted, and where such failure appears to be for the purpose of unduly delaying the early distribution of the estate, particularly where it might well appear that the delay is only an attempt to force some form of settlement, to the prejudice of petitioner. Horney v. Superior Court, 83 Cal.App.2d 262, 188 P.2d 552; Focha v. Estate of Focha, 8 Cal.App. 576, 97 P. 321; Steen v. City of Los Angeles, 31 Cal.2d 542, 190 P.2d 937; Pearson v. County of Los Angeles, 49 Cal.2d 523, 539, 319 P.2d 624.

We conclude that the court was authorized to grant the motion and no abuse of discretion affirmatively appears.

Order affirmed.

SHEPARD and MUSSELL, JJ., concur.



168 Cal.App.2d 269

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Howard M. FIELD, Defendant and Appellant.

Cr. 1198.

District Court of Appeal, Fourth District, California.

Feb. 26, 1959.

Prosecution for driving motor vehicle without consent of owner. The Superior Court, San Bernardino County, Edward P. Fogg, J., entered judgment of conviction and defendant purportedly appealed. The District Court of Appeal, Mussell, J., held that where record disclosed that defendant after having been informed of his rights and with participation of counsel entered plea of guilty to charge contained in information, plea constituted admission of every element of offense charged and a conclusive admission of defendant's guilt, and record failed to disclose that there was any abuse of discretion by trial court in denying probation.

Affirmed.

1. Criminal Law ⇐273

Where record disclosed that defendant, after having been informed of his rights, and with participation of counsel, entered plea of guilty to charge of driving motor vehicle without consent of owner as charged in first count of information, plea was an admission of every element of offense charged and constituted conclusive admission of defendant's guilt. West's Ann.Vehicle Code, § 503.

2. Criminal Law ⇐982.3(3)

In prosecution for driving motor vehicle without consent of owner, where record disclosed that defendant after full knowledge of his rights entered, with participation of his counsel, a plea of guilty to charge and after denial of probation claimed that he had been misled by district attorney, who allegedly told him that offense would be looked upon as a misdemeanor with county jail time or probation, record failed to disclose an abuse of discretion by trial court in denying probation.

3. Criminal Law ⇐982.3(3), 1147

Matter of exercising power of probation is committed to sound discretion of trial court, and order denying probation will not be reviewed on appeal unless it be shown that it was an abuse of that discretion, and probation is not an absolute right to which a defendant is entitled but an act of clemency which may be granted.

Bertram L. Spears, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Asst. Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant was accused in the first count of an information with driving a motor vehicle without the consent of the owner (Veh.Code, Sec. 503) and in the second count he was charged with child stealing (Pen.Code, Sec. 278). On April 25, 1958, he pleaded not guilty and trial was set for May 14, 1958. On that date appellant and his appointed counsel Harry G. Andrews moved the court to vacate the appointment of said counsel. This motion was granted and Bertram L. Spears was then appointed as counsel for appellant and the trial was continued until May 27, 1958. On May 22, 1958, appellant and his newly appointed counsel appeared before the court and the following proceedings were had:

"Mr. Spears: At this time, your Honor, the defendant requests permission of the Court to withdraw his plea of not guilty heretofore entered to the count of violation of California Vehicle (sic) Section 503 for the purpose of entering a plea of guilty to that count.

"The Court: That is the first count?

"Mr. Spears: Yes, sir.

"The Court: Mr. Field, you have heard your attorney state that you desire to withdraw your plea of not guilty to Count One of this Information which charges you with driving a motor vehicle without the consent of the owner, a felony, in violation of Section 503 of the California Vehicle Code, for the purpose of entering a plea of guilty. Is that your wish?

"The Defendant: Yes, sir.

"The Court: The plea of not guilty is permitted to be withdrawn. What is the plea of the defendant, then?

"The Defendant: Guilty, your Honor.

"The Court: You plead guilty to Count One of the Information?

"The Defendant: Yes, your Honor."

Application for probation was received by the court and referred to the probation officer for investigation and report. The hearing on this report and pronouncement of judgment were continued to June 12, 1958. On that date, at the request of the probation officer, the matter was continued to June 20, 1958, at which time the court stated that he had read and considered the report of the probation officer and appellant was asked if he had legal cause to show why judgment should not then be pronounced. Attorney Bertram Spears stated that there was no legal cause. The court then stated that the probation officer had recommended against probation and that the report appeared to be a most excellent and thorough study of appellant's situation. The court then announced that the defendant's application for probation was denied and the defendant then said:

"The Defendant: Your Honor, can I say something, please? It was my understanding, when the district attorney come up and talked to me, that in order—he told me that he would drop the charge of child stealing and the 503 would be looked at as a misdemeanor with county jail time or probation, and that is the only reason that I pleaded guilty to the 503. Actually I had permission to drive the automobile anyway."

Judgment was then pronounced that the defendant be confined in the state prison of the State of California for the term prescribed by law for the offense of driving a motor vehicle without the consent of the owner, a felony. A motion was then made by the district attorney that count two of the information charging the defendant with child stealing be dismissed in the interests of justice and this motion was granted.

On July 2, 1958, the appellant filed the following letter with the county clerk:

"To Whom It May Concern:

"I, Howard Mclain Field hereby request that this letter act as a request for Appeal.

"Subject: People of the State of California vs. Howard M. Field under California Penal Code 503 (C.U.C.) (sic) I hereby protest the results of the trial and feel the results are not justifiable in that court. I am innocent of the charges in which I was accused. I solemnly swear that this statement is true to the best of my knowledge.

"Respectfully submitted

"Howard Mclain Field"

[1] This letter purports to be a notice of appeal from the judgment. However, the record shows that the defendant, after having been informed of his rights, and with the participation of his counsel, entered a plea of guilty to the charge contained in the first count of the information. This plea, entered under the advice of his attorney, was an admission of every element of the offense charged and constituted a conclusive admission of appellant's guilt. People v. Cooper, 123 Cal.App.2d 353, 356, 266 P.2d 566; 14 Cal.Jur.2d, Sec. 247, p. 492.

No motion was made by appellant or his attorney to permit withdrawal of the plea of guilty and while the appellant stated that the district attorney told him he would drop the charge of child stealing and the "503" would be looked on as a misdemeanor with county jail time or probation and that for that reason he pleaded guilty to "503", this statement was made only after appellant was informed that probation was denied. It was not urged as a legal excuse at the time set for pronouncing of judgment. It was not made under oath and is not supported by the record. The probation officer conducted a thorough investigation and study of appellant's situation and there is no suggestion in the record of any claim made by appellant to the probation officer that the district attorney made the statement that the "503" would be looked upon as a misdemeanor or that probation would be granted.

The report of counsel for appellant filed herein in lieu of an opening brief shows that he represented the appellant in the superior court and "That at all times mentioned no force or threats was used upon defendant, nor was he promised any immunity or leniency; and at all times herein mentioned the defendant acted freely and voluntarily"; and that "It is respectfully submitted that in my opinion no meritorious grounds of appeal exists."

[2] Even proceeding upon the assumption that the statement of appellant is equivalent to a motion to withdraw his plea of guilty there was no convincing evidence presented showing an abuse of discretion on the part of the trial court.

In People v. Ottenstror, 127 Cal.App.2d 104, 109, 273 P.2d 289, 292, the court held:

"It is well settled in our law that an accused who seeks to set aside a plea of guilty must show good cause therefor, and the granting or denial of such an application rests in the sound discretion of the trial judge, and his decision will not be disturbed on appeal unless an abuse of that discretion is clearly shown, People v. Broady, 120 Cal.App.2d 901, 903, 262 P.2d 669, and cases therein cited."

In People v. Cooper, supra, 123 Cal. App.2d 353, 356, 266 P.2d 566, 567, the court said:

"Proof must overcome the act of appellant in pleading guilty under the guidance of his own attorney. Such a plea is an admission of every element of the offense charged, and constitutes a conclusive admission of defendant's guilt. (Citing cases.)

"While a plea of guilty may be withdrawn pursuant to Penal Code section 1018 by reason of the mistake, ignorance, inadvertence or any factor that overcame the defendant's exercise of a free judgment, the basis of the motion for such relief 'must be established by clear and convincing evidence.' Moreover, the reviewing court is justified in concluding that the motion was properly denied when it is shown that the accused 'acted with knowledge of the facts and on advice of his counsel.'"

[3] It is a well settled rule that the matter of exercising the power of probation is committed to the sound discretion of the trial court, and that an order denying probation will not be reviewed on appeal unless it be shown that it was an abuse of that discretion, and that probation is not an absolute right to which a defendant is entitled, but is an act of clemency which may be granted. People v. Jackson, 89 Cal.App.2d 181, 182, 200 P.2d 204. No abuse of discretion in this connection is shown by the record.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.



168 Cal.App.2d 102

Sharon Elizabeth GILLETT, a minor, by her Guardian ad litem, Adrian K. Gillett, Plaintiff and Respondent,

v.

Josephine I. GILLETT, Defendant and Appellant.

Civ. 23250.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1959.

Order Modifying Judgment Feb. 25, 1959.

Hearing Denied April 22, 1959.

Action was brought by a 8 year old girl, by her guardian ad litem against her stepmother for injuries caused by allegedly excessive punishment by stepmother. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment for the girl for $50,000, and the stepmother appealed. The District Court of Appeal, Ashburn, J., held that stepmother stood in loco parentis and was entitled to same immunity, which would attend a natural parent, but that a parent has no immunity with respect to willful torts, and that when he administers excessive punishment, he is civilly liable for the consequences, and that evidence sustained finding that punishment imposed by stepmother was excessive, and that award of damages of $50,000 was excessive and should be reduced to $30,000.

Judgment modified and, as modified, affirmed.

1. Parent and Child ⇐14

In action by 8-year-old girl against her stepmother for injuries received through allegedly excessive punishment by stepmother, stepmother stood in loco parentis and was entitled to same immunity which would attend a natural parent, but no greater.

2. Parent and Child ⇐11

Though a parent is not liable to his child for the results of negligence, the parent has no immunity with respect to willful torts.

3. Parent and Child ⇐11

A parent may administer reasonable punishment to his child with impunity, but when parent exceeds that limit and does so willfully, he commits a battery and is civilly liable for the consequences.

4. Parent and Child ⇐11

Questions of excessiveness of punishment inflicted by parent on child and willfulness are issues of fact for trial judge or jury to solve.

5. Parent and Child ⇐11

In action by 8-year-old girl against her stepmother for injuries received through allegedly excessive punishment by stepmother, evidence sustained trial court's finding that punishment inflicted by stepmother was excessive, so that she was not relieved from liability on ground of parental immunity.

6. Evidence ⇐555

In action by 8-year-old girl against her stepmother for injuries received through allegedly excessive punishment by stepmother, trial court did not err in permitting doctor to testify, over objection

of stepmother that he was testifying from hospital record under guise of merely interpreting hospital record, and that an expert can testify only in response to hypothetical questions, where hospital record involved technical terms not familiar to the layman, and doctor explained the meaning of the technical terms, and doctor was then led by both sides into testifying as to causes and effects of conditions that he found or thought he found and disclosed by the record.

7. Witnesses ⇐392(2)

Where defense counsel used plaintiff's deposition by way of impeachment and to entire satisfaction of defense counsel, and, after the evidence was closed, defense counsel offered whole deposition in evidence, trial court did not err in declining to receive the deposition.

8. Damages ⇐132(4)

Award of $50,000 to 8-year-old girl from stepmother for injuries, which resulted from excessive punishment, and which required removal of a kidney and spleen, was excessive and should be reduced to $30,000.

Robert H. Sanders; Warner, Peracca & Cowan, Los Angeles, for appellant.

George H. Pratt, Los Angeles, for respondent.

ASHBURN, Justice.

Appeal from judgment for $50,000 awarded for injuries received by 8-year-old plaintiff through excessive punishment by her stepmother, the defendant.

[1–4] Defendant stood *in loco parentis* and was entitled to the same immunity which would attend a natural parent, but no greater (Trudell v. Leatherby, 212 Cal. 678, 682, 300 P. 7). It is now established as California law that, while a parent is not liable to his child for the results of negligence, he has no immunity with respect to willful torts; that he may administer reasonable punishment with impunity, but when he exceeds that limit and does so willfully he commits a battery and is civilly liable for the consequences; the questions of excessiveness and willfulness are issues of fact for trial judge or jury to solve.

Emery v. Emery, 45 Cal.2d 421, at page 427, 289 P.2d 218 at page 222, upholds the right of a child to recover from her father for willful misconduct resulting in an accident and injuries to her. After pointing out that "[t]he parent's immunity, if any, from tort liability is based on the minor child's disability to sue rather than on the absence of a violated duty", the court said 45 Cal.2d at page 429, 289 P.2d at page 223: "The rationale of the cases refusing to extend immunity to the parent for wilful or malicious torts against his minor children is that the lack of such immunity does not conflict with or inhibit reasonable parental discipline. [Citations.] Preservation of the parent's right to discipline his minor children has been the basic policy behind the rule of parental immunity from tort liability. [Citation.] Since the law imposes on the parent a duty to rear and discipline his child and confers the right to prescribe a course of reasonable conduct for its development, the parent has a wide discretion in the performance of his parental functions, but that discretion does not include the right wilfully to inflict personal injuries beyond the limits of reasonable parental discipline. No sound public policy would be subserved by extending it beyond those limits. While it may seem repugnant to allow a minor to sue his parent, we think it more repugnant to leave a minor child without redress for the damage he has suffered by reason of his parent's wilful or malicious misconduct. A child, like every other individual, has a right to freedom from such injury. Accordingly, we conclude that an unemancipated minor may sue his parent for a wilful or malicious tort, and thus that Buel is not immune from suit for the causes of action pleaded by Barbara and Joyce in the complaint in the present action." Perkins v. Robertson, 140 Cal.App.2d 536, 295 P.2d 972, relying upon the Emery case, holds that such an action will lie for willful misconduct of a stepfather. This was also an

automobile accident case; but that is not a limiting circumstance. The rule applies to any type of willful wrong to the child. Indeed the infliction upon a child of "cruel or inhuman * * * punishment or injury resulting in a traumatic condition" is a felony. Pen.Code, § 273d. And such excessive punishment, when found to be a willful wrong, amounts to a battery (Wright v. Wright, 85 Ga.App. 721, 70 S.E.2d 152, 154). The complaint charges and the court found in terms of assault and battery; it was also found that defendant was not actuated by express malice. But the terms assault and battery when used with respect to this case imply willfulness.

Plaintiff Sharon and her older sister Inette were doing the supper dishes; plaintiff was drying; she dropped a dish and it broke; defendant came in from the yard and, according to Inette, got very upset, started yelling and screaming and swearing at Sharon, hit her in the back with her doubled fists; Sharon ran into the bedroom and defendant followed, hitting her on the way and in the bedroom; at that place Sharon was between two beds with her face to the wall, crying and screaming, and defendant kept hitting her in the back with her doubled fists, sideways. This was in the early evening of June 15, 1953. The father returned from a fishing trip about midnight. At that time Sharon was moaning and groaning, pale and very upset. He did not sleep any that night. However he did not learn of the beating until three or four days later when Sharon's own mother told him about it. At his suggestion defendant took plaintiff to the family doctor the next day after the assault, the 16th.

The doctor was plaintiff's great-uncle, Dr. Claude S. Gillett. Defendant told him the child had been vomiting from 1:00 a. m. to 6:45 a. m. and that her father had punished her a few days before. The doctor saw no external evidence of trauma. With a history of vomiting and pain in the abdomen, radiating to the back, he sent the child home and told defendant to watch her.

That evening he was called to the house and found plaintiff pale and ill, in mild shock, with evidence of internal bleeding. She was taken to the hospital and Dr. Robbins, a surgeon, was called in. The two doctors made a pre-operative diagnosis of blood in the abdomen, the most common cause in children being a ruptured spleen; they thought that was probable in this case. An exploratory operation was performed and it was found that the splenic and renal (kidney) veins were ruptured and bleeding into the abdominal cavity. In Dr. Gillett's opinion (he was called by the defendant) the ruptures were caused by some injury from outside the body, certainly not from internal injury or disease; the veins could not be repaired, because of bruising and tearing; plaintiff's life was in jeopardy; the supply of return blood had been ruined, and it was necessary to remove the spleen and kidney to prevent her bleeding to death.

Dr. Chas. R. Parrish, who testified from the hospital record which had been received in evidence by stipulation, interpreted the doctors' entries for the court and said they showed rupture of spleen and kidney (rather than the veins leading to same); this seems to have grown out of use of the word "view" in the post-operative diagnosis; Dr. Gillett says the word should have been "vein." Dr. Parrish also said a substantial blow would be necessary to cause such ruptures; that a fist could do it and not necessarily leave external evidence of trauma; more than half of such ruptures show no external bruising. The kidneys and spleen are below the rib cage and are protected by muscular tissue. Plaintiff was in the hospital about two weeks and made good recovery.

Both doctors testified that little is known about the functions of the spleen or the effect of its removal. They also agreed that the removal of a kidney from a female child impairs her capacity for successful pregnancy due to the overload of work upon the one remaining kidney.

[5] That the limit of reasonable punishment was passed in this instance and that

defendant's violence was willful admits of little debate; certainly the trial judge was warranted in so concluding. Proximate cause is clear also. Defendant denied the whole punishment incident and said the father had beaten plaintiff with a belt and buckle about a week before, but the court accepted the evidence which sustains the inferences above set forth. These considerations dispose of appellant's contention that she was entitled to judgment as a matter of law upon the theory of parental immunity.

[6] Appellant contends that the court erred in permitting Dr. Parrish, over objection, to testify from the hospital record under the guise of merely interpreting it. The claim is that an expert can testify only in response to hypothetical questions. This witness interpreted the records made by the doctors in the hospital and, because of the technical terms involved, there could be no error in this. (See, Law v. Northern Assurance Co., 165 Cal. 394, 402, 132 P. 590; Alta Planing Mill Co. v. Garland, 167 Cal. 179, 183, 138 P. 738; Scoville v. de Bretteville, 50 Cal.App.2d 622, 629, 123 P.2d 616; Manos v. James, 7 Wash.2d 695, 110 P.2d 887, 893–894; Christiansen v. Hollings, 44 Cal.App.2d 332, 347, 112 P.2d 723; Howland v. Oakland Consol. St. Ry. Co., 110 Cal. 513, 518–519, 42 P. 983; 82 A.L.R. 1460, Annotation.) People v. Le Doux, 155 Cal. 535, 554, 102 P. 517, 524, upon which appellant relies is not to the contrary. In that case certain physicians, called as expert witnesses, were asked: "'Now, doctor, assuming each and all of the facts and circumstances testified to by these gentlemen I have named as true, what in your opinion was the cause of the death of A. N. McVicar, the deceased person mentioned in this case?'" It was held that objection thereto was improperly overruled, the court saying in part: "The best way to obtain the opinion of an expert witness upon a matter which is the subject of expert evidence is through the medium of a hypothetical question. Unsatisfactory as that method unquestionably is, it is the least objectionable known to the law." But the court added, 155 Cal. at page 555, 102 P. at page 525: "In thus pointing out what we conceive to be the best method for obtaining the expert opinion of a witness, we would not be understood as saying that every departure from that method involves error, necessitating the reversal of a case. Cases may arise where the facts upon which the opinion is sought are simple, salient, and few. If it be made to appear that the expert has heard the testimony by which those facts have been presented, it would not necessarily be held [ground for reversal] that he was asked to express his opinion upon those facts, without a restatement of them."

Dr. Parrish, in the case at bar, initially explained the meaning of the entries made in the hospital record in terms which are not familiar to the layman. He was then led by both sides into testifying as to causes and effects of conditions that he found or thought he found disclosed by the record. In that we see no error. If he did misinterpret the doctors' diagnosis, no prejudice ensued; the trial was not before a jury; and defendant's own witness (the only other expert) testified that rupture of the mere veins leading to the spleen and kidney would have caused her death had those organs not been removed. The rupture of the organ itself could not be more serious.

Dr. Robbins, who performed the operation (assisted by Dr. Gillett), was not called by either side. It does not appear that he was not equally available to them. No presumption arises from plaintiff's failure to call him. Gibson v. Kennedy Extension G. Min. Co., 172 Cal. 294, 305, 156 P. 56; 20 Am.Jur. § 189, p. 193.

[7] After defense counsel had used plaintiff's deposition by way of impeachment and to his entire satisfaction, and after the evidence was closed, he offered the whole document in evidence. The court declined to receive it. There was no error in this. Under like circumstances this court said in Stafford-Lewis v. Wain, 128 Cal.App.2d 614, 627, 276 P.2d 157, 166,

"Plaintiff complains of the exclusion from evidence of the depositions of defendants and the failure of the court to consider the depositions of Wain and Rosenus. Although the depositions had been filed earlier and portions had been used for impeachment purposes, they were not actually offered in evidence until during the course of the closing argument on behalf of plaintiff. The admission of the depositions at this point would have required the court to reopen the case; would have necessitated reading the depositions into the record; and the consequent determination by the court of the admissibility of such portion of the depositions as to which objections had been made when they were taken and would possibly have occasioned the introduction of further evidence and further argument on behalf of defendants. Because of the lateness of the offer the court did not abuse its discretion in refusing to admit the depositions in evidence."

[8] Finally appellant argues that an award of $50,000 (the full amount of compensatory damages for which plaintiff prayed) is excessive as matter of law. Dr. Gillett testified that plaintiff always appeared to him to be a delicate child, that he felt she had a speech impediment and might be a mild spastic; she did not handle herself as well as an ordinary child. He also said: "The spleen, while its functions may be important they are certainly not absolutely essential. And while it is a sad thing for any of us to lose our kidneys, that is the one organ that is taken over—the function is taken over completely by the other organ." Dr. Parrish: "Doctor, would you tell the Court, please what the probable effect on the health of the patient is of the removal of one kidney and a spleen? A. That may influence the patient's future well-being more or less. In the case of a woman one kidney could give complications later in life during pregnancies because the kidneys are burdened during pregnancies even with two kidneys. As to the effect of the spleen I don't think too much is known yet, what the effect of the removal of the spleen is. Q. Would you say that a young female would be less likely to have a successful pregnancy after having one kidney removed than if she had not had it removed? A. I think so." This rules the spleen out as a basis for substantial damages. But the probable adverse effects of removal of a kidney warrant a substantial award. However, $50,000 is patently too high. We have come to the conclusion that this judgment is excessive as a matter of law and should be reduced to $30,000.

It is ordered that if plaintiff within 20 days from the filing hereof files with the clerk of this court a written consent to a modification of the judgment by a deduction therefrom of the sum of $20,000, leaving the judgment to stand for $30,000 and costs of suit, said judgment be modified accordingly, same to bear interest at the legal rate from the date of entry of the original judgment in the superior court; but if such consent be not so filed within said time the judgment shall stand reversed hereby.

FOX, P. J., and HERNDON, J., concur.

Order Modifying Judgment

PER CURIAM.

Plaintiff and respondent having filed herein on February 25, 1959, her written consent thereto, pursuant to the decision of this Court filed February 18, 1959.

It Is Hereby Ordered that the judgment herein be modified by deducting therefrom the sum of Twenty Thousand Dollars, leaving the judgment to stand for Thirty Thousand Dollars and costs of suit, such modified judgment to bear interest at the legal rate from the date of entry of the original judgment in the Superior Court, and as so modified the judgment is affirmed. Each party to bear own costs on appeal.

Wesley REYNOLDS, Plaintiff, Respondent and Cross-Appellant,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Executor of the Last Will and Testament of Robert Donald Duncan, deceased, Defendant, Appellant and Cross-Respondent.*

Civ. 17966.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1959.

Rehearing Denied March 26, 1959.

Hearing Granted April 22, 1959.

Action to recover for loss of an airplane. From a judgment of the Superior Court, San Mateo County, Louis B. Dematteis, J., the defendant appealed and the plaintiff cross-appealed. Thereafter the defendant dismissed the appeal without prejudice to plaintiff's cross-appeal. The District Court of Appeal, Peters, P. J., held, inter alia, that in a proper case, where personal property is destroyed, the plaintiff may recover for loss of its use during the period necessary to replace the property.

Reversed with directions.

1. Damages ⇐105

Generally, for wrongful destruction of personalty, plaintiff is entitled to an amount representing the difference in value of property before the injury and value after the injury. West's Ann.Civ.Code, § 3333.

2. Damages ⇐105

Where personalty is totally destroyed, since value of property after the accident is zero, plaintiff is entitled to recover the total reasonable value of the property as of time of its destruction. West's Ann.Civ. Code, § 3333.

3. Damages ⇐39

When personal property by wrongful act is damaged but repairable, plaintiff may recover, under statute, first the cost of repairs which at least prima facie is an acceptable method of computing the diminution of value caused by the injury, but cost of repair is not the only item of recoverable damage but in a proper case plaintiff may also recover the value of loss of use of property during period reasonably necessary for its repair and in such event value of loss of use is calculated either by amount of profits which has been lost during the repair period or the reasonable rental value of similar property for such period. West's Ann.Civ.Code, § 3333.

4. Damages ⇐39

In recovering under statute providing for damages in amount which will compensate for all detriment proximately caused by wrongful act, recovery for both rental value and loss of profits of property is not allowed since if similar property is rented there would be no loss of profits. West's Ann.Civ.Code, § 3333.

5. Damages ⇐39

In a proper case, where personal property is destroyed, plaintiff may recover for loss of its use during the period necessary to replace the property. West's Ann.Civ. Code, § 3333.

Nagle & Vale, San Mateo, for cross appellant Reynolds.

Dodd McRae, San Francisco, Kirkbride, Wilson, Harzfield & Wallace, San Mateo, for cross respondent Bank of America.

PETERS, Presiding Justice.

Wesley Reynolds, the owner of a Supercustom Apache airplane rented it to Robert Duncan. Duncan ditched the plane in the ocean, and it was a total loss. Duncan and two of his passengers were killed. One passenger survived. This action was brought by Reynolds against the administrator of Duncan's estate to recover for the loss of the plane. The complaint is in two counts, one for breach of the bailment agreement, and one for negligent operation of the airplane, both or either having resulted in the loss of the plane. The complaint alleged damages for the loss of the plane, that is, its value at the time of the accident, as being $32,835, and also alleged, as special damages, $5,000 for the loss of

* Opinion vacated 345 P.2d 926.

use of the plane until it could be replaced. At the trial the court ruled that the only recoverable item of damage was the value of the plane at the day of the accident, and ruled that no damages could be recovered for loss of use. The jury brought in a verdict of $30,000 in favor of the plaintiff. The defendant appealed from the judgment entered on that verdict, and the plaintiff cross-appealed, limiting such cross-appeal to "that part of the judgment * * * which denies to plaintiff the recovery of the loss of business profits which he suffered as the result of the destruction of the aircraft." Defendant subsequently dismissed its appeal without prejudice to plaintiff's cross-appeal. Thus the sole point presented is the correctness of the trial court's rulings that, because the plane was totally destroyed, loss of business profits, as a matter of law, were not recoverable.

This problem arose during the trial under the following circumstances: After the plaintiff had proved that the plane was totally destroyed, and the value of the plane at that time, he attempted to prove the fair market value of the use of the plane at the time of the accident. Defendant objected on the ground, among others, that this was not a proper element of damages. In the course of a lengthy argument over this issue plaintiff offered to prove that the destroyed plane was of a type not readily replaceable; that no duplicate of it was available on the open market; that on the date of the accident it would take a minimum of four to five months to secure a replacement; that the reasonable rental value of such a plane was $1,200 per month; that the earning value of the plane to the plaintiff in his rental business was about $1,500 a month; that because of his inability to replace the plane, plaintiff had in fact lost $5,000 in profits. The trial court sustained the objection to the question and refused to permit the introduction of the proffered testimony. Plaintiff submitted instructions on this element of damage. These the trial court refused to give.

This problem of the proper measure of damages that may be recovered for the wrongful destruction of personal property is not a simple one. The basic tort measure of damages, set forth in section 3333 of the Civil Code, is "the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

[1, 2] In applying this code section the courts have held generally that the plaintiff is entitled to an amount representing the difference in the value of the property before the injury, and the value after the injury. Konda v. Frumpkin, 90 Cal.App. 384, 265 P. 955; Crain v. Sumida, 59 Cal.App. 590, 211 P. 479; Bryne v. Western Pipe & Steel Co., 81 Cal.App. 270, 253 P. 776; Valencia v. Shell Oil Co., 23 Cal.2d 840, 147 P. 2d 558. When the personal property is totally destroyed, obviously, since the value of the property after the accident is zero, the plaintiff is entitled to recover the total reasonable value of the property as of the time of its destruction. Lane v. Spurgeon, 100 Cal.App.2d 460, 223 P.2d 889; Shook v. Beals, 96 Cal.App.2d 963, 217 P.2d 56, 18 A.L.R.2d 919; Tatone v. Chin Bing, 12 Cal. App.2d 543, 55 P.2d 933.

These generalizations, however, are not decisive of the question as to whether loss of use is also included, in a proper case, within the phrase such "amount which will compensate for all the detriment" caused by the wrongful act "whether it could have been anticipated or not."

[3, 4] There can be no doubt at all that, when personal property by a wrongful act, is damaged but repairable, the plaintiff may recover, under section 3333, first the cost of the repairs. Such cost, at least prima facie, is an acceptable method of computing the diminution of value caused by the injury. Tremeroli v. Austin Trailer Equip. Co., 102 Cal.App.2d 464, 227 P.2d 923; Hancock v. George R. Curtis Paving Co., 114 Cal. App. 624, 300 P. 65; Konda v. Frumpkin, 90 Cal.App. 384, 265 P. 955. But cost of repair is not the only item of recoverable damage. It is universally recognized that, in a proper case, the plaintiff is also entitled, as an additional item of damage, to

recover the value of the loss of use of the property during the period reasonably necessary for its repair. Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395; Johnson v. Central Aviation Corp., 103 Cal.App.2d 102, 229 P.2d 114; Lyle v. Seller, 70 Cal. App. 300, 233 P. 345; Tremeroli v. Austin Trailer Equip. Co., 102 Cal.App.2d 464, 227 P.2d 923. In such event the value of loss of use is calculated either by the amount of profits which have been lost during the repair period (Caso v. Heboin, 55 Cal.App. 601, 203 P. 1025), or the reasonable rental value of similar property for such period (Bedell v. Mashburn, 87 Cal.App.2d 417, 197 P.2d 98; Crain v. Sumida, 59 Cal.App. 590, 211 P. 479). Of course, recovery for both rental value and loss of profits is not allowed for the obvious reason that if similar property is rented there would be no loss of profits. Tremeroli v. Austin Trailer Equip. Co., 102 Cal.App.2d 464, 227 P.2d 923; see also for a limitation on this generality, Johnson v. Central Aviation Corp., 103 Cal.App.2d 102, 229 P.2d 114.

But, for reasons not readily apparent, and none was suggested by counsel for respondent at oral argument, some states, where the matter has arisen, have denied any recovery for loss of use during the period reasonably required to replace the destroyed property, although such states will permit such recovery where the property is damaged but not destroyed. Thus, Iowa will not permit recovery for loss of use where the personal property is totally destroyed. Kohl v. Arp, 236 Iowa 31, 17 N.W.2d 824, 169 A.L.R. 1067. The law is to the same effect in Texas (Cogbill v. Martin, Tex.Civ.App., 308 S.W.2d 269; Kansas City Southern Railway Co. v. Frederick, Tex.Civ.App., 276 S.W.2d 332); in Oklahoma (Chambers v. Cunningham, 153 Okl. 129, 5 P.2d 378, 78 A.L.R. 905; Marland Refining Co. v. Duffy, 94 Okl. 16, 220 P. 846, 35 A.L.R. 52; Magnolia Petroleum Co. v. Harrell, D.C.Okl., 66 F.Supp. 559); in Nebraska (Helin v. Egger, 121 Neb. 727, 238 N.W. 364); and in Louisiana (Adam v. English, La.App., 21 So.2d 633.)

Other states apply the same rule whether the property is damaged or destroyed. These states, therefore, in a proper case, allow recovery for loss of use during the period required to replace totally destroyed property. Kentucky is such a state, (Louisville & I. R. Co. v. Schuester, 183 Ky. 209, 209 S.W. 542, 4 A.L.R. 1344; Louisville & N. R. Co. v. Blanton, 304 Ky. 127, 200 S.W. 2d 133); as is Utah (Park v. Moorman Mfg. Co., Utah, 241 P.2d 914); and Kansas (Anderson v. Rexroad, 180 Kan. 505, 306 P.2d 137); and Delaware (Adams v. Hazel, 9 Terry (48 Del.) 301, 102 A.2d 919.) (See annotations on this general subject, 169 A.L.R. 1074, 1080; 169 A.L.R. 1100, 1107.) It should also be mentioned that the Restatement of Torts, in section 927, declares that damages for loss of use may be recovered where the personal property is totally destroyed. It is also relevant that, in case of destruction of a building on real property, recovery for deprivation of use for the period required to restore the building is permitted. Higgins v. L. A. Gas & Electric Co., 159 Cal. 651, 115 P. 313, 34 L.R.A.,N.S., 717.

On the specific problem here presented as to recovery for loss of use for totally destroyed personal property, California has no definitive case. The problem was discussed in Pfingsten v. Westenhaver, 39 Cal.2d 12, 22, 244 P.2d 395, 401, where the Supreme Court stated: "Pfingsten does not dispute the general legal proposition that there cannot be recovery for both total loss of automotive equipment and loss of use of the same equipment." But this statement was made in reference to the law of Iowa which was there involved. This is made crystal clear by the fact that, just prior to making the above statement, the court stated the problem involved as follows (39 Cal.2d at page 21, 244 P.2d at page 401): "Westenhaver argues that evidence of loss of use of the tractor was improperly admitted because, under the law of Iowa, [there involved] a plaintiff may not recover for loss of use of property totally destroyed." This, as seen from the cases

cited supra was a correct statement of Iowa law. The actual holding of the case was that the personal property had not been totally destroyed, so that loss of use was recoverable under Iowa law, so that what was said about loss of use under the Iowa law where the property is totally destroyed was dicta.

[5] Thus California is in the position of being able to adopt whichever rule appears to be sound. From the standpoints of logic and common sense, if section 3333 of the Civil Code allows recovery for loss of use in the case of personal property that can be repaired, it would seem proper to allow recovery for loss of use of personal property where it is totally destroyed and cannot be immediately replaced. The basic measure of damages is the same in each case, that is, "the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." It is the value of the article to the plaintiff that is the relevant fact. Certainly, if the replacement cost of the airplane was $30,000, as the jury has found, and if it be the fact that such plane could not be replaced for several months, the plaintiff, by reason of the acts of decedent, has lost the income he would have earned in that period. That is a separate item of special damage. In no other way can the plaintiff be compensated for the "detriment proximately caused" by the acts of decedent. We therefore adopt as the most enlightened rule the rule that, in a proper case, where personal property is destroyed, the plaintiff may recover for loss of its use during the period necessary to replace the property.

For these reasons the judgment must be reversed. Since the defendant has dismissed its appeal, there is no necessity of retrying the issue of liability or the issue of the replacement value of the plane, fixed by the jury at $30,000. The trial court should be instructed to retry only the issues as to whether the plane was readily replaceable, and, if it is found that it was not, to fix the value of the loss of use for the period reasonably required to replace it. If an amount is awarded for this item of damage it should be added to the $30,000 and judgment entered accordingly. It is so ordered.

BRAY and FRED B. WOOD, JJ., concur.

Hearing granted; PETERS, J., not participating.



168 Cal.App.2d 287

Maybelle Hughes BAALMANN and Clara Poppic, Plaintiffs and Appellants,

v.

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, a Stock Company, Defendant and Respondent.

Civ. 18033.

District Court of Appeal, First District, Division 1, California.

March 2, 1959.

Hearing Denied April 29, 1959.

Action by insured against insurer for damage by landslide to retaining walls which were more than fifteen feet from foundation of dwelling. The Superior Court, San Mateo County, Wayne R. Millington, J., rendered judgment for insurer, and insured appealed. The District Court of Appeal, Hanson, J. pro tem., held that where "Broad Form" endorsement on fire policy covered damage to dwelling, and additions in contact therewith, by landslide but expressly negatived liability for such damage to retaining walls not constituting part of the dwelling, fact that the retaining walls were necessary to confine earth and thus tend to make the dwelling safe from landslides did not ipso facto make the retaining walls part of the dwelling under terms of the policy.

Affirmed.

1. Insurance ⇐670

In action by insured against insurer, on "Broad Form" fire policy endorsement which covered damage to dwelling, and ad-

ditions in contact therewith, by landslide but expressly negatived liability for such damage to retaining walls not constituting part of the dwelling, for damage by landslide to retaining walls which were more than 15 feet from foundation of dwelling, finding that retaining walls did not constitute part of the dwelling supported judgment for insurer, and lack of any finding whether the retaining walls were additions in contact with the dwelling was immaterial.

2. Insurance ⇐163(1)

Fact that retaining walls, located more than 15 feet from foundation of the dwelling, were necessary to confine the earth and thus tend to make the dwelling safe from landslides did not ipso facto make the retaining walls part of the dwelling within "Broad Form" fire policy endorsement which covered damage to dwelling, and additions in contact therewith, by landslide but expressly negatived liability for such damage to retaining walls not constituting part of the dwelling.

3. Insurance ⇐146(1)

The construction of policy is to be ascertained from whole instrument, nature of property to which language of policy is to be applied, purposes for which property is ordinarily to be used, its situation, and manner in which it is usually kept.

4. Insurance ⇐146(4)

Some flexibility of meaning must be given to language of standard forms of policies.

5. Insurance ⇐146(1)

Policies must be interpreted in light of common understanding of the parties.

6. Insurance ⇐668(3)

In action by insured against insurer, on "Broad Form" fire policy endorsement which covered damage to dwelling, and additions in contact therewith, by landslide but expressly negatived liability for damage to retaining walls not constituting part of the dwelling, for damage by landslide to retaining walls which were more than 15 feet from foundation of dwelling, even though the retaining walls were damaged by landslide and were necessary to confine earth and thus tended to make the dwelling safe from landslides, case did not present mere question of law as to interpretation of policy, but evidence was required to determine whether the retaining walls constituted part of the dwelling.

E. C. Mahoney, Burlingame, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondent.

HANSON, Justice pro tem.

A policy of insurance as originally issued by the defendant insurer covered the composition roof frame building and additions in contact therewith owned by the plaintiffs. The perils insured against at the time were only fire and lightning. The insureds, the plaintiffs herein, subsequently inquired of the insured's representative if the coverage on their property could be improved. He replied that it could and showed them defendants' so-called "Broad Form" endorsement, which would increase the perils insured against to include, inter alia, "falling objects, including costs of removal from the premises; and land slide." In paragraph 10 of the endorsement it is expressly provided that the insurer *shall not be liable* "(8) * * *: For Loss To Outdoor Equipment, Fences, *Retaining Walls Not Constituting A Part Of A Building Covered,* Driveways, Walks, Lawns, Trees, Shrubs And Plants, Except As The Direct Result Of The Collapse Of A Building." (Emphasis added.) Thus, there is no coverage for retaining walls not constituting a part of a building covered even though damaged by landslide, a peril insured against.

It is to be noted that the "Broad Form" insures only against loss from 21 named perils to the property covered by the original policy.

The insured premises stood on a knoll considerably higher than the street level. There were two retaining walls on the prop-

erty, one located at the street level below and one further up about 15 feet in front of the main foundation supporting the house. On the night of December 22, 1955, a landslide of a part of the soil of the property occurred that damaged the retaining walls and shrubbery. The slide did not damage the dwelling itself.

The two issues before the trial court were: (1) Did the policy cover the loss; that is a question of coverage; (2) If it did, what was the measure of damages?

The plaintiffs contend that, even though the policy provides that the insurer shall not be liable for loss to retaining walls not constituting a part of the building covered, the retaining walls were as necessary as the foundation walls under the house and should be classed as secondary foundations and hence are to be considered a part of the building itself or as "additions in contact therewith." It is true that the policy insures not only the house but also "additions in contact therewith." But here it is plain from the evidence that there was no direct physical contact between the house or its foundations and either of the retaining walls.

[1] The trial judge found on the evidence adduced that the retaining walls did not constitute a part of the building and entered judgment for the defendant. He did not go on expressly to find that they were or were not additions in contact with the building. But a lack of any such finding is immaterial in that if the walls were an addition they were excluded from coverage unless they were a part of the building.

[2] It is not contended, and indeed it could not be, that the evidence does not sustain the findings; rather the contention is that the trial judge interpreted the policy incorrectly in that there was no question as to the location and function of the retaining walls and hence there was no factual issue involved. On that basis counsel for plaintiffs argues that the case below presented a mere question of law, to wit, the interpretation of the policy, and hence no findings were necessary. Accordingly, he goes on to contend that we may now interpret the policy contrary to the holding below. But he overlooks the fact that the policy does not insure the retaining walls as such unless they are a part of the house and accordingly a fact issue was shadowed forth that called for evidence to determine it. While it is an undisputed fact that the retaining walls were necessary to confine *the earth* and thus tend to make the buildings safe from landslides, that fact does not ipso facto make them a part of the house from an insurance standpoint and particularly not under the terms of the policy here in question.

The cases cited by plaintiffs for the most part repeat well-established rules of interpretation and are not at variance with what we have here said. Two of the cases on which plaintiffs rely strongly should perhaps be distinguished.

Plaintiffs contend that Taylor v. Northwestern Nat. Ins. Co., 34 Cal.App. 471, 167 P. 899, stands for the proposition that structures do not have to be physically joined to come within the meaning of the words "additions adjoining and connecting."

However, the cited case is distinguishable from the one at hand. In the Taylor case, the caption on the policy was "Country *Store* Building and Contents Policy Form" (emphasis added), and the policy provided for insurance "On the one-story frame building and its additions, adjoining and communicating, including foundations," etc., and "On stock of groceries and other merchandise." The facts were that about three months after the date of the policy a small shed was erected upon the same property with the store and about seven feet from it; it was erected for the purpose of storing a part of the groceries covered by the policy and a portion of the stock contained in the original store building at the time the policy was issued. The trial court found that the shed was communicating and connected with the one-story frame building described in the policy. The door of the shed was placed opposite a window

in the one-story building, and the groceries were passed from the one-story building to the shed by sliding along a removable board connecting the one-story building with the shed. (The court found the shed did not increase the insurance risk.) In the present case, there is no doubt but that coverage of these retaining walls would increase the risk because of (1) their high cost of replacement, and (2) the fact that the former retaining walls had within the past two years been partially if not completely destroyed by a similar slide.

[3–5] At page 473 of 34 Cal.App., at page 900 of 167 P., the court said: "The construction of a policy of insurance is to be ascertained from the whole instrument, the nature of the property to which the language of the policy is to be applied, the purposes for which property is ordinarily to be used, its situation, and the manner in which it is usually kept [Citation] * * *," and at page 474 of 34 Cal.App., at page 900 of 167 P.: "In this case the insurance was undoubtedly intended by both the defendant and the insured to cover the store as a store. The caption * * * strongly corroborates this view. In other words, the property insured was to be treated as a store, and not as a separate and distinct building or a stock of goods contained in that identical single structure." And: "Some flexibility of meaning must be given to the language of standard forms of insurance policies * * * [They] must be interpreted in the light of the common understanding of the parties, in order to do justice * * *."

It is to be noted that in the present case the phrase we are dealing with is "additions in contact therewith" and not the phrase used in the above cited case; also, in the instant case what is insured is the composition frame building and additions in contact therewith and no other descriptive words are used to describe this building.

Plaintiffs also cite the case of Meyerstein v. Great American Ins. Co., 82 Cal.App. 131, 255 P. 220, where the court held that "additions" included a laundry building and water tank, both destroyed by fire, which were located about 70 feet from the main building.

However, in that case, at page 135 of 82 Cal.App., at page 222 of 255 P., it was recited in the coverage clause that the policy covered "the frame building and additions, including the fences, walks, and sidewalks, located on and in or around the premises 'situate detached at Woodside.'" Under the clause relating to the insurance on the personal property, it was recited that "all betterments and additions paid for by the assured and contained in the main building and additions thereto are included in the coverage clause. Permission was also given [by the insurer] to make repairs and alterations to the property insured."

The court at page 135 of 82 Cal.App., at page 222 of 255 P. also said: "It seems manifest to us that the clear intent of the parties was to include in the coverage clause all the property within the inclosure. It specifically included the fences and the walks between the houses located on and 'around the premises.' The tank and its tower was the source of the water supply to the various buildings *and was connected by pipe lines to the several houses,* and they were part of the premises. * * * Considering the fact that plaintiff was given express authority to make alterations, and the alterations when so made would be covered by the policy, to give to the instruments the construction contended for by appellants would be to render meaningless the word 'additions,' for there was nothing else of an insurable nature within the inclosure to which it possibly could apply." (Emphasis added.)

[6] It follows from our analysis of the terms of the policy that evidence was required to determine whether or not the retaining walls constituted a part of the building covered even though damaged by landslide, a peril insured against. Upon the basis of the contradictory evidence adduced on that point, the trial court found in favor of the insurer. In view of that fact

it is unnecessary to consider the case in further detail.

Accordingly, the judgment must be, and is, affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; PETERS, J., not participating.



168 Cal.App.2d 274

Dolph GRANGER, Plaintiff and Appellant,

v.

ORANGE COUNTY BOARD OF SUPERVISORS et al., Defendants and Respondents.

Ira Dowd, Intervenor.

Civ. 5782.

District Court of Appeal, Fourth District, California.

Feb. 27, 1959.

Action against county board of supervisors for an injunction, damages and declaratory relief with respect to proposed lease of certain tidelands for a beach and recreation area. From adverse judgment of the Superior Court, Orange County, Raymond Thompson, J., the plaintiff appealed. The District Court of Appeal, Stone, J. pro tem., held that complaint was properly dismissed when it disclosed on its face no lease or contract had been executed.

Appeal dismissed.

1. Declaratory Judgment ⇐328

Complaint filed against board of supervisors of county, which proposed to lease certain tidelands to be operated as a beach and recreation area, seeking an injunction to prevent supervisors from so contracting, for damages and for declaratory relief was properly dismissed when complaint disclosed on its face no lease or contract had been executed. St.1919, p. 1138 as amended by St.1929, p. 974.

2. Appeal and Error ⇐781(4)

In action for injunction to prevent county board of supervisors, which proposed to lease certain tidelands to be operated as a beach and recreation area, from contracting with another person for such purpose, for damages for a conspiracy, and for declaratory relief, controversies which plaintiff attempted to raise were moot and appeal predicated on denial of such relief would be dismissed.

John R. Brunner, Los Angeles, for appellant.

Joel E. Ogle, County Counsel, Stephen K. Tamura, Asst. County Counsel, for respondents.

Rutan, Lindsay, Dahl, Smedegaard, Howell & Tucker, Santa Ana, for intervenor.

STONE, Justice pro tem.

This appeal concerns a proposal by the Board of Supervisors of Orange County to lease certain tidelands to be operated as a beach and recreation area. By Chapter 526, Statutes of 1919, as amended by Chapter 575, Statutes of 1929, the County of Orange was granted in trust certain tide and submerged lands in upper Newport Bay. In August of 1957, the County and the Orange County Harbor Improvement District announced that several acres of land so reclaimed would be leased to private interests for development. Following informal negotiations conducted with interested prospective lessees by representatives of Orange County and the Orange County Harbor Improvement District it was announced that formal negotiations for a lease would be undertaken with the Intervenor Ira Dowd. Appellant sought to enjoin the negotiations and execution of a lease, to recover damages by reason of an alleged wrongful conspiracy between the defendants and intervenor Dowd, and for declaratory relief. The trial court sustained defendants' demurrer to plaintiff's

amended complaint without leave to amend. A judgment was entered accordingly and the plaintiff appeals.

[1] At the time plaintiff's complaint and amended complaint were filed, and at the time the demurrer to the amended complaint was heard, no lease had been executed. The pleadings alleged that the defendant Board of Supervisors was negotiating for a lease with intervenor Dowd. The first cause of action of the amended complaint asked for an injunction to prevent the defendants from contracting with Dowd. The second cause of action asked for damages of $25,000,000. The third cause of action asked for declaratory relief. Defendants demurred upon the ground that the complaint disclosed on its face that no lease or contract had been executed and therefore no cause of action was stated. The court sustained defendants' demurrer without leave to amend, citing the case of Barto v. Board of Supervisors of the City and County of San Francisco, 135 Cal. 494, 67 P. 758. That case holds, 135 Cal. at page 496, 67 P. at page 758:

> "The board of supervisors are a quasi judicial body, whose duties are prescribed by statute. If they should let a contract in direct contravention of the charter, and in conflict with the power therein given, such contract would be void, and the plaintiff could not suffer any irreparable injury therefrom. The board has not yet acted. We must presume that it will do its duty, and let the contract in the method prescribed in the charter. In any event, we do not think that it is the policy of the law that the machinery of the courts should be put in motion and the writ of injunction invoked upon evidence as to the intention of a judicial body in regard to some act which has not been attempted to be performed. If the board should not proceed in accordance with law, and should let a contract contrary thereto, the taxpayer is not without remedy. But he cannot come into court upon the supposition or belief that a public official, elected by the people, and sworn to perform his duty faithfully to the best of his ability, is going to disregard his oath and willfully violate the law."

The Barto case disposes of the first cause of action which seeks injunctive relief. We believe the order was proper as to the second cause of action alleging a conspiracy and requesting $25,000,000 damages, and as to the third cause of action for declaratory relief, because as there was no lease in being, there was no way for the court to determine whether or not the plaintiff or the people of Orange County would be damaged. It is also difficult to conceive of declaratory relief being granted without the terms of the lease before the court. In light of the allegations of the complaint, this court would have to affirm the order sustaining the demurrer and judgment of dismissal.

[2] With this background in mind, we turn to the motion to dismiss the appeal upon the ground the questions raised by appellant have become moot. Since filing the appeal the defendants have executed a lease with the intervenor. The plaintiff may now file an action predicated upon a lease in being. He is in a position to question whether or not the procedure followed by the board of supervisors in entering into the lease complied with the law, and he may now challenge the validity of the agreement. Plaintiff also has something specific upon which to base his claim for damages or for declaratory relief by reason of an existent document and he may at the same time seek any other relief he deems appropriate. This court is in no position to provide appellant any effectual relief by this appeal because his complaint was filed prematurely, yet he does have recourse to all of the relief he maintains is his right by filing a new action in the trial court. To paraphrase the language of the Supreme Court in Lenahan v. City of Los Angeles, 14 Cal. 2d 128, 134, 92 P.2d 1014, a dismissal of the appeal in no way places the stamp of

approval on the alleged infractions of the requirements of the law or the acts of the respondents. All that is now decided is that the controversies which appellant attempted to raise by his amended complaint are moot. See also Consolidated Vultee Aircraft Corp. v. United Automobile, etc., Workers, 27 Cal.2d 859, 863, 167 P.2d 725; In re Estate of Tierney, 63 Cal.App.2d 295, 299, 146 P.2d 700.

The appeal is dismissed.

GRIFFIN, P. J., and SHEPARD, J., concur.



168 Cal.App.2d 292

Mattie C. DE PUY, Plaintiff and Respondent,

v.

Ella C. SULLIVAN, also known as Ella C. Eichelberger, Defendant and Appellant.

Civ. 18067.

District Court of Appeal, First District, Division 1, California.

March 2, 1959.

Action for recovery of stock certificates standing in names of plaintiff and defendant as joint tenants. The Superior Court, County of Alameda, Folger Emerson, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Bray, J., held that evidence sustained finding that plaintiff when she transferred certificates into joint tenancy intended a testamentary disposition of the stock and not the passing of a present interest.

Affirmed.

1. Appeal and Error ⇐1011(1)

Where case is purely and simply a factual one in which evidence is in some respects directly conflicting and depends upon acceptance of plaintiff's story, reviewing court is bound by trial court's findings.

2. Gifts ⇐49(6)

In action for recovery of stock certificates standing in names of plaintiff and defendant as joint tenants, evidence sustained finding that plaintiff's action in placing shares in joint names of herself and defendant was to facilitate their disposition in event of plaintiff's death and that plaintiff thereafter dealt with stock in every respect as though she were the sole owner thereof.

3. Gifts ⇐49(6)

Fact that plaintiff placed shares of stock in joint tenancy with defendant stating that she desired defendant to have them on her death was not conclusive evidence of an inter vivos gift.

4. Gifts ⇐15

In order for the placing of property in joint tenancy to constitute an inter vivos gift, there must be an intent to give a present interest.

5. Gifts ⇐49(6)

In action for recovery of stock certificates standing in names of plaintiff and defendant as joint tenants, evidence sustained finding that plaintiff in placing stocks in joint tenancy intended a testamentary disposition of stock and not the passing of a present interest.

6. Limitation of Actions ⇐197(2)

In action for recovery of stock certificates standing in names of plaintiff and defendant as joint tenants as result of conveyance by plaintiff of certificate to joint tenancy in 1949, evidence sustained finding that plaintiff did not discover that defendant claimed any present interest in stock until 1956. West's Ann.Code Civ.Proc. § 338, subd. 4.

7. Limitation of Actions ⇐95(1)

Where plaintiff placed stock certificates in joint tenancy with defendant in 1949, but plaintiff did not discover that defendant claimed any present interest in stock until 1956, plaintiff's action for recovery of stock certificates was not barred by three-year

statute of limitations. West's Ann.Code Civ.Proc. § 338, subd. 4.

Arthur Harris, Berkeley, for appellant.

Ericksen & Ericksen, Donald H. Kincaid, Robert H. Kroninger, Oakland, for respondent.

BRAY, Justice.

In an action for recovery of stock certificates standing in the names of plaintiff and defendant as joint tenants, defendant appeals from a judgment in favor of plaintiff. Solely presented is the question of the sufficiency of the evidence.

Facts.

The first amended complaint alleged in three counts that defendant obtained in joint tenancy certain securities belonging to plaintiff by reason of the confidential relationship existing between the parties and through fraud of defendant and mistake of plaintiff. The court decreed that plaintiff is the sole owner of said securities, that any interest of defendant in them is as constructive trustee, and ordered them transferred to plaintiff's name.

[1] Defendant contends that as a matter of law the evidence shows an inter vivos gift of the securities to defendant in joint tenancy and that the statute of limitations has run as to the action. The case is purely and simply a factual one in which the evidence is in some respects directly conflicting and depends upon the acceptance of plaintiff's story that she did not intend to make a gift to defendant, and, in which, under the well known rule binding an appellate court, we are bound by the trial court's findings.

Plaintiff is 87 years old. Defendant is the foster daughter of plaintiff, and at the age of 12 came to live with plaintiff and her husband, living with them for approximately 7 years, when defendant married. After living away, defendant returned to plaintiff's home in 1949 about 2½ weeks before plaintiff's husband died. Defendant concedes that a confidential relationship existed between the parties. The securities were held in joint tenancy by plaintiff and her husband. Shortly after his death plaintiff and the attorney who was representing her in connection with her husband's death and the other properties left by him, went to the husband's safe deposit box in which were the stock certificates. Plaintiff does not recall signing a signature card making defendant a joint tenant in the box, signing the certificates or instructing the attorney to have the certificates transferred into a joint tenancy with defendant. She did recall that a joint checking account between herself and defendant was opened shortly after the husband's death. Some of the stock dividends that accrued were deposited directly in the bank and some were first sent to plaintiff at her home. The latter came just in plaintiff's name, but shortly thereafter they came with both plaintiff's and defendant's names on them. Plaintiff asked defendant the reason for this and defendant stated: " 'I fixed it so that I could take care of it if anything happened to you' " and " 'I fixed it so that I could take care of the dividends in case you were ill.' " The fact of both names being on the dividend checks did not seem of consequence to plaintiff: plaintiff used all the dividends for her own income and support. She first discovered that the certificates were missing from the box in May of 1956. She then removed defendant's name from the joint account box. However, she continued, as in the past, to send the dividend checks to defendant who signed and returned them to plaintiff. Plaintiff then deposited them in her own bank account. Plaintiff denied ever intending to give or giving any interest in the stocks to defendant.

Defendant testified that she advised plaintiff in her business affairs and had access to her business papers. May 2, 1949, at plaintiff's husband's request, defendant's name was placed on the joint bank account with plaintiff. May 11, after his death, defendant's name was placed on the joint safe deposit box. At the bank where the securities were kept, plaintiff requested her attorney to

"turn * * * over" the stock certificates to a joint account with defendant. Plaintiff then signed the old certificates. Plaintiff stated, "'I would like to have you have these [securities] after I am gone.'" Defendant "accepted." Plaintiff often said, referring to the stock certificates, "'These will be yours when I am gone.'" The dividend checks were deposited in the joint bank account until April, 1956, when they were sent by the bank to plaintiff who sent them to defendant who signed and returned them to plaintiff who deposited them in her own account. All the "dividends, profits, and so on" have accumulated to plaintiff's benefit. It was stipulated that plaintiff would deny stating to defendant that she wanted defendant to have the securities if anything happened to her. Defendant was not sure that she was ever present when plaintiff signed any of the certificates, but plaintiff told her she read them before signing. As the certificates issued in their joint names came in, plaintiff gave them to defendant to place in the safe deposit box. In April, 1955, plaintiff's attorney called defendant stating that plaintiff wanted to cash in some of the certificates. Defendant then took all the certificates out of the joint box and placed them in her own box. Defendant did not tell plaintiff of this for about a year. Defendant never made personal deposits in the joint checking account where the dividends were deposited, but had drawn checks on that account for plaintiff's expenses, and never for her own personal benefit unless plaintiff knew about it.

The attorney testified that plaintiff requested him to take the certificates out of her name and that of her husband and put them in her name and that of defendant. Plaintiff then endorsed the certificates in blank. The trial court expressly found that there was no fraud. It found that plaintiff at no time intended to, nor did she, make a gift of the stock, nor did she intend to convey any interest in it to defendant, and that at all times plaintiff exercised dominion and control over the stock, and had no actual knowledge that defendant claimed any interest in the stock until April or May of 1956.

Evidence is Sufficient.

[2] In his announcement of decision the trial judge, Hon. Folger Emerson, admirably sums up the evidence: "The Court feels and will find from the evidence that plaintiff's action in placing the shares in the joint names of herself and defendant was motivated and affected by the transaction which plaintiff had just observed after the death of her husband. The court feels that Mrs. De Puy was impressed with the fact that she had acquired the shares without the necessity of probate through the termination of the joint tenancy of herself and her husband and that she decided to again place them in joint tenancy with the defendant to facilitate their disposition in the event of her own death. The court does not feel, however, that this amounted to a completed gift. The evidence shows quite the contrary. The plaintiff thereafter dealt with the stock in every respect as though she was the sole owner thereof. Her method of securing defendant's endorsement at all times before she, herself, endorsed the stock was an exercise of control designed to see that plaintiff acquired the dividends as her sole property. It is undisputed that all of the dividends went to plaintiff who exercised dominion over them."

[3–5] Defendant contends that because plaintiff placed the shares in joint tenancy stating that she desired defendant to have them on her death is conclusive evidence of an inter vivos gift. This is not so. To make such a gift there must be an intent to give a present interest. The evidence here supports the finding that there was no such intent. Plaintiff denies such intent and defendant can point to no evidence that overcomes plaintiff's testimony, believed by the court, that she intended no such gift. The conduct of the parties and even defendant's testimony as to what was said by plaintiff shows no more than that plaintiff, in effect, intended a testamentary disposition of the stock and not the passing of a present

interest. The situation here is similar to that in Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745. There a mother signed a written transfer of certain stock to her son who claimed that she gave the stock to him as a gift. At the trial the mother admitted the genuineness of her signature on the transfer but disclaimed any remembrance of the transaction which resulted in the transfer, but insisted that she never gave the stock to her son or knowingly transferred her title thereto. The son testified that the transfer was unsolicited on his part, and that the mother delivered the endorsed certificate to him and then signed as president of the company the new certificate issued to him. In our case, while the attorney testified that plaintiff instructed him to have the stock placed in joint tenancy of plaintiff and defendant, he did not testify that plaintiff said anything about making a gift to defendant nor giving any reason for the joint tenancy. In the Hotaling case there was "evidence on collateral matters and events tending more or less strongly to corroborate one or the other of the parties as to the main issue." 187 Cal. at pages 698–699, 203 P. at page 747. The finding of the trial court that no gift was intended or made was upheld, the reviewing court stating (187 Cal. at page 700, 203 P. at page 747): "The plaintiff here testified that she never gave this stock to her son, or knowingly transferred her title thereto. If there is any weight to be given to this testimony it will not be disputed under the established rules of law in this state that a finding of the court in accordance with such testimony cannot be disturbed, whatever the views of the appellate court as to the comparative strength of the testimony to the contrary." In our case, the evidence in support of the trial court's finding is stronger than that in the Hotaling case. Here, in addition to plaintiff's testimony, which the court believed, there was shown plaintiff's almost complete dominion over and control of the stock after the alleged gift, and the defendant's own testimony showing that what plaintiff had in mind was a testamentary disposition rather than a present gift.

Statutes of Limitation.

Section 338, subdivision 4, Code of Civil Procedure, provides a three year limitation for "an action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

[6, 7] The court found that plaintiff's cause of action was not barred by the statute of limitations, further finding that plaintiff "had no actual knowledge that defendant claimed an interest in the shares until the shares were removed by defendant from the safe deposit box in April or May of 1956." Plaintiff was aged and had to sign numerous papers in 1949 in connection with her husband's death. She apparently endorsed the certificates in blank. The instructions for reissuance in joint tenancy were endorsed later. Defendant explained why the joint dividends were in their joint names, "'* * so that I could take care of the dividends in case you were ill.'" Plaintiff's testimony that she did not discover that defendant claimed any interest in the stock until then, if believed, and it was believed by the trial court, constitutes sufficient support of the finding. See Ransom v. Wallace, 94 Cal. App.2d 723, 211 P.2d 339, where a father signed a deed to his daughter in 1942. He testified he had no recollection of doing so, and did not discover that he had until several years later. He brought suit shortly after such discovery. The court held that the action was not barred by the statute of limitations. See also Kallmeyer v. Poore, 1942, 52 Cal.App.2d 142, 125 P.2d 924, a fraud action, in which the defendant contended that the action was barred by the statute of limitations. The court said (52 Cal.App.2d at page 149, 125 P.2d at page 928): "It is alleged in the complaint and found by the trial court that this discovery was in November, 1936. The complaint was filed in August of 1937. This being a ques-

tion of fact, the finding of the court upon conflicting evidence will not be disturbed."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



168 Cal.App.2d 257

Arthur B. THOMPSON et al., Plaintiffs and Appellants,

v.

Ernest GOUBERT et al., Defendants and Respondents.

Ernest GOUBERT et al., Plaintiffs and Respondents,

v.

Arthur B. THOMPSON et al., Defendants and Appellants.

Civ. 5921.

District Court of Appeal, Fourth District, California.

Feb. 26, 1959.

Action by landlords for declaratory relief, damages and an injunction, on ground that tenants failed to farm premises as required by lease which had been entered into between the parties, along with action by tenants for damages for wrongful eviction and loss of crops. The Superior Court, Riverside County, S. Thomas Bucciarelli, J., entered judgments in favor of tenants and landlords appealed. The District Court of Appeal, Stone, J. pro tem., held that where lease provided liquidated damages to be paid tenants in event property was sold by landlords, but lease did not provide that provision for liquidated damages was applicable to other situations, provision was not applicable as a measure of tenants' damages for dispossession, and in any event, damages were not recoverable under such a provision due to fact that they were neither pleaded nor proved.

Judgment reversed with directions.

1. Appeal and Error ⇐1011(1)

Evaluation of conflicting evidence does not come within the province of the District Court of Appeal.

2. Landlord and Tenant ⇐331(1, 8)

In action by landlords for declaratory relief, damages and an injunction on ground that tenants failed to farm premises as required by lease which had been entered into between the parties, along with action by tenants for damages for wrongful eviction and loss of crops, evidence presented a question for the jury as to whether tenants improperly farmed the leased premises justifying a termination of the lease and their eviction, or whether they farmed the premises properly so that landlords had no cause for terminating the contract or evicting tenants.

3. Damages ⇐157(3)

Where lease provided liquidated damages to be paid tenants in event property was sold by landlords, but lease did not provide that provision for liquidated damages was applicable to other situations, provision was not applicable as a measure of tenants' damages for dispossession and in any event, damages were not recoverable under such a provision due to fact that they were neither pleaded nor proved. West's Ann.Civ.Code, § 1671.

4. Damages ⇐157(3)

Liquidated damages may be recovered only upon proper pleading and proof. West's Ann.Civ.Code, § 1671.

Harmon C. Brown, Riverside, for appellants.

Neblett, Walker & Sullivan and LeMoyne S. Badger, Riverside, for respondents.

STONE, Justice pro tem.

On October 12, 1952, appellants Arthur B. Thompson and his wife, as lessors, entered into a written lease with respondents Ernest Goubert and his wife, as lessees. This appeal is concerned with an 85-acre parcel of the leased premises which was to be planted to alfalfa. The lease provided

for certain farming practices to be followed by the lessees and for liquidated damages in the event the lessors sold the property prior to the expiration of the four-year term.

On September 13, 1954, the appellant lessors filed action No. 60304 for declaratory relief, damages and an injunction, alleging respondent lessees had failed to farm the premises as required by the lease. On October 11, 1954, the default of the respondents was entered in said action. On October 22, 1954, respondents moved to have their default set aside and the court ordered all proceedings stayed until the motion to vacate and set aside the default was disposed of. On October 28th and prior to disposition of the motion appellants entered the premises and evicted the respondents. The default of respondents was subsequently set aside and they filed an answer denying the allegations of the complaint. On June 17, 1955, respondents filed action No. 62028, seeking damages for wrongful eviction and loss of crops. By stipulation of counsel the actions were by order of court, consolidated for purposes of trial and it was then further stipulated and ordered that "all evidence received in either cause be considered in both causes."

The court tried the cases without a jury and found against the appellants in action No. 60304 and in favor of respondents in action No. 62028 and fixed their damages in the sum of $8,330.

[1, 2] The appeal in case No. 60304 is concerned with the single question of whether there is substantial evidence to support the trial court's findings and judgment. In case No. 62028 the same question is raised and the additional question of whether the court applied the correct measure of damages in its findings and judgment in favor of the respondents. For the purposes of clarity and to avoid repetition we will consider the question of the sufficiency of the evidence as to actions No. 60304 and No. 62028 as one issue. The cases were jointly tried and the evidence was applicable to both cases. Appellants cite evidence in support of their position that respondents improperly farmed the leased premises justifying a termination of the contract and eviction of the respondents. On the other hand, respondents cite testimony supporting their position that they farmed properly and that appellant had no cause for terminating the contract or evicting them. Evaluation of the conflicting evidence does not come within the province of this court. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. Hence, repeating the evidence which the parties cite at length in their briefs would serve no useful purpose in this opinion. Suffice it to say that there is substantial evidence in the record to support the judgment of the trial court and this court may not weigh it as against contrary evidence.

The principal question presented is whether the trial court, having found the respondents entitled to recover, applied the proper measure of damages. The lease provided:

> "That whatever acreage is planted to alfalfa, the lease on the number of acres planted to alfalfa shall be for a term of 4 years, ending on November 1, 1956, but in case the property is sold the lessor agrees to pay to the lessee the sum of $50.00 per acre, plus $2.00 per acre, for each unexpired month of the four year lease, this to apply only to the land planted to alfalfa, and the lessee hereby agrees to accept the above, and does hereby agree thereto."

The court used this yardstick and found the lessees' damages to be an amount approximating $50 an acre plus $2 per acre per month for the remaining months of the term. Respondents argue that the court could well have considered this amount to be the lessees' actual damages as evidence was presented indicating lessees' damages to be varying amounts from nothing up to $10,000. Respondents also argue that although the amount of the judgment is close to the figure agreed to be paid by the appellants in the event of a sale of the property, the judgment is not necessarily based on the liquidated damages clause of the lease con-

tract. However, the finding of fact concerning damages signed by the trial judge reads:

"7. That by reason of the wrongful acts and conduct of said Thompsons and the wrongful eviction of said Gouberts from said premises by said Thompsons, said Gouberts have suffered damages, *as provided for in the said lease,* in the amount of Eight Thousand Three Hundred Thirty Dollars ($8,330.00)."

[3, 4] Thus the finding as well as the amount of damages indicate the court adopted the provision for liquidated damages specified in the lease. The question is, was the court justified in using the liquidated damages provision of the lease as the measure of the lessees' damages for dispossession? The provision for liquidated damages was by the parties made applicable in the event of a sale of the property. For the court to apply that provision to a termination by eviction is in effect making a new agreement between the parties. The vice of such procedure lies in the fact that frequently a lessor will agree to pay his lessee an amount greater than would be normally expected as an inducement to the lessee to agree to a termination or sales clause. There is no way of determining what motivated the parties to this action in arriving at the amounts specified in the lease. In the absence of specific language in the lease making the clause applicable to other situations there is no justification for such application.

Even though the provision in the lease for liquidated damages could be said to be applicable to this situation such damages were neither pleaded nor proved. In Kelly v. McDonald, 98 Cal.App. 121, 125, 276 P. 404, 406, the court said:

"The decisions of California are in accord with the great weight of authority which holds that liquidated damages may be recovered only upon pleading and proof of facts which bring the contract within the provisions of the exception to the general rule as announced in section 1671 of the Civil Code. 8 Cal.Jur. 891, § 128; Hanlon Drydock & Shipbuilding Co. v. G. W. McNear, Inc., 70 Cal.App. 204, 215, 232 P. 1002; McInerney v. Mack, 34 Cal.App. 153, 156, 166 P. 867; Thomas v. Anthony, 30 Cal.App. 217, 220, 157 P. 823; Sun-Maid Raisin Growers v. Paul A. Mosesian & Son, 90 Cal.App. 1, 265 P. 828; Dyer Bros. Golden West Iron Works v. Central Iron Works, 182 Cal. 588, 593, 189 P. 445. The difficulty of ascertaining actual damages, so as to maintain a suit for breach of contract under the provisions of the exception to the general rule as it is expressed in section 1671, supra, is not presumed, but must be established by proof. Green v. Frahm, 176 Cal. 259, 262, 168 P. 114; Long Beach City School District v. Dodge, 135 Cal. 401, 404, 67 P. 499."

The judgment in action No. 60304 is affirmed. The judgment in action No. 62028 is reversed with directions to the trial court to determine the damages and thereafter to enter judgment in favor of plaintiffs.

GRIFFIN, P. J., and MUSSELL, J., concur.



168 Cal.App.2d 314

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Otis Holly HORNES and Bruce A. McCollin, Defendants and Appellants.

Cr. 6284.

District Court of Appeal, Second District, Division 1, California.

March 2, 1959.

Defendants were convicted of first-degree robbery. The Superior Court, Los Angeles County, Albert E. Wheatcroft, J., entered judgment of conviction and denied motions for new trial, and defendants ap-

pealed. The District Court of Appeal, White, P. J., held that appeal would not lie from a sentence, and that evidence sustained conviction.

Attempted appeal dismissed, and judgments affirmed.

1. Criminal Law ⇐1023(10)

Appeal would not lie from a sentence.

2. Robbery ⇐24(1)

If believed by trier of facts, testimony of robbery victim's testimony is sufficient of itself to warrant a conviction, and no corroborative evidence is required.

3. Criminal Law ⇐260(11)

Primarily, question of accused's identity as perpetrator of robberty is one of fact for trial court's determination.

4. Robbery ⇐24(3)

Fact, if true, that details of robbery victim's testimony at preliminary hearing, and his testimony concerning height and weight of defendants as compared with that of robbers, were incorrect would not warrant reversal of conviction.

5. Criminal Law ⇐260(11), 1159(5)

Unless evidence of identification can be strictured as inherently improbable or incredible as matter of law, finding of trial court or jury cannot be disturbed, and a reviewing tribunal cannot substitute its judgment for that of lower court.

6. Robbery ⇐24(1)

Evidence sustained conviction for first-degree armed robbery.

7. Robbery ⇐1

To establish crime of robbery, a taking of personalty must be shown.

8. Robbery ⇐24(1)

In robbery prosecution, a taking of personalty may be proved by circumstantial evidence.

9. Robbery ⇐11

Offense of first-degree robbery may be proven, in regard to the necessity for showing a taking of personalty, by showing the taking of any amount of money.

10. Indictment and Information ⇐196(5)

In first-degree robbery prosecution, information would have to be deemed sufficient to support judgment of conviction, in view of defendants' failure to attack information as insufficient to give them notice of crime charged in regard to amount allegedly taken by them.

11. Robbery ⇐24(1)

Where, in first-degree robbery prosecution, evidence revealed that some money had been taken, element of taking of personalty was clearly shown.

12. Robbery ⇐24(1)

In first-degree robbery prosecution, evidence failed to establish that defendants had been convicted solely because they were on parole and were, in violation of their parole, associating with each other near the time and place of an alleged robbery.

13. Criminal Law ⇐260(11)

Where, in first-degree robbery prosecution, evidence was sufficient to sustain adjudication that defendants were guilty, fact, if true, that defendants were convicted solely because they were on parole and were, in violation thereof, associating with each other near time and place of an alleged robbery would not warrant a reversal of their conviction.

Sheldon Berlin, Beverly Hills, under appointment by the District Court of Appeal, for appellants.

Otis Holly Hornes, in pro. per.

Bruce A. McCollin, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

WHITE, Presiding Justice.

The District Attorney of Los Angeles County filed an information wherein defendants were accused of the crime of robbery while armed with a deadly weapon. It was also alleged that each defendant had suffered a prior conviction of robbery and had served a term of imprisonment there-

for. Defendants pleaded not guilty. Trial by jury was duly waived and by stipulation the cause was submitted on the transcript of the preliminary examination with each side reserving the right to offer additional evidence. Defendants were adjudged guilty of robbery which the court found to be robbery of the first degree. No finding was made as to the prior conviction charged against each defendant. Their motions for new trial were denied and each was sentenced to state prison.

[1] Defendant Hornes appeals from the judgment and order denying his motion for a new trial. Defendant McCollin appeals from the judgment and sentence. Since no appeal lies from the sentence as such (People v. Gallardo, 41 Cal.2d 57, 60, 257 P.2d 29), the attempted appeal therefrom must be dismissed.

We regard the following as a fair epitome of the factual background surrounding this prosecution.

On the early morning of October 19, 1957, Edward Rollins was on duty as the attendant at a service station located on Florence Avenue, in the city of Los Angeles. At about 3:00 a. m. that morning, according to the testimony of Mr. Rollins, defendant McCollin, with his hand under his coat, approached the witness at the service station, and pointing to Mr. Rollins' automobile, said, "Isn't that tire flat?" The witness testified, "Well, I told him he was drunk, and I didn't pay any attention to him and by that time he walked up to me and threw his arm around my waist and told me to come and go with him." At that time the witness observed that defendant McCollin had a nickel plated revolver in his hands. Defendant McCollin then escorted Rollins across the street to a distance of approximately 100 yards from the station; Rollins testified that he went with him "because of the gun". As McCollin and Rollins moved away from the station Rollins noticed the defendant Hornes, who had followed McCollin into the station by approximately five feet, proceeding toward the booth where the cash register was kept.

McCollin held Rollins momentarily, and, after searching his person, told him to "make the block". Rollins went to San Pedro Street and Florence Avenue and called the police. This was at about 3:15 a. m. He then hurried back to the station, called the "day man" who was to relieve him, and checked the cash register. Approximately $190 was missing. When Rollins had left the station with McCollin the cash register was closed; when he returned, it was open. He was the only one working at the station and had given no one permission to open the register.

A radio car of the Los Angeles Police Department responded to Rollins' call. Officer Funk first observed the defendants walking together about two and one-half blocks from the service station, at about 3:20 a. m. The defendants were taken to the service station, and Rollins was asked if he could identify them. When asked about Hornes, Rollins replied, "I am not sure. I don't want to have any trouble. I have a wife and three kids." As to McCollin, he said, "Yes, I think that's the man." Later the same day at the police station Rollins positively identified the defendants. He testified he had never worn eyeglasses or had a restricted driver's license, and no one had talked to him about identifying the appellants.

Although defendants were apprehended within forty-five minutes after the alleged robbery, the amount of money taken by the robbers or the weapon used were not found in the possession of defendants or in their automobile. Defendant McCollin had no money on his person and defendant Hornes had $40 in his possession.

Sworn as witnesses in their own behalf defendants testified they were together on the night and early morning of their arrest. That defendant Hornes called for defendant McCollin at the latter's home, 1182 East 41st Street, about 9:30 p. m. They proceeded in Hornes' automobile to Watts to call on a girl friend of defendant McCollin's but she was not at home. They they proceeded to a club on 103rd Street,

from which place they departed about 2:15 a. m. That while en route to McCollin's home, they decided to call on a girl friend of defendant Hornes' who lived on 71st Street. That Hornes "* * * didn't remember the address, but he knew the house, and he walked down there. We found a place to park and got up and walked back towards the house where she was supposed to live". That, "We got to the corner and he (Hornes) couldn't remember the address, so we went around the corner and that was supposed to be the house—it was near San Pedro—and we didn't see a house—and we started turning around the corner, and at that point they (the officers) stopped us." When the defendants saw the police automobile they separated for the reason, "we was on parole and we violated our parole if we was together". Defendant McCollin first told the officers he had been walking up from Watts and that he had left his wallet at his cousin's house—both untrue statements and which he explained he made because of his fear of being charged with a parole violation if he was found in the company of his co-defendant. Both defendants were gainfully employed and working at the time of their arrest. They denied any complicity in the robbery of Mr. Rollins, or that they were in possession of any weapon.

[2–5] As their first ground for reversal appellants contend that "there is no substantial evidence to connect appellants to the robbery". They assail the testimony of the victim as to identification of appellants, pointing out claimed inconsistencies and uncertainties therein, saying, "However, with the aid of suggestive questions and instructions by People's counsel, Rollins did identify Appellant McCollin as the 'short man' and Appellant Hornes as the 'tall man' at the Preliminary Hearing; and there was evidence at the Preliminary Hearing and at the trial that Rollins, after failing to recognize Appellants at the service station, went to the police station with his manager and there identified Appellants as the 'robbers' upon seeing them standing, alone, behind a glass door." Appellants assert that in the light of the foregoing, the testimony of Mr. Rollins standing alone is insufficient to identify them and lacks any corroboration. However, it is well settled that the testimony of a robbery victim if believed by the trier of facts, is sufficient of itself to warrant a conviction, and that no corroborative evidence is required (People v. Thompson, 147 Cal.App.2d 543, 546, 547, 305 P.2d 274). Primarily, the identity of the accused as the perpetrator of a robbery is a question of fact for determination of the trial court. And appellants' argument that the testimony of the prosecuting witness was in some respects contradictory is not sufficient to warrant a reversal (People v. Hightower, 40 Cal.App.2d 102, 106, 104 P.2d 378). Unless the evidence of identification can be strictured as inherently improbable or incredible as a matter of law, the finding of the trial court or jury cannot be disturbed and an appellate tribunal cannot substitute its judgment for that of the court below (People v. McNeal, 123 Cal.App.2d 222, 224, 266 P.2d 529). In the case of People v. Addington, 43 Cal.App. 2d 591, 593, 111 P.2d 356, 357, wherein, at the preliminary examination, two identifying witnesses had testified that they were not absolutely positive in their identification, the reviewing court said: "* * * In order to sustain a conviction it is not necessary that the identification of the defendant as a perpetrator of the crime be made positively or in a manner free from inconsistencies. It is the function of the jury to pass upon the strength or weakness of the identification and the uncertainties of the witnesses in giving their testimony." Whatever may be said as to the weakness of the victim's identification at the scene of the crime following the arrest of appellants, the record reveals that Mr. Rollins positively and without hesitation identified appellants at the preliminary examination, and that he had previously, on the day the robbery occurred, positively identified them at the police station. Appellants claim that certain details of the victim's testimony at the preliminary hear-

ing, and his testimony concerning the height and weight of appellants as compared with that of the robbers, were incorrect, does not warrant a reversal (People v. Addington, supra, 43 Cal.App.2d at page 593, 111 P.2d at page 357).

[6–11] It is next contended by appellants that there is no substantial evidence that the crime of armed robbery of the first degree was committed by anyone. In this regard, appellants assert that "* * * there is no substantial evidence that $190.00 or any other property was taken from the immediate presence of Rollins by reason of the force used upon Rollins by the 'short man'; and that therefore Appellants conviction should be reversed irrespective of whether or not there was substantial evidence of their participation in the events described by Rollins." This contention is without merit. While it is true, as set forth by appellants, that to establish the crime of robbery a taking of personal property must be shown nevertheless, this element may be proved by circumstantial evidence (People v. Appleton, 120 Cal. 250, 251, 52 P. 582; People v. Lathrop, 37 Cal. App.2d 341, 345, 99 P.2d 330). In the instant case, the victim was forced from the premises by a man he later identified as appellant McCollin. At the same time Rollins observed appellant Hornes proceeding toward the place where the cash was kept. When he was able to return to the service station Rollins found money was missing. The information alleged that $190 was taken. This estimate was arrived at on the basis of the station attendant Rollins' experience, both as to the usual intake on a Friday night, and on his observations as to the amount taken in on the night of the robbery. Since it is clear from the record that some money was taken as evidenced by the testimony of Rollins that when he returned to the station he found less than $1 in change in the register, the amount of money taken becomes inconsequential because the offense charged may be proven by showing the taking of *any* money (People v. Hewitt, 78 Cal.App. 426, 429, 248 P. 1021). The purpose of alleging a sufficient description of the property taken would seem to be to apprise the accused of the particular property he is charged with having taken, and thus enable him the better to defend against the charge. Since no attack was made upon the information as being insufficient to give appellants notice of the crime charged with regard to the amount taken, the information must here be deemed as sufficient to support a judgment. And, since some money was taken, the element of "taking of personal property" was clearly shown.

Appellants' claim that the property was not taken from the "immediate presence" of the victim is equally untenable. Although the station attendant was unable to view the actual taking, or sense it in any way, the court below was entitled to conclude from the evidence that appellants sought to facilitate their crime by removing the victim some 100 yards from the scene. When appellant McCollin compelled the victim Rollins to leave the station he thereby initiated the first of a chain of acts leading directly to the consummation of the robbery. That the victim was, therefore, constructively present during the "taking" and that such "taking" was within his "immediate presence" is supported by the case of People v. Lavender, 137 Cal.App. 582, 591, 31 P.2d 439, 442, in which the accused and a companion forced a hotel clerk to remain in an upstairs room while they returned to the office to take the money there. The court undertook a lengthy review of the authorities, concluding that the taking was within the immediate presence of the clerk. The court said: "* * * At least as early as the time when the clerk was induced to leave the hotel office for the purpose of 'showing' the room to defendant and his companion the crime of robbery was commenced; it was an overt act connected with the commission of the offense, at which time the clerk was 'immediately' present. *The trick or device by which the physical presence of the clerk was detached from the property under his protection and control should not avail defend-*

ant in his claim that the property was not taken from the 'immediate presence' of the victim." (Emphasis added.)

The remaining elements of the crime, viz., fear and the felonious intent to rob, are amply supported by the evidence.

[12, 13] Finally, appellants urge that they were convicted "solely because they were on parole and associating with each other, a parole violation, near the time and place of an alleged robbery". An examination of the record fails to sustain appellants in this contention. While their counsel in his argument to the court made mention of appellants being on parole, and the deputy district attorney disclaimed any intention, "* * * to infer that they (appellants) were guilty just because they were violating their parole", at the conclusion of arguments by counsel, the court simply announced, "The defendants will be found guilty as charged". Furthermore, since the evidence was sufficient to sustain the adjudication of guilt, what appellants contend actuated the court in arriving at such conclusion, does not warrant a reversal.

The attempted appeal from the sentence by defendant McCollin is dismissed and the judgment as to him is affirmed. The judgment against, and the order denying motion for a new trial as to defendant Hornes are, and each is affirmed.

LILLIE, J., concurs.

FOURT, Justice.

I concur.

In this case each of the defendants was charged with a prior conviction of armed robbery. The certified copies of the former prison records were in proper order, and were received in evidence. Each defendant admitted to the prior charge and conviction on cross-examination. It is interesting to note that the defendants and appellants in this case committed the previous first degree armed robberies mentioned in the information as the priors, on August 25, 1954, in almost the identical fashion (robbing a service station around 4:00 a. m.—asking permission to use the restroom—each pulled a gun and forced the attendant to open the cash box, taking the money—taking the attendant away from the station to empty lot) as they committed the armed robbery with which we are concerned in this case. For the prior convictions, Hornes entered prison on February 28, 1955, and was released on parole August 28, 1957; McCollin entered prison on March 29, 1955, and was released on parole September 30, 1957. The two defendants, obviously, immediately got together after their release from prison and within less than sixty days were back at the business of armed robbery.

The court was fully informed of the background of each of the defendants, for the judge said at the time of sentence:

> "The Court: Yes, I have also checked my notes, and the preliminary transcript shows that these gentlemen were convicted in 1954—Hornes in 1954 for robbery, and McCollin in 1955 for robbery. They served a term of imprisonment for those offenses, and it seems to me that they, more than anybody else, ought to know the seriousness of the conditions of their parole. Apparently they took it too lightly. I like to give a man a chance, but they just repeatedly become involved in offenses of this kind, and I don't see that there is anything we can do for them. I wish I had a pill I could give them to straighten them out, but I haven't."

The court then made no findings as to the prior convictions, as required by Penal Code, section 1158, and sentenced each of the defendants as a first offender. As said in People v. Fields, Cal.App., 334 P.2d 1001, 1004: "* * * the defendant in this case is now, by reason of the judge's failure to find as to the prior convictions * * * permitted to serve a sentence which can be considerably less than that required and set forth in the statutes."

168 Cal.App.2d 127

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Patrick Joseph Clarence Calvin O'WARD, Defendant and Appellant.

Cr. 6425.

District Court of Appeal, Second District, Division 3, California.

Feb. 20, 1959.

Rehearing Denied March 18, 1959.

Hearing Denied April 15, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, Edwin L. Jefferson, J., for having committed a lewd and lascivious act upon the body of a female child of the age of 13 years, and he appealed. The District Court of Appeal, Vallée, J., held that the record would not sustain defendant's contention that he had not intentionally waived his right to aid of counsel.

Affirmed.

1. Criminal Law ⇐641(1)

Right of defendant to counsel is protected, but there is nothing in law which prevents defendant from defending himself, and right to counsel is one which may be waived. West's Ann.Pen.Code, §§ 686, 987; West's Ann.Const. art. 1, § 13.

2. Criminal Law ⇐641(1)

Before there can be an effective waiver of right to counsel, defendant must have an intelligent understanding of his act; and determination of whether there has been an intelligent waiver of counsel involves a consideration of nature of charge, facts and circumstances of case, and background, experience, mental competence and conduct of accused. West's Ann.Pen.Code, §§ 686, 987; West's Ann.Const. art. 1, § 13.

3. Criminal Law ⇐641(1), 1152(1)

Whether waiver of right to counsel in particular case meets required standard is largely a matter for determination of trial judge; and his decision will not be disturbed on review in absence of abuse of discretion.

4. Criminal Law ⇐641(1)

Waiver of right to counsel may be implied. West's Ann.Pen.Code, §§ 686, 987; West's Ann.Const. art. 1, § 13.

5. Criminal Law ⇐1144(10)

It is presumed that court performed duty enjoined upon it by Penal Code section requiring assignment of counsel to defendant desiring to be represented but unable to employ counsel. West's Ann.Rules on Appeal, rule 52; West's Ann.Pen.Code, § 987.

6. Criminal Law ⇐641(1)

Record, on appeal from conviction for committing a lewd and lascivious act upon body of female child of age of 13 years, would not sustain defendant's contention that he had not intentionally waived his right to aid of counsel. West's Ann.Pen. Code, §§ 686, 987; West's Ann.Const. art. 1, § 13.

7. Criminal Law ⇐1144(15)

Jurors are presumed to have followed court's admonitions and to have performed their duty in accordance with them.

8. Criminal Law ⇐1141(2)

Error will not be presumed on appeal.

9. Criminal Law ⇐1144(10)

It is presumed that trial proceeded with defendant's consent and not against his wishes.

Al Matthews, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Asst. Atty. Gen., for respondent.

VALLÉE, Justice.

A jury found defendant guilty of having committed a lewd and lascivious act upon the body of a female child of the age of 13 years on October 23, 1957. His only point is that he did not intentionally waive his right to the aid of counsel.

The information in count I charged a violation of Penal Code, section 288a; and in count II, a violation of Penal Code, section 288. The information also charg-

ed three prior felony convictions: in 1939, violation of the Mann Act, 18 U.S.C.A. § 2421 et seq., in Oklahoma; in 1943, violation of section 11160 of the Health and Safety Code of California;* and in 1950, burglary in Texas.

On November 18, 1957, the public defender was appointed counsel for defendant and he was arraigned. On November 22, the public defender being present, Dr. McGinnis, a psychiatrist, was appointed under section 1871 of the Code of Civil Procedure to examine defendant and report to the court as to his present and past mental condition. The record does not disclose what prompted the court to appoint the psychiatrist. Dr. McGinnis' report, made November 29, was to the effect that "defendant is legally sane at the present time" and "the examiner is of the present opinion that the defendant is not delusional and that the defendant is capable of participating in his own defense in the presently approaching hearing."

On December 4, the public defender being present, defendant pleaded not guilty to both counts, denied the prior convictions, and the cause was set for trial on January 15, 1958. On January 15 the public defender was relieved as counsel for defendant, and because of the congested condition of the calendar the trial was continued to January 16. The record does not disclose why or at whose request the public defender was relieved.

On January 16 defendant appeared in propria persona, the cause was called for trial, defendant admitted the prior convictions, a jury was impaneled, the information was read, and the plea stated to the jury. On motion of defendant, the court declared a mistrial. The record does not disclose the ground on which the motion was granted or at what stage of the proceedings it was made. The trial was continued to January 17. On January 17, defendant again appearing in propria persona, a jury was impaneled, the information was read, the plea was stated to the jury, and the trial proceeded. At the conclusion of the evidence, on motion of the People count I was dismissed. The jury returned a verdict of guilty as to count II.

After sexual psychopathy proceedings and the commitment of defendant to Atascadero for about 90 days, defendant was found not to be a sexual psychopath, his motion for new trial was denied, and he was sentenced to state prison. He appeals from the judgment and the order denying his motion for new trial.

Defendant premises his argument for reversal on the fact that the record does not show that he waived his right to representation by counsel. There is nothing in the record to show that defendant did not waive his right.

In criminal prosecutions the accused has the right to appear and defend in person and with counsel. Const. Art. I, § 13; Pen.Code, § 686. "If the defendant appears for arraignment without counsel, he must be informed by the Court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the Court must assign counsel to defend him." Pen.Code, § 987.

[1–4] There is nothing in the law which prevents a defendant from defending himself. People v. Ballentine, 39 Cal.2d 193, 196, 246 P.2d 35. While the right of a defendant to counsel is protected, it is a right which may be waived. In re Berry, 43 Cal.2d 838, 846, 279 P.2d 18. Before there can be an effective waiver, the defendant must have an intelligent understanding of his act. People v. Chesser, 29 Cal.2d 815, 821, 178 P.2d 761. The determination of whether there has been an intelligent waiver of counsel involves a consideration of the nature of the charge, the facts and circumstances of the case, and the background, experience, mental competence and conduct of the accused. In re Connor, 16 Cal.2d 701, 710, 108 P.2d 10; People v. Chesser, supra, 29 Cal.2d

* Now Section 11500.

815, 822, 178 P.2d 761. Whether a waiver in a particular case meets the standard is largely a matter for the determination of the trial judge, and his decision will not be disturbed on review in the absence of an abuse of discretion. People v. Loignon, 160 Cal.App.2d 412, 418, 325 P.2d 541. A waiver of the right to counsel may be implied. In re Jingles, 27 Cal.2d 496, 499, 165 P.2d 12; People v. Gonzales, 151 Cal.App.2d 112, 116, 311 P.2d 53. "The right to the assistance of counsel guaranteed by the constitutional and statutory provisions, like any other legal right, may be invoked only in the course of orderly procedure." In re Connor, supra, 16 Cal. 2d 701, 709, 108 P.2d 10, 15.

Speaking for the court in People v. Crooker, 47 Cal.2d 348, at page 353, 303 P.2d 753, at page 756, affirmed Crooker v. State of California, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448, Mr. Justice McComb stated:

"The due process clause of the Fourteenth Amendment of the Federal Constitution and article I, section 13, of the California Constitution guarantee a defendant the right to be represented by counsel in every stage of the proceedings, and deprivation of this guarantee may be a violation of the due process clause of the Fourteenth Amendment. To constitute deprivation of due process, however, the denial of the right of the accused to be represented by counsel in every stage of the proceedings must have so fatally infected the regularity of his trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice. (Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166; cf. Stroble v. State of California, 343 U.S. 181, at page 197, 72 S.Ct. 599, 96 L.Ed. 872.)

"The burden of showing unfairness and a miscarriage of justice by the denial of defendant's right to counsel in some stage in a proceeding against him rests upon the defendant. (Stroble v. State of California, supra, 343 U.S. at page 198, 72 S.Ct. at page 607.)"

People v. O'Neill, 78 Cal.App.2d 888, 179 P.2d 10, was a prosecution for robbery with prior convictions. On arraignment the public defender was appointed to represent the defendant. Later, with his counsel present, the defendant pleaded not guilty and denied the prior convictions. Several days before the day set for trial, pursuant to defendant's personal request made in open court, the public defender was relieved from further service as his counsel; and thereafter he appeared in propria persona. The court stated (78 Cal.App.2d at page 891, 179 P.2d at page 12):

"When the public defender is appointed to represent a defendant in a criminal case, he is the attorney for the accused for all purposes of the action to the same extent as an attorney regularly retained and employed by a defendant. In re Hough, 24 Cal. 2d 522, 529, 150 P.2d 448. A defendant cannot urge as a ground for reversal that the trial court failed to appoint suitable counsel to represent him where prior to the trial he appeared before the court and without apparent good reason terminated the services of the public defender who had been acting as his counsel and when the case was called for trial stated that he was ready to proceed. People v. Cortze, 108 Cal.App. 111, 112, 290 P. 1083."

[5] There is no showing of a violation of defendant's right to counsel. On the contrary, the record indicates a voluntary and intelligent waiver of the right to the aid of counsel by one who chose to represent himself rather than rely on the services of the public defender. It appears from the record of the proceedings, and defendant does not claim otherwise, that he at no time during his appearances in court after the public defender was relieved or during the trial of the case made any complaint there with respect to being deprived of the aid of counsel. The record

clearly shows that defendant was fully aware of the nature of the proceedings, that he at all times had an intelligent conception of the consequences of proceeding in propria persona, and that he did so voluntarily. After the public defender was appointed and he was arraigned, he appeared in court three times with the public defender acting as his counsel. The public defender was relieved on the day the cause was to be tried. So far as appears, he could have proceeded with the aid of the public defender. The public defender was relieved for reasons which are not apparent. Defendant has not seen fit to make the oral proceedings which took place at the time the public defender was relieved a part of the record on appeal. We must presume that the record includes all matters material to a determination of the points on appeal. Rules on Appeal, rule 52. We must assume it was at the request or with the consent of defendant for on the next day the trial proceeded with defendant acting as his own counsel. Penal Code, section 987, says that if the defendant desires and is unable to employ counsel, the court must assign counsel to defend him. It is presumed the court performed its duty in this respect. People v. Justice, 125 Cal.App.2d 572, 574, 270 P.2d 859.

The record shows that defendant fully understood the charges against him and his available defenses. Due, no doubt, to his previous encounters with the law, he was familiar with legal procedure in criminal cases. When the cause was called for trial the first time on January 16, 1958, defendant appeared in propria persona; he admitted the previous convictions; a jury was impaneled; on his motion the court declared a mistrial; the jury was discharged; and the trial was continued to the next day, January 17. When the cause was called for trial on January 17 defendant was asked: "The Court: Are you ready, Mr. O'Ward?" Defendant answered, "Yes, sir." He made no request for the appointment of an attorney or for a continuance to obtain one, and proceeded with the impanelment of a jury. Defendant cross-examined the witnesses of the prosecution intelligently, searchingly, and extensively. He bowed to the court's rulings with exceeding good grace. He called and examined three witnesses in his own behalf. He entered into a stipulation with the district attorney with respect to the testimony a fourth witness would give in his behalf if called. He did not take the stand because, as he stated to the court out of the presence of the jury, if he did the prosecutor could bring out his prior convictions. He argued his cause to the jury.

[6] On the record the only permissible conclusion is that defendant did not choose to avail himself of his right to counsel after the public defender was relieved; he was not denied the aid of counsel.

Defendant asserts that without counsel he was prejudiced because: the information containing two counts was read to the jury and at the conclusion of the evidence count I was dismissed; he was forced to trial one day after the mistrial; evidence that his former wife was attempting a "frame-up" might have been introduced in such a manner as to result in his acquittal; the record does not show that he was made aware of the charges against him, the elements of the offenses, the pleas and defenses that may have been available, or the punishment which might be imposed. We find no merit in these contentions.

[7–9] During the trial the jury was admonished and readmonished not to form any opinion on the case until it was finally submitted to them. The jury is presumed to have followed the court's admonitions, performed their duty in accordance with them, and to have given no consideration to the fact that the information originally contained two counts. People v. Sutic, 41 Cal.2d 483, 494, 261 P.2d 241. There is no showing that defendant was forced to trial the day after the mistrial was declared. Error will not be presumed on appeal. People v. Farrara, 46 Cal.2d 265, 268–269, 294 P.2d 21. It is presumed that the trial proceeded with defendant's consent and not against his wishes. People v. Justice, supra, 125 Cal.

App.2d 572, 574, 270 P.2d 859. Furthermore, when the cause was called the day after the mistrial, defendant answered that he was ready. The record reflects that defendant's claim that his former wife was attempting a frame-up was fully explored in defendant's cross-examination of the People's witnesses, in his examination of his own witnesses, in the stipulation as to the testimony of the absent witness; and he chose not to testify. There is no indication that any more evidence was available except that of defendant himself. As we have said, the record shows without question that defendant was aware of the nature of the charges against him, the elements of the offenses, and the pleas and defenses which were available to him. Defendant concedes the evidence supports the verdict. We are satisfied there was no miscarriage of justice.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



M. MAXWELL and F. Maxwell, E. B. Cnopius, J. E. Berry and F. H. Berry, R. S. Butts and Irene Butts, Zelma Butts, L. B. Grohe, S. E. Townsend and M. Townsend, R. H. Taylor and R. R. Taylor, A. J. Franchetti and G. G. Franchetti, and Pearl Finnely, Plaintiffs and Appellants,

v.

CITY OF SANTA ROSA, a municipal corporation, and H. A. Jensen, Kenneth R. Mitchell, Vincent Rafanelli, Karl Stolting, Charles P. Toohey, as members of the Council of the City of Santa Rosa, a municipal corporation, Defendants and Respondents.*

Civ. 9502.

District Court of Appeal, Third District, California.

March 2, 1959.

As Amended March 23, 1959.

Hearing Granted April 29, 1959.

Property owners' action for determination that proceedings of city council respecting assessments for proposed improvement were void. The Superior Court, Sonoma County, Lincoln F. Mahan J., entered judgment of dismissal and property owners appealed. The District Court of Appeal, Warne, J. pro tem., held that complaint alleging that city engineer and city council in determining and preparing assessment perpetrated a fraud upon property owners was sufficient to state a cause of action for mandamus.

Reversed with direction.

1. Certiorari ⇐21, 64(1)
Mandamus ⇐66, 172

Where municipal corporation with valid authority to do so holds a public hearing and makes a quasi-judicial determination with reference to matter which it is vested with power to determine, method of review is by certiorari or mandamus in which issues are limited. West's Ann.Code Civ. Proc. § 1094.5.

2. Mandamus ⇐172

Under statute relating to review of actions of municipal corporations by mandamus, inquiry is limited to determining whether or not municipal corporation has proceeded without or in excess of jurisdiction whether there has been a fair trial and whether there has been a prejudicial abuse of discretion. West's Ann.Code Civ. Proc. § 1094.5.

3. Municipal Corporations ⇐465

Where jurisdiction of city council in approving assessments for public improvement is not attacked, its decisions as to amount and apportionment of assessment are conclusive in absence of fraud or proof that action was so palpably unreasonable and arbitrary as to raise an inference of plain abuse of discretion as a matter of law.

4. Fraud ⇐41
Pleading ⇐8(15)

In determining issue of fraud factual allegations of complaint must be examined in the light of cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied

* Opinion vacated 1 Cal.Rptr. 534, 347 P.2d 678

upon to constitute fraud, and it is not sufficient to allege fraud in general terms or in terms which amount to a mere conclusion.

5. Mandamus ⇐154(4)

Complaint of property owners seeking to prevent enforcement of assessments against their lands to cover cost of improvement, and alleging that actions of city engineer and city council in determining and preparing assessments perpetrated a fraud upon property owners, was sufficient to state a cause of action in mandamus. West's Ann.Code Civ.Proc. § 1094.5.

DeMeo & DeMeo, Santa Rosa, for appellants.

Richard B. Maxwell, City Atty., and Kirkbridge, Wilson, Harzfeld & Wallace, San Mateo, for respondents.

WARNE, Justice pro tem.

This is an appeal from a judgment of dismissal entered after plaintiffs failed to amend their third amended complaint following the sustaining of a demurrer thereto.

Under the provisions of Articles I and IV of Chapter 5 of the Improvement Procedure Code of the City of Santa Rosa, the city council of said city adopted a resolution of preliminary determination and of intention to improve a portion of Pacific Avenue within the City of Santa Rosa. The resolution, a copy of which is attached to the complaint, stated that the improvements were of more than local or ordinary public benefit and that the cost and expenses thereof were to be charged upon an assessment district therein described and declared to be benefited by said improvements and that serial bonds were to be issued to represent any unpaid assessments. The resolution, among other things, directed the city engineer to make and file with the clerk of said city "a proposed assessment of the total amount of the cost and expenses of the proposed improvements upon the several subdivisions of land in said district in proportion to the estimated benefits to be received by such subdivisions, respectively, from said improvements, * * *." It is alleged in the complaint as amended that after the city engineer prepared and filed his report, a majority of the property owners within the assessment district filed protests in the matter and in the time required by the notice of improvement; that a hearing was held, but without any investigation of the matter set forth in said protests the city council overruled said protests, approved the report of the city engineer and the assessments and ordered that the work of constructing the improvements be done.

By their action plaintiffs seek a declaration that the proceedings were void and ask for an injunction to prevent enforcement of the assessments against their lands to cover the costs and expenses of said improvement. The basis of their third amendment to the complaint is that the city engineer and the city council in determining and preparing the assessment perpetrated a fraud upon plaintiffs.

[1, 2] The question before this court is whether or not the complaint states a cause of action for certiorari or mandamus. The rule is that where a municipal corporation with valid authority to do so holds a public hearing and makes a quasi judicial determination with reference to a matter which it is vested with power to determine, the method of review is by certiorari or mandamus, in which the issues are limited. Nathan H. Schur, Inc. v. City of Santa Monica, 47 Cal.2d 11, 300 P.2d 831. Under the provisions of Section 1094.5 of the Code of Civil Procedure (mandamus) the inquiry is limited to determine whether or not the respondent has proceeded without or in excess of jurisdiction, whether there has been a fair trial, and whether there was a prejudicial abuse of discretion. The section provides: "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, * * *." All of the contentions plaintiffs sought to raise are properly reviewable in mandamus. Fascination, Inc. v. Hoover, 39 Cal. 2d 260, 246 P.2d 656.

[3] Where, as here, jurisdiction of the council is not attacked, its decisions as to the amount and apportionment of the assessment are conclusive in the absence of fraud. As stated in Hannon v. Madden, 214 Cal. 251, 257, 5 P.2d 4, 6:

> "* * * Where an appeal has been taken to the council, its decision may be attacked in a legal proceeding only upon pleading and proof that the board acted fraudulently or that its action is so palpably unreasonable and arbitrary as to raise an inference of plain abuse of discretion as a matter of law. Cutting v. Vaughn, 182 Cal. 151, 187 P. 19; Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 P. 217, L.R.A. 1918E, 197; Lambert v. Bates, 137 Cal. 676, 70 P. 777; Hutchinson Co. v. Coughlin, 42 Cal.App. 664, 184 P. 435."

[4] In determining the issue of fraud, we must examine the factual allegations of the complaint in the light of the cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute the fraud. It is not sufficient to allege fraud in general terms, or in terms which amount to mere conclusions. Hannon v. Madden, supra, 214 Cal. at page 267, 5 P.2d at page 10.

Plaintiffs allege generally in the complaint as amended that the defendants have perpetrated a fraud on plaintiffs and have oppressed plaintiffs and have "fraudulently, in bad faith, arbitrarily, illegally, unjustly and unreasonably deprived them of their property and property rights, and have violated their constitutional and statutory rights." More specifically, it is alleged that the city council fraudulently and arbitrarily determined that it should pay only 25% of the estimated cost of said improvements; that no investigation was made by the city council or its duly authorized officers, including the city engineer in the preparation of his report, as to the nature and extent of any benefits or lack of benefits to the property owned by plaintiffs resulting from the intended work and improvement in determining the proposed respective assessments levied upon the properties of the plaintiff; that the city engineer fraudulently failed to perform his duty of investigation; that the city council knew that the city engineer had not made any investigation and that, although the matter was brought to the council's attention by plaintiffs' protest, the council, nevertheless, without any investigation of the matter and without considering the benefits or lack of benefits to their property, arbitrarily adopted the city engineer's report and levied assessments against plaintiffs' property for 75% of the cost of said improvements. There is the further allegation that the city engineer's report resulted in favoritism, collusion and discrimination and that plaintiffs were assessed for $53,756.88 of the estimated $62,148.69, cost of the improvement, whereas the street, being a thoroughfare and main artery of travel, gave greater benefit to the public than to the plaintiffs.

It was further alleged that the enactment of the resolution of intention was passed solely to comply with legal requirements in form only; that the members of the council had no intention of giving any consideration to protests that might be submitted; that the members have predetermined to vote the levy of the assessments; that they only intended to give a pretense of the hearing and because of their predetermination could not and did not give consideration to the protests filed; that the council had in fact instructed the engineer in advance of his report to propose a levy of assessments in accordance with the council's predetermined plan. The complaint sufficiently stated a cause of action based on fraud.

When the council refused to decide upon the merits the objections urged against the assessments, and instead thereof wilfully based its order upon illegal considerations which were inconsistent with making the assessments in proportion to the benefits to be derived from the improvements their action was arbitrary and in effect amounted to a fraud upon the rights of the plain-

tiffs. Nutting v. City of Los Angeles, 35 Cal.App. 519, 526, 170 P. 680. The action of the council deprived plaintiffs of their right to a just and fair hearing. We must here, of course, accept as true all well-pleaded allegations found in the complaint.

Defendants' principal ground of demurrer was that the complaint failed to state a cause of action and the demurrer to the complaint was apparently sustained upon that ground since the other ground, that is, that the complaint was ambiguous, unintelligible and uncertain for stated reasons, clearly has no merit. It is also apparent that the trial court did not consider the complaint a petition for a writ of mandamus or review.

The complaint in form is simply a complaint in a civil action. Plaintiffs seek a declaration that the proceedings were void and an injunction to prevent the enforcement of the assessments against their land to cover the cost of the proposed improvements. For this relief an ordinary civil action is inappropriate. As stated in Boren v. State Personnel Board, 37 Cal.2d 634, 637, 234 P.2d 981, 982:

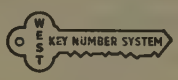
> "Since the enactment of section 1094.5 of the Code of Civil Procedure, it is no longer open to question that in this state the writ of mandamus is appropriate 'for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer * * *.'"

[5] The proceedings in the instant case, in connection with the assessment, were clearly of the type contemplated by section 1094.5 of the Civil Code of Procedure and the writ of mandamus will, therefore, lie to review the council's decision. And as further stated in Boren v. State Personnel Board, supra:

> "* * * As against a general demurrer * * * it is unimportant that plaintiff's pleading was not in form a petition for mandamus or certiorari. All that is required is that plaintiff state facts entitling him to some type of relief, and if a cause of action for mandamus or certiorari has been stated, the general demurrer should have been overruled. [Citing cases.]"

The judgment is reversed and the trial court is ordered to overrule the demurrer to the complaint as amended.

VAN DYKE, P. J., and PEEK, J., concur.



168 Cal.App.2d 206

Kent B. HOLLAND and Alex B. McLean, Plaintiffs and Respondents,

v.

MORGAN & PEACOCK PROPERTIES COMPANY, a copartnership, Amanda Hanford Morgan and Jules J. Agostini, Jr., Defendants and Appellants.

Civ. 18049.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1959.

Rehearing Denied March 27, 1959.

Hearing Denied April 22, 1959.

Action by brokers against vendors on oral agreement for sharing between brokers commission for sale of real estate. The Superior Court, County of Alameda, Thomas J. Ledwich, J., rendered judgment for the brokers and vendors appealed. The District Court of Appeal, Draper, J., held held that where vendors, representing that they were real estate agents who had written contracts with owners to sell real estate, orally agreed with brokers to divide commission if buyer was found, and sale was consummated directly between purchaser and vendors but through efforts of the brokers, although agreement was tainted with illegality because vendors were not actually licensed real estate agents, bro-

kers who did not know true licensing situation until after finding the buyer, were not barred from recovery of agreed portion of commission.

Affirmed.

See also 335 P.2d 773.

1. Appeal and Error ⇐1001(1)

In passing on question of sufficiency of evidence to support verdict and judgment, appellate court determines only whether there is substantial evidence to support judgment, resolving all conflicts and indulging all reasonable inferences in favor of conclusion of jury.

2. Brokers ⇐86(1)

In action by brokers against vendors on agreement for sharing between brokers commission for sale of real estate, evidence supported verdict for brokers.

3. Appeal and Error ⇐1002

Where witnesses differ, jury's decision is final.

4. Brokers ⇐66

Statute of frauds does not apply to contract between brokers for sharing of commissions. West's Ann.Civ.Code, § 1624, subd. 5.

5. Brokers ⇐66

Where vendors, representing to brokers that they were real estate agents who had written contracts with owners to sell real estate, made oral agreement with brokers to divide commission if brokers "were to come up with" buyer and received material profits from sale of the real estate through the efforts of the brokers, statute of frauds would permit recovery by the brokers under the agreement. West's Ann.Civ.Code, § 1624, subd. 5.

6. Brokers ⇐66

Where vendors, representing that they were real estate agents who had written contracts with owners to sell real estate, orally agreed with brokers to divide commission if brokers "were to come up with" buyer and sale was consummated directly between purchaser and vendor but through efforts of the brokers, although the agreement was tainted with illegality because vendors were not actually licensed real estate agents, brokers, who did not know of true licensing situation until after rendering their services, were not barred from recovery of agreed portion of commission.

7. Contracts ⇐139

Where illegality of contract is due to facts of which one party is justifiably ignorant and the other party is not, illegality does not bar recovery by innocent party of compensation for performance rendered while he remains justifiably ignorant of facts establishing illegality.

8. Contracts ⇐139

Although there is no estoppel to prove illegality of contract, misrepresentation to innocent party may be important to show justification for innocent party's ignorance of facts establishing illegality.

9. Licenses ⇐39.1

Where illegality of contract consists in failure to secure license, and transaction has been wholly consummated as concerns parties designed to be protected by the licensing statute, culpable party cannot rely upon licensing requirement to retain proceeds of transaction and avoid payment to innocent party.

10. Brokers ⇐86(1)

In action by brokers against vendors on oral agreement for sharing between brokers commission for sale of real estate, evidence produced by brokers which negatived brokers' claim did not require judgment to be entered against the brokers. West's Ann.Code Civ.Proc. § 2049.

11. Evidence ⇐591

Jury is not bound by evidence which is introduced by party and which negatives his claim. West's Ann.Code Civ.Proc. § 2049.

12. Brokers ⇐86(1)

In action by brokers against vendors on oral agreement for sharing between brokers commission for sale of real estate, even if rule that introduction by claimant of any evidence negativing his claim re-

quires judgment to be rendered against the claimant was sound, the rule would not be applied where brokers introduced affidavits of vendors for impeachment purposes only. West's Ann.Code Civ.Proc. § 2049.

13. Conspiracy ⇐19, 21

In action by brokers against vendors on oral agreement for sharing between brokers commission for sale of real estate, where inducement of breach of the agreement was actionable wrong under circumstances alleged, admission of evidence of conspiracy to breach the agreement and giving of instructions on conspiracy was proper.

Wm. H. Neblett, Los Angeles, R. Arthur Bellman, Berkeley, for appellants.

Bernard Allard, Fernhoff & Wolfe, Oakland, for respondents.

Leon G. Seyranian, Richard G. Logan, Oakland, of counsel.

DRAPER, Justice.

Plaintiffs brought this action upon an oral agreement for the sharing between brokers of commissions upon the sale of real estate. Judgment was entered on jury verdict in favor of plaintiffs for $53,791.66. Defendants appeal.

[1] Appellants urge insufficiency of the evidence to support verdict and judgment. In passing upon this contention an appellate court determines only whether there is substantial evidence to support the judgment, resolving all conflicts and indulging all reasonable inferences in favor of the conclusion of the jury. Tidlund v. Seven Up Bottling Co., 154 Cal.App.2d 663, 665, 316 P.2d 656. So viewed, the record discloses evidence that: Appellants represented to respondents that appellants were real estate brokers and had written contracts with the owners to sell extensive properties. They agreed to pay respondents half the commissions if respondents "were to come up with" a buyer. Respondents submitted the properties to one Stevens by letter dated December 1, 1954, and thereafter communicated with him further by letter and telephone. Early in February, 1955, at the insistence of appellant Agostini, respondents disclosed to him the name of Stevens. In March, Agostini told respondents that an offer on these properties had been made "out of the clear blue sky," but that certain conditions would have to be met. Respondents kept Agostini advised of their continued interest until October, when they read newspaper stories that the properties had been sold to Stevens. In fact, the properties were sold to a corporation formed by Stevens, who provided the major part of the financing. Although agreement of purchase dated February 28 is in the name of one Clodfelter, it is signed by him as "agent." There is also evidence that appellants, on February 28, agreed to sell their real estate business to Clodfelter (who again signed as "agent") for a specified price which was substantially increased by agreement of September 15, although there is no showing of increased value of the business. It is respondents' theory that this increased price was a hidden commission to appellants.

There is evidence that Clodfelter had telegraphed an offer and placed a deposit in escrow January 19. However, the deposit was not paid to appellants until execution of the agreement of February 28, at which time Clodfelter did not again sign individually, but designated himself as "agent." The jury was not required to believe that Clodfelter was acting for Stevens before respondents' disclosure of Stevens' name to appellants. In view of the extensions of time for payment granted to Clodfelter, and the fact that the ultimate sale was to Stevens, who supplied the major financing, the jury could infer that appellants, after the initial Clodfelter offer, brought Stevens into the transaction as the real buyer.

[2, 3] The evidence briefly summarized above is sufficient to support the verdict. There is much conflicting evidence, but

"[w]here witnesses differ, under our system, the jury's decision is final. It appears futile to repeat this statement which, though it runs through the decisions like a monotonous refrain, seems never to reach the consciousness of attorneys for appellants." Lovelady v. Sacramento City Lines, 102 Cal.App.2d 28, 29, 226 P.2d 722, 723. Our conclusion that the evidence is sufficient disposes of appellants' claims of error in denial of their motions for nonsuit, directed verdict, judgment notwithstanding the verdict, and for new trial.

[4, 5] Appellants also contend that the contract is within the statute of frauds (Civ.Code, § 1624, subd. 5) and, since admittedly oral, is therefore invalid. But the rule is clear that the statute does not apply to a contract between brokers for the sharing of commissions. Gorham v. Heiman, 90 Cal. 346, 27 P. 289; and cases cited in 9 Cal.Jur.2d, Brokers, § 38, p. 182. Furthermore, the jury impliedly found that appellants here had in fact received material profit from the sale of their principals' property through the efforts of respondents. In such case, the statute permits recovery. Jenkins v. Locke-Paddon Co., 30 Cal.App. 52, 57, 157 P. 537.

But appellants point to the fact that only appellant Morgan is a licensed real estate broker. Appellant Agostini is licensed as a salesman, and their partnership has no separate license. To the extent that enforceability of their contract with respondents depends upon their acting as brokers it is, they contend, illegal, and therefore void. But there is testimony that the individual appellants represented to respondents, at the outset, that they and their partnership were licensed brokers, who had written contracts from the owners of the properties they sought to sell. Under the instructions, the jury impliedly found that these representations were in fact made. There is evidence that respondents did not know the true licensing situation until after their services were rendered.

[6–9] Thus respondents come within a recognized exception to the rule barring recovery upon contracts tainted with illegality. Where the illegality is due to facts of which one party is justifiably ignorant and the other party is not, the illegality does not bar recovery by the innocent party of compensation for performance rendered while he remains justifiably ignorant of the facts establishing illegality. While there is no estoppel to prove illegality, misrepresentation to the innocent party may be important as showing justification for his ignorance of the facts establishing illegality. Rest., Contracts, § 599; 6 Corbin on Contracts, § 1538; 5 Williston on Contracts (Rev.Ed.), § 1631; see also Marshall v. LaBoi, 125 Cal.App.2d 253, 270 P.2d 99; Lewis v. Wainscott, 124 Cal.App.2d 345, 268 P.2d 835. Also relevant is the rule that where the illegality consists in the failure to secure a license and the transaction has been wholly consummated as concerns the parties designed to be protected by the licensing statute, the culpable party cannot rely upon the licensing requirement to retain the proceeds of the transaction and avoid payment to the innocent party. Norwood v. Judd, 93 Cal.App.2d 276, 209 P.2d 24; Denning v. Taber, 70 Cal.App.2d 253, 160 P.2d 900. We are satisfied that to permit recovery under the circumstances of this case is consistent with the purpose of the statute, and that to deny recovery would unreasonably enrich appellants by leaving them in possession of gains which the jury has found to stem from misrepresentations by them.

Appellants also argue that they were part owners of the land sold, and that thus their agreement with respondents was one between owners and brokers. But the issue of appellants' ownership was for the jury. There is evidence that they represented themselves to be brokers acting for the owners under a written contract. The jury was not required to believe their testimony that they in fact were part owners. It is also contended that respondents in fact were partners doing business under a partnership name but without separate license to the partnership. The evidence does not support this view.

[10–12] Throughout appellants' treatment of the facts runs the contention that respondents are "bound by" testimony which they produced. Thus, it is argued, if any evidence produced by respondents negatives their claim, judgment must go against them. This is a common misconception. In the earliest days of trial, it had some merit (3 Wigmore on Evidence (3d Ed.), § 896), but it is no longer sound (3 Wigmore, supra, § 897). It is clear that such evidence does not bind the jury, which is charged to determine the truth on all the evidence. The principal effect of the rule in modern law is to prohibit impeachment of one's own witness in certain ways. Code Civ.Proc., § 2049; Lantz v. Stribling, 130 Cal.App.2d 476, 482, 279 P.2d 112; Worthington v. Peoples' State Bank, 106 Cal.App. 238, 241, 288 P. 1086. Further, appellants' reliance for testimony "binding on" respondents is upon affidavits of appellants introduced by respondents for impeachment purposes only. Even if the rule for which appellants contend were sound, it would lead to absurdity to apply it to such documents.

[13] Appellants assert error in the admission of evidence and the giving of instructions upon conspiracy. They apparently contend that no unlawful act is alleged to have been done in furtherance of the conspiracy. But inducement of breach of contract is, under the circumstances alleged in the complaint, an actionable wrong. Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867; Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631. The pleading of conspiracy is adequate. California Auto Court Ass'n v. Cohn, 98 Cal.App.2d 145, 219 P.2d 511.

The other instructions complained of were consonant with the rules of law discussed above, and appellants' present objections to them are without merit.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

168 Cal.App.2d 212

Kent B. HOLLAND and Alex B. McLean, Plaintiffs and Respondents,

v.

MORGAN & PEACOCK PROPERTIES COMPANY, a copartnership, Amanda Hanford Morgan and Jules J. Agostini, Jr., Defendants and Appellants.

Civ. 18035.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1959.

Rehearing Denied March 27, 1959.

Hearing Denied April 22, 1959.

Action by brokers against vendors on oral agreement for sharing between brokers commissions for sale of real estate. The Superior Court, Alameda County, Donald K. Quayle, J., denied motion to set aside judgment for brokers as void, and vendors appealed. The District Court of Appeal, Draper, J., held that where at outset of pretrial conference, brokers orally dismissed as to title company joined as a defendant, and after pretrial but before trial brokers filed formal written request for dismissal, the action against the company was terminated at outset of pretrial conference and fact that pretrial judge and trial judge were stockholders and directors of the company did not make judgment in favor of brokers void.

Affirmed.

1. Dismissal and Nonsuit ⇐67

Request for dismissal in open court and order thereon is as effective as written request to dismiss specified by statute. West's Ann.Code Civ.Proc. § 581, subd. 1.

2. Judges ⇐43

In action by brokers against vendors on oral agreement for sharing between brokers commission for sale of real estate, where at outset of pretrial conference, brokers orally dismissed as to title company joined as a defendant, and after pretrial but before trial brokers filed formal written request for dismissal, the action against the company was terminated at outset of

pretrial conference, and fact that pretrial judge and trial judge were stockholders and directors of the company did not disqualify them or invalidate judgment. West's Ann.Code Civ.Proc. §§ 170, subds. 1, 2, 581, subd. 1.

3. Brokers ⇐82(4)

In action by brokers against vendors on oral agreement for sharing between brokers commission for sale of real estate, where answer admitted the brokers were licensed, but after judgment for the brokers, vendors for first time raised issue of whether the brokers were properly licensed by filing with trial court affidavit which showed brokers' license had been suspended but which did not show whether the suspension continued up to date of the oral agreement, brokers did not have burden of proving at trial as prerequisite of recovery that their license was restored before date of the agreement.

Wm. H. Neblett, Los Angeles, R. Arthur Bellman, Berkeley, for appellants.

Bernard Allard, Fernhoff & Wolfe, Oakland; Leon G. Seyranian, Richard G. Logan, Oakland, of counsel, for respondents.

DRAPER, Justice.

Judgment in this action was affirmed this day in No. 18049. Cal.App., 335 P.2d 769. After entry of judgment and denial of motions for judgment notwithstanding the verdict and for new trial, appellants moved (Code Civ.Proc., § 473) to set aside the judgment as void. In addition to their appeal from the judgment (No. 18049), they appeal separately from the order denying this motion.

Upon the appeal from the judgment we have held that the agreement of the parties was not required to be in writing and was not illegal. This disposes of appellants' claim that the judgment is void because based upon an invalid or illegal contract.

[1,2] However, appellants also assert that the judgment is void because the pretrial judge and the trial judge were stockholders and directors of a title company which was joined as a defendant. This contention was first asserted in affidavits supporting the present motion, made after judgment. The point is without merit. It appears that at the outset of the pretrial conference, plaintiffs-respondents dismissed as to the title company. Formal written dismissal was filed before trial, but some 12 days after the pre-trial conference. However, the written request to dismiss specified by the code (Code Civ.Proc., § 581(1)) is not a mandatory or exclusive means of dismissal. Request in open court, and order thereon, is equally effective. Richards & Knox v. Bradley, 129 Cal. 670, 62 P. 316; McDonald v. California Timber Co., 2 Cal.App. 165, 83 P. 172. Thus the action was terminated as to the title company at the outset of the pre-trial conference. The only grounds of disqualification urged are personal or financial interest. Code Civ.Proc., § 170, subds. 1, 2. In view of the dismissal, no such interest appears.

[3] Appellants also filed an affidavit alleging that the broker's license of respondent McLean and that of McLean & Holland, a partnership, were suspended September 17, 1954. However, there is no showing that the suspension continued to November 15, 1954, the date of the oral contract upon which respondents' action is based. Even if the trial court were required to accept the allegations of this affidavit as true (a point which we do not decide) it fails wholly to show that either respondent was unlicensed at the time of the agreement. Appellants' answer admitted that respondents were licensed brokers. No issue of their licensing was made until after judgment. Thus there is no merit in appellants' present contention that respondents in some way had the burden of anticipating this post-judgment attack, and of proving at trial that the licenses had been restored before November 15. In this state of the record, it is unnecessary to determine whether a showing, after judgment, that respondents were unlicensed at the time of the contract would render

the judgment void within the meaning of Section 473.

Order affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



168 Cal.App.2d 342

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Raymond Noble CLARKE, Defendant and Appellant.

Cr. 2918.

District Court of Appeal, Third District, California.

March 3, 1959.

Prosecution for burglary in the second degree. The Superior Court, Modoc County, Bertram D. Janes, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Schottky, J., held that where record indicated that defendant was fully informed of all his constitutional rights, and that he freely and voluntarily waived his rights to counsel and to a jury trial and entered a plea of guilty, there was no merit to defendant's appeal and his conviction would be affirmed.

Judgment affirmed.

1. Criminal Law ⇐273

A plea of guilty is an admission of a defendant's guilt and of every element of the offense charged and the degree of the crime.

2. Criminal Law ⇐1182

Record on defendant's appeal from judgment of conviction for second-degree burglary indicated that defendant was fully informed of all his constitutional rights and that he freely and voluntarily waived his rights to counsel and to a jury trial, and entered a plea of guilty; his appeal was without merit, and his conviction would be affirmed.

Harry A. Ackley, Woodland, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

SCHOTTKY, Justice.

Appellant Raymond Noble Clarke was charged jointly with several other defendants with the crime of burglary in the second degree. Upon being arraigned he entered a plea of guilty. Probation was denied and judgment was pronounced. Thereafter he filed notice of appeal. Upon appellant's request for counsel to assist him on appeal this court appointed Mr. Harry A. Ackley of the Yolo County Bar. Mr. Ackley has informed this court that after a careful study of the record and a personal interview with appellant at San Quentin Prison it is his opinion that there is no merit to the appeal. After an examination of the record we agree with Mr. Ackley's conclusion.

The record discloses that appellant was accused of participation in a burglary of Casey's Club, a bar and restaurant in the town of Adin, which is located in Modoc County. The record discloses further that appellant was informed of his right to counsel which he refused; that the information was read to him; that he entered a plea of guilty to the charge; that he was told of his right to a jury trial; that he was asked a second time if he wished to enter a plea of guilty; that he answered yes; and that the court accepted his plea.

[1] A plea of guilty is an admission of defendant's guilt and of every element of the offense charged and the degree of the crime. People v. Mendietta, 101 Cal.App. 2d 788, 226 P.2d 34.

[2] The record indicates clearly that appellant was fully informed of all his constitutional rights and that he freely and voluntarily waived his rights to counsel and to a jury trial.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

Grace N. MULLEN, Plaintiff, Respondent and Appellant,

v.

Margaret BRUCE, Defendant, Appellant and Respondent.

Civ. 5954.

District Court of Appeal, Fourth District, California.

March 6, 1959.

Rehearing Denied March 30, 1959.

Hearing Denied April 29, 1959.

Action against sanitarium patient who was suffering from alcoholism and who was in delirium tremens on the night that she assaulted and injured plaintiff, her special duty nurse. The Superior Court of Orange County, Royal A. Hubbard, J., gave judgment for plaintiff for $3,500. The defendant appealed. The plaintiff also appealed on the ground that damages awarded were insufficient. The District Court of Appeal, Griffin, P. J., held that the question whether the patient had sufficient capacity to intend violent conduct essential to the commission of battery was a question for trial judge sitting without jury.

Affirmed.

1. Drunkards ⇐7

Sanitarium patient who was suffering from alcoholism and who was in delirium tremens on the night that she assaulted her nurse was "person of unsound mind" within statute providing that person of unsound mind is civilly liable for a wrong done by him but is not liable in exemplary damages unless at time of the act he was capable of knowing that it was wrongful. West's Ann.Civ.Code, § 41.

See publication Words and Phrases, for other judicial constructions and definitions of "Person of Unsound Mind".

2. Infants ⇐59, 64

Mental Health ⇐411, 415

The statute providing that a minor or person of unsound mind is civilly liable for a wrong done by him but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful is a codification of the common-law rule. West's Ann.Civ.Code, § 41.

3. Assault and Battery ⇐42

In action against sanitarium patient who was suffering from alcoholism and who was in delirium tremens on the night she assaulted and injured plaintiff, her special duty nurse, the question whether patient had sufficient capacity to intend the violent conduct essential to the commission of battery was a factual question for trial court sitting without jury. West's Ann. Civ.Code, § 41.

4. Infants ⇐59

An infant is liable for his torts even though he lacks the mental development and capacity to recognize the wrongfulness of his conduct so long as he has the mental capacity to have the state of mind necessary to the commission of the particular tort with which he is charged. West's Ann.Civ.Code, § 41.

5. Assault and Battery ⇐42

In action against sanitarium patient who was suffering from alcoholism and who was in delirium tremens on the night that she assaulted and injured plaintiff, her special duty nurse, the evidence was sufficient to raise question for trial court sitting without jury as to whether plaintiff assumed the risk.

6. Assault and Battery ⇐26

In action against sanitarium patient who was suffering from alcoholism and who was in delirium tremens on the night she assaulted and injured plaintiff, her special duty nurse, the patient had the burden of proving that plaintiff assumed the risk.

7. Assault and Battery ⇐35

In action against sanitarium patient who was suffering from alcoholism and who was in delirium tremens on the night that she assaulted and injured plaintiff, her special duty nurse, evidence sustained finding that patient's act was the proximate cause of nurse's injuries.

8. Assault and Battery ⇐40

In action against sanitarium patient who was suffering from alcoholism and

who was in delirium tremens on the night that she assaulted and injured plaintiff, her special duty nurse, evidence disclosing that the nurse was knocked to the floor and that she suffered a severe fracture of the shoulder and the upper part of the humerus and that the nurse contracted considerable medical, X-ray and other bills in effecting a recovery and lost considerable time from future employment supported award of $3,500 special damages. West's Ann.Code Civ.Proc. § 53.

Rimel & Johnston, Santa Ana, for plaintiff, respondent and appellant.

Jacobs, Jacobs, Hayden & Nelson, Santa Ana, for defendant, appellant and respondent.

GRIFFIN, Presiding Justice.

Plaintiff Grace N. Mullen filed this action against defendant Margaret Bruce alleging generally that on January 25, 1955, defendant assaulted her and negligently caused her to fall to the floor and that she suffered a fractured right shoulder and sustained multiple bruises. General damages in the sum of $30,000 and special damages in the sum of $3,371.50 are alleged. After denial of these allegations, defendant alleges, by way of defense, assumption of risk by plaintiff and unlawful restraint of defendant by plaintiff. The trial court, sitting without a jury, gave judgment for plaintiff for $3,500. Defendant appeals from the judgment on the ground the evidence conclusively shows: (1) implied consent or assumption of risk on plaintiff's part; (2) that the injuries sustained by plaintiff were not proximately caused or the direct result of the assault upon her by defendant. Plaintiff appeals on the ground that the damages awarded were insufficient as a matter of law, and seeks to have this court, under section 53 of the Code of Civil Procedure, fix plaintiff's damages in a reasonable amount and to direct the trial court to enter judgment accordingly.

The material facts are brief and little, if any, conflict is noted. Plaintiff was a registered nurse and was called at about 11 P. M. of the night in question for special duty by the Santa Maria Convalescent Home or sanitarium to take care of defendant, a patient, who was there suffering from alcoholism. On entering the sanitarium she went to the desk, received her orders, and noticed the patient's chart. She was informed that the patient was in delirium tremens; that she would probably have a rough night with her; that she was violent and unmanageable; and that the nurse did not envy her position. When plaintiff arrived in the patient's room defendant was in a bed with the side rails up. Later that night the patient requested to go to the bathroom. Plaintiff allowed her to do so. Thereafter, the patient insisted she was going home in her gown. She was carrying her cosmetic bag (size about 8"x10"x15"). After some encounter she was coaxed back to her bed by a priest. Her attending doctor was called and he administered medication (5 per cent alcohol intravenously over a period of several hours). Early in the morning the patient manifested great disturbance and asked to be allowed to go to the bathroom again. In the course of her tour, dressed in her gown, barefooted, and carrying her cosmetic bag, she again insisted on going home. The patient struggled with plaintiff in her attempt to carry out her threat, and plaintiff endeavored to restrain her by grasping her left wrist and holding onto the door jam. The patient jerked and shoved her and did, or endeavored to, strike her with the cosmetic bag. In the struggle defendant tripped plaintiff and in some fashion she was knocked to the floor and suffered a severe fracture of the shoulder and the upper part of the humerus. By other assistants defendant was subdued and replaced in her bed. Plaintiff was taken to the hospital and later contracted considerable medical, X-ray and other bills in effecting a recovery, and lost considerable time from future employment.

Plaintiff stated that after the first encounter and also after the second one she was of the opinion that defendant acted

irrational and was unaccountable. At the trial defendant testified she did not remember being at the sanitarium and did not remember any such fracas or injury to plaintiff.

The trial court found generally that defendant assaulted plaintiff and caused her injury which was permanent in nature; that plaintiff did not assume the risk incident to caring for defendant and was not contributorily negligent; that plaintiff did not unlawfully or illegally restrain defendant nor assault her but on the contrary was acting in accordance with the obligation she had assumed toward defendant in attempting to care for her. Judgment was entered accordingly.

[1, 2] Section 41 of the Civil Code provides: "A minor, or person of unsound mind, of whatever degree, is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful." That defendant was of unsound mind, to a certain degree, at the time, cannot be well disputed. She would therefore be a person coming within the provisions of said section. A child of the age of four years, charged in a civil action with battery, was held to come within the provisions of this section. Ellis v. D'Angelo, 116 Cal.App.2d 310, 253 P.2d 675. See also Singer v. Marx, 144 Cal.App.2d 637, 301 P.2d 440. Section 41, supra, is a codification of the common-law rule. Ross v. York, Tex.Civ.App., 233 S.W.2d 347; Elliott v. Sternberg, Sup., 61 N.Y.S.2d 73. No California case is cited involving civil liability for battery, tortious conduct, or the negligence or wrong done by a person of unsound mind. In McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760, it appears that for over a period of some 14 months a nurse had been employed to care for the defendant, an insane person. Occasionally the defendant had violent spells. On the occasion when plaintiff was injured the defendant was breaking furniture. Plaintiff approached her and was struck by her with one of the furniture legs. In disposing of the question 8 N.E.2d at page 762, the court said:

> "Turning to authorities elsewhere, we find that courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts. As a rule no distinction is made between those torts which would ordinarily be classed as intentional and those which would ordinarily be classed as negligent * * *." Then 8 N.E. 2d at page 763, it is said:
>
> "We think that the danger of actual physical injury was not, *as a matter of law*, plain and obvious up to the time when the plaintiff entered the room on the occasion of the assault. But by that time an emergency had been created. The defendant was breaking up the furniture, and it could have been found that the plaintiff reasonably feared that the defendant would do harm to herself. Something had to be done about it. The plaintiff had assumed the duty of caring for the defendant. We think that a reasonable attempt on her part to perform that duty under the peculiar circumstances brought about by the defendant's own act did not necessarily indicate a voluntary consent to be injured. Consent does not always follow from the intentional incurring of risk."

[3, 4] There seems to be no apparent distinction in principle between such a person and a four-year-old child insofar as it bears on the question here involved. In Ellis v. D'Angelo, supra, it was held that section 41 indicates clearly that the legislature intended that a minor or person of unsound mind should be liable in compensatory damages for his tortious conduct even though he was not capable of knowing the wrongful character of his act at the time he committed it. Whether the defendant had sufficient capacity to intend the violent conduct essential to the commission of battery was a factual question for the trial judge. An infant is liable for his torts even though he lacks the mental development and capacity to recognize the wrong-

fulness of his conduct so long as he has the mental capacity to have the state of mind necessary to the commission of the particular tort with which he is charged. The finding of the trial court in this respect has evidentiary support.

[5] It cannot be said, from the evidence, as a matter of law, that plaintiff assumed the risk which here resulted in her injury. This was a factual question for the determination of the court. Ching Yee v. Dy Foon, 143 Cal.App.2d 129, 138, 299 P.2d 668; DeGraf v. Anglo California National Bank, 14 Cal.2d 87, 101, 92 P.2d 899.

Plaintiff, when first called, was not informed of any danger that might result in accepting the assignment. She was registered at this sanitarium as being subject to call for private duty. When informed of the fact at the sanitarium that defendant patient had delirium tremens she could have refused the case but this may well have affected her standing with the sanitarium and medical profession in the future, respecting other calls. She had been called to duty at that santarium on previous cases for the care of such patients without being assaulted, and she may well not have realized, from what was told her, that she would be thus treated if she accepted the professional duty assigned to her.

In Ching Yee v. Dy Foon, supra [143 Cal. App.2d 129, 299 P.2d 673], it was held that an instruction there given on this subject was proper. It was there said:

> "First, the person in question must have actual knowledge of the danger. Second, she must have freedom of choice. This freedom of choice must come from circumstances that provide her a reasonable opportunity, without violating any legal or moral duty, to safely refuse to expose herself to the danger in question."

[6] This question was one of fact and was specifically decided against the defendant. See also 35 Cal.Jur.2d 814, sec. 266. The burden of proof of assumption of risk was on defendant. Kreitzer v. Southern Pacific Co., 38 Cal.App. 654, 177 P. 477.

[7] The finding that the act of defendant was the proximate cause of plaintiff's injuries has sufficient evidentiary support.

[8] Plaintiff's claim that the judgment awarded was insufficient as a matter of law is not meritorious. The question was one of fact for the determination of the trial court and the evidence supports the finding.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.



168 Cal.App.2d 472

Application of Emery Tilghman NEWBERN for a Writ of Habeas Corpus.

Cr. 6589.

District Court of Appeal, Second District, Division 1, California.

March 6, 1959.

Proceeding in habeas corpus wherein petitioner sought release from city jail in which he was held after conviction upon his plea of guilty to charge of being drunk in a public place. The District Court of Appeal held that where only manner in which petitioner was informed of his right to counsel, if he was so informed, was by virtue of a statement made by a deputy city public defender who spoke from a microphone to prisoners confined in four tanks adjacent to a municipal courtroom on the morning prior to time court convened, and informed them of their right to an attorney of their own choosing, or if they were unable to employ counsel of their own choosing that the public defender would represent them, such statement did not and could not constitute performance of obligation placed by the constitution and statutes upon the court to advise a defendant of his right to counsel, and petitioner who was not so informed by the court was de-

prived of his constitutional rights, and judgment of conviction was void.

Judgment annulled and matter remanded with instructions.

1. Criminal Law ⇐1208(4)

A judgment of banishment either from the state or from one part of the state is void as against public policy.

2. Drunkards ⇐11

Habeas Corpus ⇐30(3)

A judgment of conviction for violation of section of Los Angeles Municipal Code proscribing being drunk in a public place, consisting merely of a sentence to 180 days, the maximum penalty, with a 5-day stay of execution of that judgment, was within the jurisdiction of the court and was not subject to attack in a habeas corpus proceeding on ground that such judgment in effect was a judgment of banishment.

3. Municipal Corporations ⇐641

Difficulties with which a municipal court is faced in handling tremendous volume of cases of public drunkenness which arise in a city cannot and does not justify adoption of procedure of staying a judgment and in conveying the impression to a prisoner that he is banished from the state, and that the stayed sentence will not be imposed as punishment for the misdemeanor committed but as a punishment that will be inflicted upon him should he exercise his right to remain an inhabitant of the state.

4. Habeas Corpus ⇐102

Despite presumption that in preparing abstract of docket of a municipal court official duty was regularly performed, and although the record may not be impeached in a collateral habeas corpus proceeding, where constitutional rights of a petitioner for habeas corpus were involved, District Court of Appeal could look to the entire record to ascertain the meaning of a docket entry stating that defendant, in court duly arraigned, was informed of all his legal rights. West's Ann.Code Civ.Proc. § 1963, subd. 5.

5. Criminal Law ⇐641(1)

A defendant's right to counsel of his own choosing is one granted by both the state and federal Constitutions, and it is the duty of the court to protect this right and that duty it cannot delegate to others.

6. Criminal Law ⇐641(1)

Obligation of the court to perform duty of advising a defendant of his right to counsel cannot be fulfilled by a statement by an unseen and unknown person over a public address system by one not authorized either to advise prisoners or to act upon any request made by them. West's Ann. Pen.Code, § 987.

7. Criminal Law ⇐641(1)

Where only manner in which petitioner was informed of his right to counsel, if he was so informed, was through a statement made by a deputy city public defender, who spoke from a microphone to prisoners confined in four tanks adjacent to a municipal courtroom on the morning prior to time court convened, and informed them of their right to an attorney of their own choosing, or if they were unable to employ counsel of their own choosing that the public defender would represent them, such statement did not and could not constitute performance of obligation placed by the Constitution and statutes upon the court to advise a defendant of his right to counsel, and petitioner who was not so informed by the court was deprived of his constitutional rights, and judgment of conviction was void. West's Ann.Pen.Code, § 987.

Earl Klein, Los Angeles, for petitioner.

Roger Arnebergh, City Atty., Philip E. Grey, Asst. City Atty., and Wm. E. Doran, Deputy City Atty., Los Angeles, for respondent.

PER CURIAM.

By means of habeas corpus the petitioner seeks his release from custody after conviction upon his plea of guilty of a misdemeanor, the violation of section 41.27(a) of

the Los Angeles Municipal Code (drunk in a public place). In support of his petition for release he asserts that the judgment rendered was in excess of the jurisdiction of the court in that it was in effect a judgment of banishment and that prior to his arraignment and plea of guilty he was not advised of his constitutional rights to counsel or given the opportunity to select counsel of his own choice.

As shown by the uncontroverted allegations of the petition and the affirmative allegations of the return, the facts are: On December 21, 1958, petitioner was arrested in the city of Los Angeles for violation of the ordinance above mentioned; after his arrest he was confined in the Lincoln Heights city jail; while so confined he suffered an epileptiform-type seizure; on the morning of December 22 there were in excess of 200 prisoners confined in 4 tanks adjacent to the courtroom of Division 58 of the Municipal Court of the Los Angeles Judicial District; on that morning prior to the time court had convened a deputy city public defender inspected the tanks in which these prisoners were confined and who were to be arraigned that morning; that he determined to his satisfaction that all the prisoners were awake and attentive. He then spoke from a microphone in the corridor of the jail addressing the prisoners confined in the 4 tanks and advised them of their right to a speedy and public trial, reasonable bail and that they were entitled to be represented by an attorney of their own choosing or if they were unable to employ counsel of their own choosing they could so inform the judge and that he, the public defender, would represent them. He further advised that they would be granted a continuance for that purpose. Thereafter he informed the clerk of the court that he was ready to proceed with the arraignments.

There is some conflict in the evidence before this court as to whether the petitioner was at the time the prisoners in the tanks were addressed by the public defender, confined in one of those tanks, or was, due to his illness, confined in the detention room off the booking office of the jail and in which there was no loud speaker connected with the public address system which the public defender used in advising the prisoners. In view of the conclusion we have reached as hereinafter stated, it is unnecessary for us to resolve this conflict.

Upon being arraigned before the court the following occurred: The prisoner asked the court if he pleaded guilty to the charge, if there was any chance of his being with his mother for Christmas, whereupon the judge asked: "Where is she?" And petitioner answered: "In Oklahoma City, Oklahoma." And the judge then advised: "Perhaps there is. Is your plea guilty to this charge?" And the prisoner answered: "Yes sir, guilty." The court then addressed the petitioner as follows: "This document I have just signed is an order directing the Chief of Police to commit you to jail for a period of 180 days. However, there will be a five-day stay of execution in this matter, which means that you will be released now to get out of this state. This court warns you, however, that you had better get out of this state and stay out. You will be a fugitive from Justice, and while we will not extradite you from any other state on this, if you ever again set foot in the state of California, you are going to spend 180 days in jail just as surely as your name is Emery Newbern." Petitioner left the state but returned and on January 28, 1959, was arrested under a bench warrant and confined pursuant to the judgment rendered by the court on December 22, 1958. He is now confined pursuant to that judgment. It is apparent from the record before us that the petitioner is a chronic alcoholic and has suffered numerous arrests for drunkenness.

The judgment of the municipal court as set forth in the transcript of the docket of that court, which is a part of the record here, does not reflect the language used by the court in sentencing the petitioner but is only that the petitioner be imprisoned in the city jail of Los Angeles county for 180 days and that the judgment be stayed for

five days; the defendant to be released on his own recognizance. Neither does the commitment under the authority of which the petitioner was held in custody by the chief of police contain any reference to the petitioner leaving the state and not returning thereto, but only recites the fact that petitioner was to be imprisoned for 180 days.

[1, 2] It has long been the law of this state that a judgment of banishment either from the state or from one part of the state is void as against public policy. In re Scarborough, 76 Cal.App.2d 648, 173 P.2d 825; People v. Lopez, 81 Cal.App. 199, 253 P. 169. The court in the present case, however, was careful to so word its judgment as to not make it subject to attack as one of banishment. The judgment consists of merely a sentence to 180 days (the maximum penalty) with 5 days stay of execution of that judgment and as such it was one within the jurisdiction of the court and is not subject to attack in this proceeding.

[3] We do not wish to be understood as approving the actions of the trial judge in pronouncing sentence. The language used by him in sentencing the prisoner was such as to convey the impression to the prisoner that he was banished from the state and that the sentence of 180 days was not imposed as punishment for the misdemeanor committed but as a punishment that would be inflicted upon him should he exercise his right to remain an inhabitant of the state. We are advised by counsel for respondent that in sentencing the prisoner in the manner above related, the trial judge was but following an established routine or custom. If that be true the custom is not founded in law but is based solely upon someone's arbitrary view as to how offenders against an ordinance such as the one involved here should be punished. We are cognizant of the great burden placed upon the municipal court in handling the tremendous volume of cases of this character which arise in this densely populated area, but the difficulties with which the court is faced cannot and do not justify the adoption of procedures which are designed to evade the law of this state as to judgments of banishment even though the form of the judgment rendered thereunder may comply with the law. Such a procedure can only tend to cast reflection upon the administration of justice.

[4] The abstract of the docket of the municipal court which is a part of the record here states: "Defendant in court duly arraigned, informed of all his legal rights." The presumption is that in preparing this record official duty was regularly performed (Code Civ.Proc. § 1963, subd. 15), and while this record may not be impeached in this collateral proceeding (In re Connor, 16 Cal.2d 701, at page 708, 108 P.2d 10, at page 14), the constitutional rights of the petitioner being involved we may look to the entire record to ascertain the meaning of the entry. In re Bell, 19 Cal.2d 488, at pages 501–504, 122 P.2d 22, at pages 30–31; In re McVickers, 29 Cal.2d 264, at page 273, 176 P.2d 40, at page 46; Wilde v. Superior Court, 53 Cal.App.2d 168, at pages 174–176, 127 P.2d 560, at pages 563–564; In re Gutierrez, 122 Cal.App.2d 661, at page 663, 265 P.2d 16, at page 17. The entry in the docket does not state how, when or in what manner or means the defendant was informed of his constitutional rights. The uncontroverted facts shown by the return shows the meaning of the entry and that the only manner in which petitioner was advised of his right to counsel was by the announcement made by the public defender over a public address system outside of court or the presence of the judge.

[5] Petitioner's right to counsel of his own choosing is one granted by both the State and Federal Constitutions and it is the duty of the court to protect this right and that duty it cannot delegate to others. The proposition is clearly stated by our Supreme Court in People v. Chesser, 29 Cal.2d 815, at pages 821–822, 178 P.2d 761, at page 764: "One purpose of the constitutional guaranty is to protect an accused from his own ignorance of his legal and constitu-

tional rights, and the guaranty would be nullified if it were held that a waiver made in ignorance of its consequences would remove the protection of the Constitution. As stated in Johnson v. Zerbst, [304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461] the constitutional right of an accused to be represented by counsel of itself invokes the protection of the court when the accused is without counsel, and 'This protecting duty imposes the serious and weighty responsibility *upon the trial judge* of determining whether there is an intelligent and competent waiver by the accused. *While the accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.*' (Italics added.) (304 U.S. at page 465, 58 S.Ct. at page 1023, 82 L.Ed. 1461.

"The determination of whether there has been an intelligent waiver of counsel involves a consideration of the nature of the charge, the facts and circumstances of the case, and the education, experience, mental competence and conduct of the accused. [Citations.]

"In order for a *trial judge* to determine whether there has been a competent and intelligent waiver of counsel, he must first ascertain whether the defendant clearly understands the nature and effect of his waiver." (Italics ours.)

[6] The obligation of the *court* to perform the duty of advising a defendant of his right to counsel is expressly declared by section 987 of the Penal Code. It is self-evident that a statement by an unseen and unknown person over a public address system, by one not authorized either to advise the prisoners or to act upon any request made by them, does not and could not constitute the performance of the obligation placed by the Constitution and the statutes upon the court.

[7] We are of the opinion that the petitioner was deprived of his constitutional rights and that the judgment of the court was therefore void and must be and is hereby annulled and the matter is remanded to the municipal court with instruction to permit the petitioner to appear before that court through counsel of his own choosing or through counsel appointed by the court if petitioner is financially unable to employ counsel, and to permit the petitioner to withdraw his plea of guilty if he is so advised; petitioner to remain on the bail heretofore fixed by this court until the further judgment of the municipal court.



168 Cal.App.2d 365

Kurtz A. DECKER, Plaintiff and Respondent,

v.

S. H. KRESS COMPANY et al., Defendants and Appellants,

Pacific Indemnity Company, a corporation, Plaintiff in Intervention and Respondent.

Civ. 18042.

District Court of Appeal, First District, Division 2, California.

March 5, 1959.

Rehearing Denied April 3, 1959.

See 337 P.2d 163.

Hearing Denied April 29, 1959.

Action against proprietor of store for personal injuries sustained by plaintiff as result of fall in store. From adverse judgment of the Superior Court, City and County of San Francisco, Raymond J. Arata, J., the proprietor appealed. The District Court of Appeal, Dooling, J., held that where contractor entered into agreement with proprietor of store under which proprietor was to receive a percentage of sales of contractor's products in return for furnishing counter space, employee of contractor, who was aware of excess cord running from electrical outlet to an amplifier, which was furnished for his benefit in demonstrating the products, was an "invitee" of pro-

prietor of store and he was not entitled to recover from proprietor for injuries sustained when he tripped on excess cord lying on floor while leaving his work.

Judgment reversed.

1. Negligence ⇐32(2.10), 66(1)

Where contractor entered into agreement with proprietor of store under which proprietor was to receive a percentage of sales of contractor's products in return for furnishing counter space, employee of contractor, who was aware of excess cord running from electrical outlet to an amplifier, which was furnished for his benefit in demonstrating products, was an "invitee" of proprietor of store and he was not entitled to recover from proprietor for injuries sustained when he tripped on excess cord lying on floor while leaving his work.

See publication Words and Phrases, for other judicial constructions and definitions of "Invitee".

2. Negligence ⇐32(1), 52

Owner of property, in so far as an invitee is concerned, is not an insurer of safety, but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils, and he is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care.

O'Connor, Moran, Cohn & Hall, San Francisco, for appellant.

Allan L. Sapiro, Bergen Van Brunt, San Francisco, for respondent Decker.

Boyd & Taylor, San Francisco, for respondent Pacific Indemnity Co.

DOOLING, Justice.

Plaintiff Kurtz Decker brought an action to recover damages for personal injuries received as the result of a fall in defendant's store. Pacific Indemnity Company intervened to recover workmen's compensation benefits paid to plaintiff. Judgment was entered on a jury verdict in favor of plaintiff for $50,000 out of which plaintiff in intervention was granted recovery by way of reimbursement in the sum of $12,882.53. Defendant appeals.

Appellant operated a department store in San Francisco. Respondent started work in the store on September 24, 1953 as a demonstrator for Shontex products and appellant received a percentage of the sales in return for furnishing counter space.

[1] Respondent performed his demonstrations in a rectangular counter area formed by four counters. Each of the counters were three feet wide and the working area bounded by these counters measured two feet by nineteen feet. Respondent worked at one end of this rectangle behind the counter facing to the east. To his right was an opening about one foot wide permitting ingress and egress from the work area.

When respondent arrived on September 24 he found a microphone on top of the counter and an amplifier underneath the counter. The microphone was connected to the amplifier by approximately 15 feet of electrical wire and the amplifier was connected to an electrical outlet by approximately 6 to 8 feet of electrical cord. This outlet was located in the center of a baseboard in back of the counter.

Although respondent had worked in appellant's store at the same counter for two years from 1948 to 1950 he had not then used a microphone. Prior to starting work at appellant's store respondent had observed another demonstrator using the microphone at this counter with the amplifier placed on the counter.

Respondent placed the amplifier on the counter at a distance of about 4 feet from the electrical outlet. The excess cord from the microphone to the amplifier respondent pushed under the counter, but since the excess cord from the amplifier to the outlet was only about 3 feet it would not remain under the counter. Respondent did not attempt to fasten the excess cord up off the floor, nor to wrap the excess around the amplifier, nor did he request that it be

fastened. He was aware of the cord and its position throughout the three days that he worked there.

On the day of the accident respondent put on his coat and was preparing to leave. He looked at the clock, saw that it was ten minutes to six p. m., took a step and tripped on the cord on the floor. He was not thinking about the cord. The resulting injuries brought about this action.

[2] We are satisfied that under the facts of this case the evidence as a matter of law is insufficient to support the judgment. Respondent as the employee of a contractor with the appellant occupied the position of an invitee on the premises. Pauly v. King, 44 Cal.2d 649, 653, 284 P.2d 487, 489. The duty of the owner to such invitee is thus stated in that case:

"The applicable general principle is that the owner of the property, insofar as an invitee is concerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care."

This rule has repeatedly been stated and applied in California cases. Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 512, 50 P.2d 801; Weddle v. Heath, 211 Cal. 445, 452, 295 P. 832; Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793. Many of the cases add the obvious corollary that where the condition which results in injury to the invitee is actually as well known to the invitee as to the property owner no liability arises. Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 561, 296 P. 76; Mawhiney v. Signal Trucking Co., 132 Cal.App.2d 809, 813, 283 P.2d 27; Markwell v. Swift & Co., 126 Cal.App.2d 245, 251, 272 P.2d 47; Delk v. Mobilhomes, Inc., 118 Cal.App.2d 529, 532–533, 258 P.2d 75; Hill v. Eaton & Smith, 65 Cal.App.2d 11, 13–14, 149 P.2d 762; Walker v. Greenberger, 63 Cal.App.2d 457, 462, 147 P.2d 105; Funari v. Gravem-Inglis Baking Co., 40 Cal.App.2d 25, 29, 104 P.2d 44; Vitrano v. Westgate Sea Products Co., 34 Cal.App.2d 462, 465, 93 P.2d 832.

In Mautino v. Sutter Hospital Ass'n, supra, 211 Cal. at page 561, 296 P. at page 78, the court said: "The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality * * * It is when the perilous instrumentality is known to the owner or occupant and not to the person injured that a recovery is permitted * * * There is no liability for injuries from the dangers that are obvious, or as well known to the person injured as to the owner or occupant."

It is clear in our case that the condition of the electrical cord over which respondent tripped was at least as obvious to respondent as it was to appellant. Respondent not only knew of its position on the floor, he actually plugged it into the outlet socket and left it on the floor in the position where he afterwards tripped over it. Electrical cords are commonplaces of modern life and whatever danger is inherent in a cord lying on a floor was as obvious to respondent as it could be to appellant. It lay fully in respondent's power to protect himself from this danger by unplugging the cord when it was not in use and placing it on or under the counter. This would not even have been an inconvenience of any gravity since respondent testified that he only used the microphone for brief periods each day. To hold appellant liable in this case would be to require appellant to exercise greater care for respondent's safety than respondent himself saw fit to use. We find nothing in section 6400 of the Labor Code which could create a liability upon appellant under the facts of this case, where respondent himself created the condition and it lay readily within respondent's power to avoid the very danger of which he seeks to complain. Albert v. McKay & Co., 174 Cal. 451, 455, 163 P. 666.

Respondent points to the fact that a blackboard diagram, by which he illustrated his testimony and showed the position of

the outlet plug, and a length of electric cord described as similar to the one over which he tripped are not before us on appeal. He argues that we must assume that these, if before us, would support the judgment in his favor. Haase v. Central Union H. S. Dist., 27 Cal.App.2d 319, 325–326, 80 P.2d 1044. The rule can be of no comfort to respondent under the facts of this case. Wherever the plug was located and whatever the character of the cord respondent was as fully aware of those facts as was appellant. His knowledge of the danger from tripping over that cord which he himself had inserted in that plug could not be affected by the location of the plug or the character of the cord.

Judgment reversed

KAUFMAN, P. J., and DRAPER, J., concur.



168 Cal.App.2d 387

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Rodell KELLY, Defendant and Appellant.

Cr. 2915.

District Court of Appeal, Third District, California.

March 5, 1959.

Prosecution for robbery of co-owner of a restaurant during course of which defendant displayed a .45 caliber automatic pistol, which was found under some boards on which defendant was lying when he was arrested about 4½ hours later. From adverse judgment of the Superior Court, Sacramento County, Raymond T. Coughlin, J., the defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that testimony of arresting officers that the gun was loaded when found was properly admitted.

Judgment affirmed.

1. Robbery ⇐24(1)

Evidence was sufficient to sustain conviction for robbery in the first degree.

2. Robbery ⇐11

Revolver displayed during course of a robbery was a deadly weapon whether loaded or not. West's Ann.Pen.Code, § 211a.

3. Robbery ⇐24(1)

In prosecution for robbery of co-owner of a restaurant during course of which robber displayed a .45 caliber automatic pistol, fact that weapon was near robber's hand, although concealed under boards on which he was lying when he was found, and that it was loaded, was sufficient to warrant a finding that revolver had been loaded when it was used at the restaurant. West's Ann.Pen.Code, § 211a.

4. Criminal Law ⇐384

Lapse of time affects merely the weight of evidence.

5. Robbery ⇐23(3)

In prosecution for robbery of co-owner of a restaurant during course of which defendant displayed a .45 caliber automatic pistol, which was found under some boards on which defendant was lying when he was arrested about 4½ hours later, testimony of arresting officers that the gun was loaded when found was properly admitted. West's Ann.Pen.Code, § 211a.

6. Indictment and Information ⇐176

In prosecution under information charging defendant with robbery of co-owner of restaurant on 29th of April, wherein there was testimony that owner immediately notified sheriff's office of robbery and that defendant was arrested within about 4½ hours, date of offense was sufficiently proved and there was no fatal variance as to date of commission of crime.

7. Criminal Law ⇐200(8)

In prosecution for robbery of owner of restaurant, waitress, and a customer,

three separate and distinct crimes were committed although all three robberies were committed in close succession, and prosecution of charge of robbing owner did not place defendant twice in jeopardy for the same offense following dismissal of counts as to robbery of waitress and customer.

8. Criminal Law ⇐202(6)

In crimes against the person, there are as many offenses as persons affected.

Walter D. Cook, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Lloyd Hinkelman, Deputies Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

After trial by the court without a jury appellant was found guilty of robbery in the first degree.

[1] On the evening of April 29, 1958, three people were in a restaurant in Sacramento County. They were Mrs. Del Monico, who was the cook and a co-owner of the restaurant, Scharleene Spencer, a waitress, and Fred T. Young, a customer. Appellant was charged separately with robbing the three. At the conclusion of the trial and on motion of the district attorney, the trial court dismissed the counts charging robbery of the waitress and the customer. The court found appellant guilty of robbing Mrs. Del Monico.

There was evidence that at about 7 P. M. Mrs. Del Monico admitted Fred Young to the restaurant and then locked the door. She returned to the kitchen to prepare food for him. Within minutes thereafter Mrs. Spencer saw appellant standing by the door. She walked over and opened the door to inform him the restaurant was closed. He displayed a .45 caliber automatic pistol and pushed his way in. Mrs. Spencer screamed, whereupon appellant told her to shut up and sit down. He then entered the kitchen, grabbed Mrs. Del Monico's wrist, and twisted it, and told her to open the cash register. She did so and gave to appellant the cash contents amounting to about $50. Appellant then turned to Mrs. Spencer and took from her $2 she carried in a purse. He then turned to Young and took from him his wallet, extracted therefrom $12 and before leaving gave the wallet to Young. He ordered the three to lie down on the floor and to remain there for 3 minutes, failing which he would shoot. He left the restaurant. Mrs. Del Monico immediately notified peace officers who started a search. Appellant was arrested about 4½ hours thereafter. He was found lying on his stomach on some boards by a pumphouse located at the rear of a house on Cypress Street. When discovered he was lying with his right hand under him, his left hand stretched out in front. A search of the place where he was lying disclosed, under the boards, a .45 automatic pistol that was cocked and loaded. It had one shell in the chamber and two shells in the clip. Appellant was positively identified by all three of his victims. It is obvious that the evidence was sufficient to sustain the conviction that he had robbed Mrs. Del Monico.

[2–5] Appellant assigns as error the court's refusal on his motion to strike out the testimony of the officer that the gun when found was loaded. He argues that there was no evidence that it was loaded at the time of the robbery. The revolver, whether loaded or not, was a deadly weapon within the meaning of Section 211a of the Penal Code. People v. Rainey, 125 Cal. App.2d 739, 741, 271 P.2d 144. The testimony related also established sufficiently that the gun had been loaded when he used it to commit the robbery. The officers had been continually searching the area wherein he was found and the fact that when found the weapon was near his hand, although concealed under the boards, and that it was then loaded, was sufficient to warrant a finding that it had been loaded when he used it at the restaurant to compel his victims to give their money to him. The lapse of time affects merely the weight of the evidence. People v. Green, 13 Cal. 2d 37, 87 P.2d 821. It was material for the People to show that the robbery had been committed with a dangerous or deadly

weapon so as to fix the degree of the crime and also to prove the elements of force and fear. The court did not err in refusing to strike the testimony of the officers as to the condition of the gun when found.

[6] Appellant next contends that a fatal variance exists between the pleading and the proof as to the date of the commission of the offense charged. He argues that the information alleges appellant committed the offense on the 29th of April, 1958, and that the prosecution failed to establish the commission of the crime on that day. The contention is not borne out by the record. There was testimony that Mrs. Del Monico immediately notified the sheriff's office of the commission of the robbery; that the officers began searching the area almost immediately and within about four hours found and arrested the appellant. Although the victims of the robbery were uncertain as to the date, they clearly identified the occurrence and the sheriff's deputy testified that he answered the call, found the appellant, arrested him and that these transactions occurred on the 29th of April. The date was thus sufficiently proved and there was no variance.

[7, 8] Finally, appellant contends he had been twice placed in jeopardy for the same offense. He argues that the crimes charged were connected in one transaction and constituted but one offense; that the dismissal of counts two and three would bar further prosecution on count one. Although the three robberies were committed in close succession while appellant was in the restaurant, nevertheless they were three separate and distinct crimes. He first took the money from Mrs. Del Monico. He next took money from the waitress, and then took money from the customer. "In crimes against the person, there are as many offenses as persons affected." People v. Galvin, 148 Cal.App.2d 285, 293, 306 P.2d 575, 580. There is no merit in this last contention.

The judgment appealed from is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

168 Cal.App.2d 89

MOUNTAIN VIEW UNION HIGH SCHOOL DISTRICT OF SANTA CLARA COUNTY, a political subdivision, Plaintiff and Appellant,

v.

CITY COUNCIL OF CITY OF SUNNYVALE et al., Defendants and Respondents.

MOUNTAIN VIEW SCHOOL DISTRICT OF SANTA CLARA COUNTY, a political subdivision, Plaintiff and Appellant,

v.

CITY OF SUNNYVALE, a Municipal Corporation et al., Defendants and Respondents.

No. 17912.

District Court of Appeal, First District, Division 1, California.

Feb. 18, 1959.

As Corrected on Denial of Rehearing March 20, 1959.

Hearing Denied April 15, 1959.

Actions in which a high school district and an elementary school district challenged validity of annexation of territory to alleged city school district. The Superior Court, County of Santa Clara, Edwin J. Owens, J., rendered judgments for defendants, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that under statute providing that every city, except cities of the sixth class, unless otherwise prescribed in its original charter, constitutes a separate school district, sixth class city, upon adopting a charter providing for a school district thereby constituted a separate school district.

Affirmed.

1. Municipal Corporations ⇐22

City of Sunnyvale, by adoption of charter, thereby ceased to be a city of the sixth class. West's Ann.Education Code, §§ 2421, 2421.5; West's Ann.Gov.Code, § 34000; West's Ann.Const. art. 11, § 8½.

2. Municipal Corporations ⇐22

A city may be designated as a certain class of city for purposes of Classification Act and as of another class for other purposes. West's Ann.Const. art. 11, §§ 8(g),

8½; West's Ann.Gov.Code, § 34000 et seq.; St.1949, p. 3247, § 1703.

3. Municipal Corporations ⇐211

Fact that Municipal Corporation Bill provides for school districts in all classes of cities except sixth class cities indicates legislative intent that school departments not be established in sixth class cities. West's Ann.Education Code, §§ 2421, 2421.5; West's Ann.Gov.Code, § 34000 et seq.

4. Schools and School Districts ⇐37(1)

Effect of statute providing that territory annexed to city shall not become part of any school district within city unless proceedings therein specified are complied with was merely to create procedures or to establish conditions precedent through which territory annexed to city would also be annexed to school district. West's Ann. Education Code, § 2421.5.

5. Statutes ⇐212.1

That legislature, in enacting statute, was aware of construction which attorney general had given to another statute on same subject was factor which could be considered by court in applying statute.

6. Courts ⇐89
Statutes ⇐219

Attorney general's construction of statute is not controlling on court but attorney general's opinions are nevertheless accorded substantial weight.

7. Schools and School Districts ⇐25

Under statute providing that every city, except cities of the sixth class, unless otherwise prescribed in its original charter, constitutes a separate school district, sixth class city, upon adopting a charter providing for a school district thereby constituted a separate school district. West's Ann.Education Code, §§ 2421, 2421.5; West's Ann.Const. art. 11, §§ 8(g), 8½.

8. Schools and School Districts ⇐25

In the statute providing that every city, except cities of the first class, unless otherwise prescribed in its original city charter, constitutes a separate school district, "original city charter" refers to a special charter and not to the original incorporation of a city under the Municipal Corporation Bill. West's Ann.Education Code, § 2421; West's Ann.Gov.Code, § 34000 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Original City Charter".

9. Schools and School Districts ⇐30

The provisions of statute, relating to annexation of territory to a city school district, stating that provisions of the three subdivisions thereof, one relating to annexation of contiguous territory, one to noncontiguous territory and one to territory part of a unified school district, apply as the case may be, for territory proposed to be annexed do not require that all three subdivisions be complied with in any given case, as such would be impossible, and only that subdivision applicable to the type of territory to be annexed must be complied with. West's Ann.Education Code, §§ 2421, 2421.5.

10. Schools and School Districts ⇐30

Under statutes, where city school district was itself a part of another high school district when territory was annexed to city, it automatically became part of high school district and fact that resolution of intention to annex did not mention explicitly the high school district did not result in annexation's being limited to elementary school district. West's Ann.Education Code, §§ 2421.5, and (a–c), 3892–3894, 3895.

11. Schools and School Districts ⇐9

Power of Legislature in school matters is plenary. West's Ann.Const. art. 4, § 1; art. 9, § 14.

12. Constitutional Law ⇐63(2)
Schools and School Districts ⇐22

The statute providing for annexation of territory to city school district, by requiring determination of city council that territory to be annexed be included in city school district and by requiring a placing of a statement to that effect in resolution of intention to annex provides sufficient events upon which legislative will operates so that

statute is lawful delegation of legislative power. West's Ann.Education Code, § 2421.5; West's Ann.Const. art. 4, § 1.

Atkinson, Farasyn & London, Mountain View, Marlais & Hover, San Jose, for appellants.

Robert P. Berkman, Sunnyvale, for respondent City of Sunnyvale.

Robert E. Hayes, Santa Clara, for respondents.

BRAY, Justice.

Two causes involving substantially the same issues were consolidated for trial. Plaintiffs are two school districts, one a high school and the other an elementary district. The issues are practically the same. Plaintiffs appeal from judgments in favor of defendants entered upon orders sustaining demurrers without leave to amend.

Questions Presented.

Whether territory called "Guadalupe No. 2" when annexed to the City of Sunnyvale resulted in the withdrawal of that territory from the two plaintiff school districts and inclusion in the defendant school districts. Corollary to this question are the following:

1. Do sections 2421 and 2421.5 of the Education Code apply to the City of Sunnyvale?

2. Was section 2421.5 complied with?

3. Is section 2421.5 unconstitutional?

Facts.

At the request of Lockheed Aircraft Corporation, the City of Sunnyvale commenced and carried to completion proceedings for the annexation to it of the unincorporated territory known as Guadalupe No. 2, owned by the corporation. The proceedings were under the Annexation of Uninhabited Territory Act of 1939, section 35300 et seq., Government Code. In the Resolution of Intention was a provision "That pursuant to Section 2421.5 of the Education Code of the State of California, said territory proposed to be annexed shall become part of the Sunnyvale School District of Santa Clara County." During the proceedings and at the time set for protests, both plaintiffs filed written and made oral protests to inclusion of the territory within defendant school districts. The city rejected the protests and in its ordinance No. 487 annexing said territory it provided "That the territory so annexed shall become part of the Sunnyvale School District of Santa Clara County." Thereafter plaintiff Mountain View School District filed action for writs of certiorari, mandamus and declaratory relief, and plaintiff high school district filed action for writ of injunction and declaratory relief. Demurrers to both causes of action were sustained with leave to amend. Demurrers to the amended complaints were sustained without leave to amend, and judgments of dismissal entered, from which these appeals are taken.

1. Sections 2421 and 2421.5.

Section 2421 provided:[1] "Except as provided in Section 2421.5 every city, except cities of the sixth class, unless otherwise prescribed in its original city charter, constitutes a separate school district, which shall be governed by the board of education or board of school trustees of the city * * *"

Section 2421.5, subdivision (c), states: "Territory annexed to a city which is contiguous to a city school district within such city, except as otherwise provided in subdivision (v) * * * shall not become part of any elementary, high school, junior college, or any other school district within said city as provided in Section 2421 unless proceedings" are had in the manner prescribed in this code, or unless the resolution of intention to annex "contains a statement that the annexed territory shall become part of the school district of the city." The provisions of these subdivisions

1. This section and section 2421.5 are considered as they read at the time of the annexation proceedings. Both were amended in 1957.

apply to territory proposed to be annexed to a city in which territory is situated any school district or part thereof. The provisions do not apply to sixth class cities.

Plaintiffs contend that Sunnyvale is a sixth class city and hence sections 2421 and 2421.5 do not apply. However, although originally a sixth class city prior to 1949, Sunnyvale in that year adopted a charter, St.1949, p. 3247, section 1703 of which provides: "Boundaries. The boundaries of the Sunnyvale School District shall be as the same are now presently constituted together with all territory presently within the city limits of the City of Sunnyvale, and *as the same may be changed by annexation or otherwise.*" (Emphasis added.)

Section 8½, article XI, California Constitution, granting cities authority to adopt charters, provides that a charter may provide "for the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such boards."

[1, 2] Strictly speaking, Sunnyvale, because of its charter, is not a sixth class city. However, as pointed out by Professor Peppin in his series of articles on Municipal Home Rule in California (30 Cal. Law.Rev. 1, 304), a city may be designated as a certain "class" of city for purposes of the Classification Act and of another class for other purposes. When a city adopts a charter it is no longer subject to the provisions of the Municipal Corporation Bill (now Gov.Code, § 34000 et seq.) to which as a certain class city it was theretofore subject. Section 8, subdivision (g), article XI, of the Constitution provides that a duly adopted charter "shall become the organic law of such city * * * and supersede any existing charter and all laws inconsistent therewith." See People ex rel. Johnson Attorney General v. Bagley, 1890, 85 Cal. 343, 24 P. 716, holding that when the City of Stockton duly adopted its charter it ceased to exist as a fourth class city.

[3–7] There appears to be no case interpreting section 2421 or its predecessor section 1576, Political Code, with respect to the instant problem. The Municipal Corporation Bill provided for school districts in all classes of cities except sixth class. This omission indicates that the Legislature did not intend school departments to be established in conjunction with such cities. Hence the exemption in section 2421. But since Sunnyvale's charter provides for a school district, there is no reason why it should be exempted from the application of the section. Since the Constitution authorizes charters to provide for school boards it logically follows that a chartered city should contain a school district for the school board to govern, and that annexed territory should also become part of the annexing city's school district. Prior to the enactment of section 2421.5 in 1953, territory annexed by a chartered city automatically was annexed to its school district. The effect of section 2421.5 was merely to create procedures, or, more properly, conditions precedent through which the territory was also annexed to the school district.[2]

2. The attorney general in 9 Ops.Atty.Gen. 133 (1947) rendered an opinion to the effect that a school district in territory annexed to Santa Rosa, a chartered city having a charter provision concerning annexing school districts similar to that of the Sunnyvale charter, became a part of the Santa Rosa School District by operation of law. In 8 Ops.Atty.Gen. 46 (1946) the attorney general ruled that upon the annexation by a sixth class city (unchartered) of contiguous territory constituting a part of a school district apart from the area of a school district coterminous with or which includes the city, the added territory remains a part of the school district of which it was a part prior to the annexation. The Legislature amended section 2421 and enacted section 2421.5 since said attorney general's opinions. (There have been other opinions since to the same effect.) That the Legislature was then aware of the construction of section 2421 by the

It should be pointed out that in chartered cities of any class, having a city school department, a most anomalous situation could result if in the annexed territory, which after annexation is as much a part of the city as the older territory, there should continue to be a school district or districts completely independent of the city's school department, unless for some reason the city's best interests require that there be no merger. In Mitchell v. Henry, 1920, 184 Cal. 266, at page 269, 193 P. 502 at page 503, the court, by way of dicta, as the point was not involved, stated with reference to section 1576, Political Code: "* * * a not unreasonable construction of the Code section is, that by it the annexed territory is upon annexation *ipso facto* taken out from the school district of which it was before a part and made a part of the district of which the city is either the whole or a part. This, in fact, would seem to be the probable effect in the case of the annexation of territory to a city other than one of the sixth class. * * *

"It may be said that the reason for the distinction which the portion of the section just quoted makes between cities of the sixth class and others is that the former do not have school departments as parts of their organizations * * *"

See also Pass School Dist. of Los Angeles County v. Hollywood City School Dist., 1909, 156 Cal. 416, 418, 105 P. 122, 26 L.R.A.,N.S., 485; Jefferson Union School District of Santa Clara County v. City Council, 1954, 129 Cal.App.2d 264, 267, 277 P.2d 104.

[8] Plaintiffs ingeniously argue that section 2421 should be read in effect as follows: "* * * every city (unless otherwise prescribed in its original city charter) except cities of the sixth class, constitutes a separate school district * * *" Plaintiffs contend further that a city of the sixth class which adopts a charter still remains a city of the sixth class, and no provision can be made in its charter to constitute the city a separate school district. We believe that the proper construction of the section, in view of the fact that sixth class cities historically have not had and do not now have a separate school district, is that the provision concerning city charters attaches to "sixth class cities" and not to "every city." Plaintiffs also contend that the phrase "original city charter" refers to the original incorporation of cities under the Municipal Corporation Bill and not to special charters. We are unable to agree with that construction.

2. Compliance.

[9] Plaintiffs contend that where the territory to be annexed is included in or part of any other school district, the provisions of subdivisions (a), (b) and (c) of section 2421.5 must *all* be complied with. This contention is based upon the following paragraph at the end of subdivision (c): "The provisions of subdivision (a), (b), or (c) of this section, as the case may be, apply for territory proposed to be annexed to a city in which territory is situated any school district or part of any school district." An examination of those subdivisions shows the fallacy of the argument. Subdivision (a) provides: "Territory annexed to a city *which is not contiguous* to a school district within the city shall not become a part of any school district within such city pursuant to Section 2421." (Emphasis added.) Obviously this subdivision does not apply to the territory annexed to Sunnyvale for the reason that the territory annexed is contiguous to Sunnyvale's school district. Subdivision (b) provides: "Territory annexed to a city which is *part of a unified school district* shall not become a part of any school district within the city pursuant to Section 2421 * * *" (Emphasis added.) Ob-

attorney general is a factor which may be considered in applying the statute (Southwest Exploration Co. v. County of Orange, 1955, 44 Cal.2d 549, 283 P. 2d 257, 555, and while not controlling the attorney general's opinions are accorded substantial weight by the courts (Carter v. Commission on Qualifications, of Judicial Appointments, 1939, 14 Cal. 2d 179, 185, 93 P.2d 140.

viously this subdivision does not apply as the territory annexed was not a part of a unified school district. Subdivision (c) provides: "Territory annexed to a city which is *contiguous to a city school district* within such city" (emphasis added) shall not become a part of the school district within the city unless the "resolution required by Section 35306 of the Government Code in proceedings for the annexation of uninhabited territory contains a statement that the annexed territory shall become part of the school district of the city." [3] The resolution required by that section provided "That pursuant to Section 2421.5 of the Education Code of the State of California, said territory proposed to be annexed shall become part of the Sunnyvale School District of Santa Clara County." Thus, at least, insofar as the annexation of Mountain View School District, the elementary school district, to the Sunnyvale School District, also an elementary school district, is concerned, section 2421.5 was fully complied with.

A reading of the subdivisions of section 2421.5 clearly shows that it would be impossible in any annexation to come within all three subdivisions and that the language that the provisions of subdivisions (a), (b) and (c) apply "as the case may be" means as the territory to be annexed comes within the particular subdivision.

[10] Sunnyvale School District is a part of the Fremont Union High School District. Plaintiffs urge that as the resolution of intention to annex did not mention explicitly the Fremont district the annexation was limited to the elementary school district and therefore section 2421.5 was not complied with. However, Sunnyvale School District is itself a component part of the Fremont district. Section 3892, Education Code, provides: "Except as otherwise provided in this code, a school district shall not lie partly within a high school district and partly without." Section 3893: "In all cases where the boundaries of a school district comprised within any high school district are for any cause changed to include territory not previously in the school district, the territory added to the school district shall become and constitute a part of the high school district." Section 3894: "In all cases where the boundaries of the school district comprised within any high school district are changed so as to exclude territory from the district, the excluded territory shall, except as provided in this article, be excluded from the high school district." Section 3895: "Where a new school district is formed from territory situated wholly within one high school district, the new school district shall continue to be a part of the high school district." Here is a set of code sections obviously intended to cover every situation in which, in its relation to the territory in which it is situated and to high school districts, a school district may find itself. In each situation the school district is required to be in the high school district of which it is territorially a part. Section 3893 clearly states that when, as here, the boundaries of a school district are for any cause changed to include a school district not theretofore within the first district, the included district becomes a part of the high school district in which the annexing district is located. Therefore, when the annexed territory became a part of the Sunnyvale School District, which itself was a part of Fremont High School District, the annexed territory automatically became a part of the Fremont district. Subdivision (c) of section 2421.5 must be construed together with the above mentioned sections, particularly section 3893. Any other interpretation would produce the anomalous and confusing situation of part of one municipal school district being in one high school district and part in another, a situation expressly forbidden by section 3892, Education Code. Section 2421.5 was fully complied with.

3. The territory annexed here was uninhabited and the proceedings were those initiated by the resolution required by section 35306 of the Government Code.

3. Constitutionality.

Plaintiffs refer to the fact that prior to the enactment of section 2421.5 the change in school district boundaries in an annexation by a city other than that of the sixth class resulted by operation of law without any discretionary act by the city involved and was not objectionable, and contend that in section 2421.5 the Legislature vested in a city an uncontrolled discretionary power to provide for the change of school district boundaries by an affirmative act thereby divesting the Legislature of its power and thereby violating section 1, article IV (vesting the legislative power in the State Legislature) and section 14, article IX (vesting in the Legislature the responsibility for the organization and management of school districts) of the state Constitution. The issue is simply whether section 2421.5 is unconstitutional because it constitutes a delegation of legislative power without adequate standards.

[11] The power of the Legislature in school matters is plenary. (See cases cited in footnote 11, 43 Cal.Jur.2d 631.) Section 2421.5 does not vest uncontrolled discretion in the Sunnyvale City Council but merely establishes a condition precedent to the annexation by operation of law. The section does not authorize anyone to change school district boundaries.

[12] It was said in an early case that the power to change the boundaries of a school district is of legislative origin and whether exercised by the Legislature or delegated to a local legislative body is in its exercise a legislative act. Hughes v. Ewing, 1892, 93 Cal. 414, 417, 28 P. 1067. In Worthington School Dist. v. Eureka School Dist., 1916, 173 Cal. 154, 156, 159 P. 437, the court referred to the plenary power of the Legislature over school districts and added that the Legislature may divide, change or abolish such districts at its pleasure and delegate powers of annexation to boards of supervisors under certain conditions. These basic views have been mentioned by recent cases. Hammond Lumber Co. v. Board of Supervisors, 1948, 85 Cal. App.2d 568, 571, 193 P.2d 503; Merrill Elementary School District of Tehama County v. Rapose, 1954, 125 Cal.App.2d 819, 820, 271 P.2d 522.

The determination by the city council that the territory to be annexed shall be included in the city school district and the placing of a statement to that effect in the resolution of intention to annex are the events upon which the legislative will operates, and hence is a lawful delegation of the legislative power. If a further yardstick is necessary it is provided by the requirements of the statutes providing the procedure for annexation. The Annexation of Uninhabited Territory Act of 1939 requires that the resolution giving notice of the proposed annexation shall give notice of a time to hear protests and that the resolution shall be published as prescribed. This, of course, includes an opportunity to protest against inclusion in the city school district. Inherent in the prceedings is the requirement that the council find as it did here, that such annexation is for the best interests and general welfare of the city.

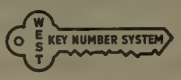
In City of El Cajon v. Heath, 86 Cal.App. 2d 530, at page 534, 196 P.2d 81, at page 83, the court, speaking of the general rule that upon annexation of a portion of one public corporation to another public corporation the property lying in the annexed territory belongs wholly to the corporation to which it is annexed, said: "In the case of a school district the rule works no injustice because the transfer is nothing more, in effect, than the naming by the State of other trustees to manage the property which it owns." In Jefferson Union School District of Santa Clara County v. City Council, supra, 129 Cal.App.2d 264, 277 P.2d 104, in discussing the legality of the resolution of intention to annex certain territory, this court said: "The proposed annexation, if successful, will automatically remove the annexed territory from the school district and from its tax rolls." 129 Cal.App.2d at page 267, 277 P.2d at page 106. Section 2421.5 is not unconstitutional. In view of our decision on this point we deem it unnecessary to consider defend-

ants' contention that plaintiffs have no standing to raise the question of constitutionality.

The judgments are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; PETERS, J., not participating.



168 Cal.App.2d 411

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul Smith LINER, Jr., et al., Defendants. Jack Wayne Watterson, Appellant.

Cr. 1402.

District Court of Appeal, Fourth District, California.

March 5, 1959.

The defendant was convicted of first-degree robbery. The Superior Court of San Diego County, Gerald C. Thomas, J., entered judgment, and the defendant appealed. The District Court of Appeal, Mussel, J., held that under the circumstances the question of whether the defendant was armed with a dangerous or deadly weapon was a question of fact for the jury.

Affirmed.

1. Robbery ⇐26

In prosecution of occupant of back seat of automobile for robbery of hitchhiker who was sitting in front seat, the evidence, including hitchhiker's testimony that four or five blows were applied on the back of his head from the back seat and that it felt like a blunt object and testimony of doctor that injury to hitchhiker's head appeared to be a laceration one and one half to two inches in length, with serrated or jagged edges, and that jagged wound in back of scalp means that a blunt object was used, was sufficient to raise question for jury as to whether occupant was armed with dangerous or deadly weapon within statute providing that robbery perpetrated by person armed with such a weapon is first-degree robbery. West's Ann.Pen.Code, § 211a.

2. Robbery ⇐11

A "dangerous or deadly weapon" within statute providing that robbery perpetrated by person armed with a dangerous or deadly weapon is first-degree robbery is any weapon or instrument which, from the manner of its use or attempted use, is likely to produce death or cause great bodily injury. West's Ann.Pen.Code, § 211a.

See publication Words and Phrases, for other judicial constructions and definitions of "Dangerous Or Deadly Weapon".

3. Robbery ⇐24(1)

Circumstantial evidence may be utilized to show that a weapon is a dangerous or deadly weapon within statute providing that robbery perpetrated by a person armed with a dangerous or deadly weapon is first-degree robbery. West's Ann.Pen.Code, § 211a.

4. Criminal Law ⇐481

The qualification of a doctor to testify as an expert is within the trial court's discretion and such discretion is not restricted by any specified limitations in determining such qualification.

5. Criminal Law ⇐1153(2)

The exercise of the trial court's discretion as to whether doctor is qualified to testify as an expert will not be disturbed except when the discretion is shown to have been abused.

6. Criminal Law ⇐494

In second-degree robbery prosecution, the jurors were not bound by the opinion expressed by the doctor as to the type of weapon used on the victim but were free to disregard the opinion if they found it to be unreasonable. West's Ann.Pen.Code, § 211a.

7. Criminal Law ⇐543(2)

In robbery prosecution, the evidence, including evidence that deputy district at-

torney, in attempt to locate victim of robbery, interrogated manager of hotel where victim had been staying and was told that victim had apparently received letter from wife and had gone to his home in Massachusetts by airplane, and that subpoena for victim had been returned and that telegram to victim in Massachusetts had brought the reply that victim was presently living with wife and children in Massachusetts and could not attend the trial in California, was sufficient to permit victim's testimony at preliminary hearing to be given as evidence at the trial under statute providing that deposition of witness at preliminary hearing may be read at trial upon it being satisfactorily shown that witness cannot with due diligence be found in California. West's Ann.Pen.Code, § 686, subd. 3.

8. Criminal Law ⇐543(1)

The question as to what will constitute due diligence to secure the presence of a witness which will authorize the reading of such witness' testimony taken at a preliminary hearing when such witness is shown to be unavailable is largely within discretion of trial court and depends on facts of each particular case. West's Ann. Pen.Code, §§ 211a, 686, subd. 3.

9. Statutes ⇐223.2(1)

The uniform act to secure the attendance of witnesses from without a state in criminal proceedings is not inconsistent with statute providing that deposition of witness at preliminary hearing may be read at the trial upon it being satisfactorily shown that the witness cannot with due diligence be found within the state. West's Ann.Pen.Code, §§ 686, subd. 3, 1334–1334.6.

Marvin J. Mizeur, San Diego, for appellant.

Stanley Mosk, Atty. Gen., and John M. Huntington, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant Jack Wayne Watterson and his codefendants Paul Liner and Herman McClain were charged with the crime of robbery (Pen.Code, sec. 211) in that on or about December 28, 1957, they did wilfully, and by means of force and fear and against the will of one George L. Katz, take a wrist watch and $6 in cash from his person, possession and immediate presence.

A jury trial was had resulting in a verdict finding appellant guilty of the crime of robbery and fixing the degree as robbery in the first degree. Paul Liner was found guilty of robbery in the first degree and Herman McClain was found not guilty. A motion for new trial was denied and appellant was sentenced to imprisonment in the state prison. He appeals from the judgment.

George L. Katz was not present at the trial and his testimony taken at the preliminary hearing was introduced in evidence and read to the jury. It appears therefrom that on December 28, 1957, at about 7:30 p. m., Katz was hitchhiking from San Diego to Los Angeles when a black Ford car stopped to pick him up. McClain was driving the car, Watterson was in the back seat and appellant sat in the front seat between McClain and Liner. They stopped at a filling station in San Diego and then proceeded toward Los Angeles. About 20 minutes later Katz felt a "bang" on his head and "saw black and white" and his ears "cracked". He "figured it came from the back because both the others had their hands in front." He was hit four or five times and the blows were applied on the back of his head and "it felt like a blunt object". Katz started begging his companions to stop, stating that he had only about $6; that he had a wife and three children and asked them not to hit him. The appellant then said, "shut up or I will hit you some more." Liner took Katz' watch, a $5 bill and a $1 bill. The car was then stopped near a ditch and appellant said, "I want you to get out and lie on your belly in the ditch and if you don't I will give you a beating you will never forget." Katz complied with this order and appellant and his companions then drove away.

Katz was taken to a hospital for treatment and a wound in his head was sutured. A doctor testified that from the photographs shown to him he could not say with any degree of certainty whether the injury to Katz' head was caused by a blunt object or by a severe bump on a hard surface.

Appellant and Liner did not testify. McClain testified that he was driving the car when appellant told him to pick up Katz; that they drove north on highway 101; that Katz sat in the middle in the front seat with Liner on his right and appellant was in the back; that somebody hit Katz and that on appellant's order, he, McClain, stopped by the side of the road; that Liner put his hand in Katz' pocket and then Katz pulled out his wallet and gave it to Liner; that he, McClain, thought that appellant told Katz to get out and lie in the ditch and after Katz got out and was lying in the ditch, appellant told him (McClain) to drive off; that they then drove to Escondido, where they were arrested.

[1] Appellant contends that the evidence is insufficient to sustain a conviction of robbery in the first degree. He does not question the sufficiency of the evidence to sustain a conviction of robbery but claims that the evidence is insufficient to show that appellant was armed with a deadly or dangerous weapon at the time of the commission of the offense. Pen.Code, sec. 211a.

[2] In People v. O'Neal, 2 Cal.App.2d 551, 558, 38 P.2d 430, 433, it is said:

> "A dangerous or deadly weapon has been frequently described in our authorities as any weapon or instrument which, from the manner that it is used or attempted to be used, is likely to produce death or cause great bodily injury."

[3] Under the circumstances of the instant case the question of whether the appellant was armed with a dangerous or deadly weapon within the meaning of section 211a of the Penal Code was one of fact for the jury. People v. McKinney, 111 Cal.App.2d 690, 693, 245 P.2d 24. The character of the weapon used may be shown by circumstantial evidence. In People v. Lopez, 118 Cal.App.2d 235, 237, 257 P.2d 670, 671, the court said:

> "The evidence is also sufficient to sustain the jury's implied finding that defendant was armed with a dangerous or deadly weapon when he committed the offense, hence was guilty of robbery in the first degree. Penal Code, sec. 211a. Morgan was attacked from behind, consequently he could not see the instrument with which he was hit. However, the character of the weapon used by a defendant may be shown by circumstantial evidence. The testimony of the victim, that he was hit by 'some hard object,' rendered semi-conscious, and remained in that condition for a period of some seven minutes, justifies an inference that a dangerous weapon was used. People v. Sampson, 99 Cal.App. 306, 278 P. 492."

[4–6] In the instant case the jury could infer that a dangerous or deadly weapon was used from the testimony of the victim, George Katz, and the testimony of the doctor, who stated that the injury to the victim's head appeared to be a laceration one and one-half to two inches in length, with serrated or jagged edges, and that the appearance of a jagged wound in the back of the scalp means a blunt object of some sort was used. The qualification of the doctor to testify as an expert was within the discretion of the trial court. It is not restricted by any specified limitations in determining such qualifications and the exercise of its discretion will not be disturbed except when it is shown to have been abused. People v. Horowitz, 70 Cal.App.2d 675, 689, 161 P.2d 833. No abuse of discretion appears in this connection. The jurors were not bound by the opinion expressed by the doctor but were free to disregard it if

they found it to be unreasonable. People v. Cole, 47 Cal.2d 99, 105, 301 P.2d 854, 56 A.L.R.2d 1435.

[7] Appellant contends that the trial court erred in permitting the testimony of George Katz taken at the preliminary hearing to be given as evidence at the trial, claiming that the prosecution should have been required to utilize sections 1334–1334.6 of the Penal Code relating to procuring the attendance of a witness outside the state of California. The questioned testimony was properly admitted under the provisions of section 686, subdivision 3, of the Penal Code, which provides that the deposition of a witness at the preliminary hearing may be read at the trial upon it being satisfactorily shown that the witness can not with due diligence be found within the state.

In People v. McDaniel, 157 Cal.App.2d 492, 499, 321 P.2d 497, two investigators for the district attorney's office testified that they made inquiries as to the whereabouts of the witness and ascertained that he was in Dallas, Texas; that they sent a telegram to an address in Dallas furnished by his family and read a telegram in reply from the witness stating he would be unable to appear at the trial. Photostatic copies of the telegrams were received in evidence and the court held that the testimony of the witness given at the preliminary hearing was properly read in evidence at the trial. It was further held that if, in the exercise of a reasonable discretion, the court determines that a witness is outside the state, its order allowing the testimony taken at the preliminary hearing to be read will not be disturbed on appeal.

[8] As is said in People v. Horace, 127 Cal.App.2d 366, 369, 273 P.2d 923, 925:

> "The question as to what will constitute due diligence to secure the presence of a witness which will authorize the reading of such witness' testimony taken at the preliminary hearing when such witness is shown to be unavailable, is largely within the discretion of the trial court and depends on the facts of each particular case." See also People v. Robinson, 149 Cal.App.2d 342, 345, 308 P.2d 442.

[9] In the instant case the record shows that a deputy district attorney of San Diego county, in attempting to locate George Katz, interviewed the manager of a hotel where Katz had been staying and was told that Katz had left on February 7 and had gone to his home town, which was shown on his room rental record as 126 Den Quarry Road, Lynn, Massachusetts; that Katz had apparently received a letter from his wife and had gone home by airplane. The district attorney issued a subpoena for Katz three or four days after the arraignment in the Superior Court and it was returned on February 13. On March 4, 1958, the district attorney's office sent a telegram to Katz and on the same date received the following reply:

> "Am now residing at 126 Den Quarry Road, Lynn, Massachusetts with my wife and children and cannot attend trial in San Diego on March 11, 1958. (signed) George L. Katz."

This evidence was sufficient to authorize the reading of the questioned testimony at the trial and there was no showing of bad faith on the part of the district attorney or that he encouraged Katz to leave the state. While sections 1334–1334.6 provide a method which makes it possible under certain conditions for either the prosecution or the defense to secure the attendance of witnesses from outside the state, these provisions are not inconsistent with the provisions of section 686 of the Penal Code.

Apparently the precise question here involved has not been passed upon by the courts of this state. However, in People v. Cahan, 141 Cal.App.2d 891, 297 P.2d 715, Lee Cobert, the victim of a robbery, was in Las Vegas, Nevada, at the time of trial and the court permitted the prosecution to read in evidence his testimony taken at the preliminary hearing. The

defendant requested a continuance for the purpose of taking Cobert's deposition under the Uniform Act to secure the attendance of witnesses from without the state in criminal cases. Pen.Code, secs. 1334–1334.6. The request was denied and it was held that the court did not abuse its discretion in denying a continuance.

In the instant case we find no reversible error in the action of the trial court in permitting the prosecution to read in evidence the testimony of George Katz taken at the preliminary hearing.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.



Abbie F. LEEPER and Thomas B. Leeper, Plaintiffs and Appellants,

v.

William BELTRAMI, as an Individual and as Executor of the Estate of Frank Weber, Deceased; Hazel Scarlett, as an Individual and as Special Administratrix of the Estate of Frank Weber, Deceased; Shriners Hospital for Crippled Children, San Francisco, California; Masonic Childrens Home at Covina, California; IOOF Childrens Home at Gilroy, California; Athens Masonic Lodge at Davis, California; Yolo Lodge of IOOF at Davis, California; Rebecca Lodge, Davis, California; The Grand Lodge of Free & Accepted Masons of the State of California; The Grand Lodge of IOOF of the State of California; Laverne Charles Scheidel, et al., Defendants and Respondents.*

Civ. 9425.

District Court of Appeal, Third District, California.

March 3, 1959.

Hearing Granted April 29, 1959.

Action by former owners of a ranch against executor and special administratrix of estate of decedent, and against certain distributees of decedent's estate, and against present owner of the ranch, for recovery of money paid to executor and administratrix as the result of their alleged wrongful conduct in bringing an action to foreclose a mortgage on the ranch, and for recovery of ranch from present owner, and for recovery from residuary legatees under will of decedent of portion each received of money paid estate. The Superior Court, Sacramento County, Albert H. Mundt, J., entered a judgment dismissing plaintiffs' action, as amended, without leave to amend further, and plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that even though alleged wrongful conduct of executor and administratrix formed basis of the action in sense that allegations as to their wrongful conduct had to be proved before any relief could be obtained, nevertheless, by the action, plaintiffs sought recovery of possession and quieting of their title to the ranch, and to that extent, the action was for recovery of possession of realty within five-year statute of limitations, and fact plaintiffs also sought recovery of money obtained by executor and administratrix through their wrongful conduct did not convert the action to one for relief on ground of fraud or mistake.

Judgment reversed.

Opinion, 333 P.2d 402, vacated.

1. Limitation of Actions ⇐19(3)

Where former owners of a ranch sought recovery of possession and the quieting of their title thereto, to that extent, their action was for recovery of the possession of realty within five-year statute of limitations, and even though plaintiffs also sought recovery of money obtained by certain defendants through their alleged wrongful conduct in bringing an action to foreclose a satisfied mortgage thereon, such fact did not convert the action to one for relief on ground of fraud or mistake. West's Ann.Code Civ.Proc. §§ 318, 338, subd. 4.

* Opinion vacated 1 Cal.Rptr. 12, 347 P.2d 12

2. Limitation of Actions ⇐180(1)

Where a complaint was in one count, and a demurrer which sought to raise bar of statute of limitations was general in sense that it asserted that on the face of the pleading action was wholly barred, if it were contended by a defendant that the action was barred in part, such defense of the statute of limitations had to be raised by answer.

3. Pleading ⇐406(8)

Where defendants failed to object to pleading upon special grounds that more than one cause of action was stated without being separately stated, or upon grounds of misjoinder, parties would be deemed to have waived their right to do so and to have consented to go to trial upon the pleading as drawn as being sufficient to enable the court and the parties to fully try all issues presented.

4. Threats ⇐10

Complaint by former owner of a ranch that effect of unlawful compulsion brought upon her by executor and administratrix of estate of a decedent who had held a mortgage on the ranch which allegedly had been satisfied, in bringing an action to foreclose the mortgage, was to so frighten and confuse former owner that she sold the ranch for some $20,000 less than its value, and paid them the amount of the secured debt a second time, stated a cause of action for duress, and whether or not alleged wrongful acts of executor and administratrix constituted sufficient illegal compulsion to make them responsible for the loss was a question for the trier of fact.

5. Deeds ⇐188

Complaint by former owner of a ranch alleging that present owner dealt with former owner knowing compulsions under which she labored in regard to need for money, and that under such circumstances he negotiated a deal with her whereby, for one third the value of the ranch, he obtained it, stated a cause of action for equitable relief, in that if knowing all these things, present owner drove harsh bargain alleged, a court of equity would be justified in declaring that he be compelled to suffer a cancellation of the deed so procured.

6. Money Received ⇐8

Six distributees of money paid by former owner of a ranch to a decedent's estate to satisfy a mortgage of record which allegedly had already been satisfied to the knowledge of decedent's executor and administratrix were beneficiaries of the tortious conduct of executor and administratrix, and received the fruits of their extortion, and complaint of former ranch owner stated a cause of action for recovery of their distributive shares of such money since in equity and good conscience they ought to give back what they thus obtained.

7. Action ⇐25(2)
Cancellation of Instruments ⇐32

An action upon a rescission is an action at law, whereas an action to have rescission by judicial decree is an action in equity, and in one case the contract no longer exists, having been terminated by prior rescission, while in the other the contract continues to exist until set aside by the equity decree.

8. Cancellation of Instruments ⇐22, 24(1)

Notice of rescission and offer to restore is not a necessary antecedent to an equitable action for restitution of property wrongfully obtained, and although restoration of benefits received is necessary, it can be accomplished in the action itself.

9. Cancellation of Instruments ⇐37(4)

Where former owners of a ranch, in an action in equity to have a deed thereto cancelled and have the grantee execute a deed conveying the property back to them, pleaded that in event sale of the ranch was set aside and present owner forced to reconvey present owner should be repaid money paid by him for the property and be reimbursed for legitimate expenses relating to the sale and receive interest on the sum, such pleading constituted a sufficient offer of restoration.

10. Pleading ⇐78, 193(4)

Doctrine of laches is defensive in nature and cannot be raised by demurrer un-

less the facts claimed to constitute proof of laches as a matter of law appear on the face of the complaint, and under such circumstances alone, laches can be raised by demurrer, but otherwise it is a defense which must be pleaded.

11. Pleading ⇐193(4)

Where facts claimed to constitute proof of laches did not appear on the face of complaint in equity to have a deed cancelled and to have the grantee execute a deed conveying the property back to plaintiffs, defense of laches could not be raised by demurrer.

Thomas B. and Abbie Leeper in pro. per.

Chalmers & Sans, Woodland, for respondent Scarlett.

Downey, Brand, Seymour & Rohwer, Sacramento, for respondent Shriners Hospital.

Thomas E. Reynolds, Davis, for respondents IOOF Childrens Home and Rebecca Lodge.

Driver, Driver & Hunt, Sacramento, for respondent Scheidel.

VAN DYKE, Presiding Justice.

This is an appeal taken by plaintiffs from a judgment dismissing their action following an order sustaining demurrers to their complaint as amended without leave to amend further.

The demurrers of the various defendants were general. They also pleaded various statutes of limitations and laches.

The complaint and the amendments thereto are prolix, but for the purposes of this appeal may be summarized as follows: During the lifetime of Frank Weber, plaintiff Thomas B. Leeper, hereinafter called Thomas, who was an attorney at law, borrowed from Weber $10,150 and to secure the payment of his note therefor mortgaged two different ranches owned by him, one being in Sutter County and the other in Sacramento County. During Weber's lifetime, Thomas served Weber as his attorney and the fees so earned were, by agreement between the two, applied by Weber to the payment of Thomas' note which, by said applications, was completely paid, although Weber never executed any satisfaction of the mortgage. During the year 1951, plaintiff Abbie F. Leeper, hereinafter called Abbie, executed an undertaking for the appearance of one Greene for trial in a criminal action. He failed to appear, his bond was forfeited, and demands were made upon Abbie and her fellow bondsman which were not responded to. An action was brought to obtain judgment for the amount of the forfeiture. Judgment was obtained and execution was levied on Abbie's home. Thereupon, Thomas deeded the two ranches to Abbie and her fellow bondsman for the purpose of enabling them to raise the money necessary to discharge the bond judgment. William Beltrami and Hazel Scarlett, defendants in this action and respondents herein, were executor and special administratrix respectively of the estate of Weber, who had died. Notwithstanding that they knew the $10,150 debt had been paid and that Thomas had become thereby entitled to a satisfaction of the mortgage, these two plotted together to compel Thomas to pay the debt a second time and to that end brought an action in Sacramento County to foreclose the mortgage, recording notice of action in that county and in Sutter County. The complaint was filed August 18, 1952, and the notices were recorded at about that date. October 28, 1952, Abbie and her fellow bondsman procured a purchaser for the Sutter County ranch for the sum of $18,000 which would have yielded money sufficient to pay off the bond judgment and release Abbie's home from the levy. But the suit to foreclose the mortgage clouded the title to the Sutter County ranch and prevented the consummation of the sale. Beltrami and Scarlett were informed of the prior payment of the obligation on which they had sued and yet refused to dismiss the action or otherwise clear the title except only on payment to them for the estate of Weber of the amount they claimed to be owing on the mortgage debt. The

result was that Abbie, unable by the sale of the Sutter County ranch to obtain sufficient moneys to clear her home, was compelled to make a forced sale of the Sacramento ranch to defendant and respondent LaVerne Charles Scheidel. Acting under the compulsions created by the wrongful acts of Beltrami and Scarlett she proceeded to sell the Sacramento County ranch to Scheidel for $10,760, about one-third of its value. Both sales were consummated. Abbie and her fellow bondsman conveyed the two ranches, the bond judgment was paid off, Beltrami and Scarlett for the Weber estate were paid $12,500 in settlement of their claims and there was left for Abbie over and above all demands the sum of about $4,000. Abbie and Thomas began this action November 30, 1957.

The relief prayed for was for the recovery of the money paid to Beltrami and Scarlett under the compulsions created by their wrongful conduct and also for the recovery from Scheidel of the Sacramento County ranch. Various remedies as to interest, rents, profits and the like, incidental to the main relief asked, were also contained within the prayer. The residuary legatees under the will of Weber were made parties defendant and by the prayer plaintiffs sought to recover from each the portion of the $12,500 which each had received.

Appellants contend that the action was an action to regain title to the Sacramento County ranch and that the right to bring it is to be measured by the five-year statute of limitations. Respondents contend that the action was to recover for fraud and that the right to bring it is to be measured by the three-year statute.

[1, 2] We shall first treat of the issues presented by the demurrer based on the statute of limitations. Although the alleged wrongful conduct of Beltrami and Scarlett forms the basis of the action in the sense that the allegations as to that wrongful conduct must be proved before any relief can be obtained, nevertheless by the action plaintiffs seek the recovery of the possession and the quieting of their title to the Sacramento County real property and to that extent the action is for the recovery of the possession of real property within the meaning of Section 318 of the Code of Civil Procedure and is governed by the five-year limitation provided in that section. Murphy v. Crowley, 140 Cal. 141, 73 P. 820. Clearly the action to recover the Sacramento real property is not barred. Beltrami and Scarlett are proper parties to the action for the recovery of that property, for it was their wrong which gives rise to the cause of action which eventuated in the sale at sacrifice of the Sacramento property and its transfer to Scheidel. It may be that equitable considerations may defeat the plea of the plaintiffs that the transfer be set aside and the property restored to them, in which event equity can give the alternative relief of money damages. If such relief be not sufficiently prayed for by the prayer for general relief a simple amendment will suffice to cover the matter. If appellants have stated a cause of action for the wrong alleged to have been committed by Beltrami and Scarlett then the fact that plaintiffs also seek the recovery of the $12,500 obtained by them through their wrongful conduct does not convert the action to one governed by Section 338, Subdivision 4, Code of Civil Procedure, as argued by respondents. There is but one count in the complaint. The demurrer seeking to raise the bar of the statute is general in the sense that it asserts that on the face of the pleading the action is wholly barred. If it be contended by a defendant that the action is barred in part, the defense of the statute must be raised by answer. 31 Cal.Jur.2d, p. 660, sec. 244; Lewis v. Fahn, 113 Cal. App.2d 95, 103, 247 P.2d 831. The demurrers, therefore, of Scheidel and of Beltrami and Scarlett which seek to raise the bar of the statute of limitations ought to have been overruled.

Six residuary legatees under the will of Weber, made parties hereto, are alleged to have received equal parts of the $12,500 paid into the estate of Weber by virtue of the wrongful conduct of Beltrami and

Scarlett. Plaintiffs seek to follow the funds into their hands. These distributees also plead the bar of the statute of limitations, arguing that the relief demanded as to them is governed by Section 338, Subdivision 4, Code of Civil Procedure. What has been heretofore said disposes of this contention. Their demurrers likewise ought to have been overruled.

[3] Each of the defendants, respondents here, demurs generally to the complaint. No special demurrers were interposed. If there be more than one cause of action stated without being separately stated, no demurrer has been addressed to that defect. The same must be said as to any objection that might have been raised by demurrer upon grounds of misjoinder. By failing to object to the pleading upon such special grounds, the parties are deemed to have waived their right to do so and to have consented to go to trial upon the pleading as drawn as being sufficient to enable the court and the parties to fully try all issues presented. Smith v. McLaughlin, 81 Cal.App.2d 460, 462–463, 184 P.2d 177; Shahabian v. Najarian, 14 Cal. App.2d 435, 441, 58 P.2d 396.

We will first consider the demurrers of Beltrami and Scarlett. As to them plaintiffs relied upon the concept of illegal business compulsion, which is a type of duress. The doctrine is stated and discussed in McNichols v. Nelson Valley Building Co., 97 Cal.App.2d 721, 218 P.2d 789; Lewis v. Fahn, supra, Wake Development Company v. O'Leary, 118 Cal.App. 131, 4 P.2d 802, and Young v. Hoagland, 212 Cal. 426, 431, 298 P. 996, 75 A.L.R. 654. We think the complaint states a cause of action. It alleges the plot or conspiracy between Beltrami and Scarlett to compel a payment over again of the debts secured by the mortgage upon the ranches; that they acted with knowledge that the debt had been paid; that they implemented their scheme by filing a suit to foreclose the discharged mortgage, and clouded the title to the ranches by recording lis pendens in the counties where the land lay; that when the need of Abbie arose to save her home from forced sale under the bond judgment they exerted the compulsion inherent in the defect in the title to the ranches which they had created by refusing, although knowing her situation, to withdraw from their illegal demands; that they continued to exert their wrongful compulsion, knowing all the circumstances until thereby they received $12,500 as a condition of their relinquishment of their false claims.

[4] It is alleged that the effect of their unlawful compulsion upon Abbie was to so frighten and confuse her that she sold the Sacramento County ranch to Scheidel for some $20,000 less than its value. If these things be true, and we must at this stage in the proceedings take it that they are, then a cause of action for duress is stated. Whether or not there was in the alleged wrongful acts of Beltrami and Scarlett sufficient illegal compulsion to make them responsible for the loss arising is a question for the trier of fact. McNichols v. Nelson Valley Building Co., supra. It is stated in 17A American Jurisprudence, "Duress and Undue Influence", pages 571–572:

> "Under the modern view, there is no legal standard of resistance with which the person acted upon must comply at the peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is, Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such a contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby so obtained? Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim. The means used to produce that condition, the age, sex, state of health, and mental characteristics of the alleged injured party, are all merely evidentiary of the ultimate fact in issue, of whether such person was bereft of the free

exercise of his will power. Obviously what will accomplish this result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, and not any arbitrary standard, is to be considered in determining whether there was duress."

As this court said in Lewis v. Fahn, supra, 113 Cal.App.2d at page 101, 247 P. 2d at page 835, "given an unlawful demand, a threat of groundless litigation unless the unlawful demand be met presents a situation where courts should not too readily listen to a claim by the party extorting the payment that his victim ought to have been a braver man and should have resisted his attack." The complaint states a cause of action in duress.

[5] As to Scheidel it is alleged that he dealt with Abbie, knowing the compulsions under which she labored and under those circumstances negotiated a deal with her whereby, for one-third the value of a $30,000 ranch, he obtained the ranch. It is fairly inferable, even if not expressly stated by the pleader, that from the very circumstances of Abbie's willingness to make so great a sacrifice she was in no condition to be bargained with fairly. If knowing all these things, Scheidel drove the harsh bargain alleged, a court of equity would be justified in declaring that he be compelled to suffer a cancellation of the deed he so procured.

[6] We come now to the general demurrers interposed by the six distributees. They are the beneficiaries of the tortious conduct of Beltrami and Scarlett, who represented their interests in the handling of the estate of Weber. They have received the fruits of extortion. Their very resistance against a demand that they account places them in the position of being accessory to the extortion. In equity and good conscience they ought to give back what they have thus obtained.

The rule is stated in Restatement, Restitution, Section 123, as follows:

"A person who, non-tortiously and without notice that another has the beneficial ownership of it, acquires property which it would have been wrongful for him to acquire with notice of the facts and of which he is not a purchaser for value is, upon discovery of the facts, under a duty to account to the other for the direct product of the subject matter and the value of the use to him, if any, and in addition, to:

"(a) return the subject matter in specie, if he has it;

"(b) pay its value to him, if he has non-tortiously consumed it in beneficial use;

"(c) pay its value or what he received therefor at his election, if he has disposed of it."

See California Annotations to Restatement of Restitution, citing inter alia People v. Houghtaling, 7 Cal. 348; Curran v. Kennedy, 89 Cal. 98, 26 P. 641; Freitas v. Freitas, 31 Cal.App. 16, 159 P. 611.

Respondents all argue that the payment of $12,500 to Beltrami and Scarlett in settlement of the foreclosure suit was an adjudication that the claims therein presented by the plaintiffs in that action were valid. We do not agree. There was no real adjudication of any issue in that action. Abbie was under the same compulsions which compelled her to sell the Sacramento County ranch. The tortious conduct of the plaintiffs in the foreclosure suit operated extrinsically and the same equitable principles that invalidate the land transfer are equally potent to strike through the purported settlement of the false claims. 29 Cal.Jur.2d 109.

Finally, respondents contend that the action is barred by laches. Their argument runs in this way: The deed to the real property was not void, but only voidable; the sale and the deed must therefore be rescinded or the real property cannot be recovered; to obtain rescission an aggrieved party has a positive duty to act promptly; the complaint shows that plain-

tiffs were guilty of unwarranted delay in seeking rescission; therefore plaintiffs failed to state a cause of action for rescission; since the sale and the deed cannot be set aside plaintiffs cannot and do not state a cause of action for the recovery of real property; therefore the action can only be for the recovery of money paid or for damages; any such cause of action is barred by the statute of limitations.

[7, 8] This is not an action upon a unilateral rescission. It is an action in equity to have a deed cancelled and to have the grantee execute a deed conveying the property back to plaintiffs, coupled with allegations and a prayer that if such is done then the grantee receive by the decree all equitable considerations. This is an action for rescission by judicial decree. The distinction is a well-recognized one. An action upon a rescission is an action at law. An action to have rescission by judicial decree is an action in equity. In the one case the contract no longer exists, having been terminated by prior rescission. In the other the contract continues to exist until set aside by the equity decree. The distinction is statutorily recognized. Unilateral rescission is provided for in Sections 1688, 1689 and 1691 of the Civil Code. Rescission by equitable decree is provided for in Sections 3406 and 3408 of the Civil Code. The distinction is recognized by decision law. Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990; McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019. Notice of rescission and offer to restore is not a necessary antecedent to the equitable action for restitution of property wrongfully obtained. Seeger v. Odell, 18 Cal.2d 409, 417–418, 115 P.2d 977, 136 A.L.R. 1291. Restoration of benefits received is necessary but can be accomplished in the action itself. It is stated in the Seeger case, 18 Cal.2d at page 418, 115 P.2d at page 982:

> "* * * [A] court granting equitable relief has the power to make its decrees contingent upon compliance by the plaintiff with certain conditions. * * * The interests of the defendants can thus be well protected by a decree making any relief granted to plaintiffs conditional upon their paying the mortgage debt. Plaintiffs' offer in their complaint to 'do and perform all things of them in equity required by the court to be done by them in the premises' and to subtract the amount of the mortgage debt from any sum awarded them from Mary Gibbs is a sufficient offer of restitution."

[9] Herein appellants pleaded as follows: "That in the event that said sale of said Sacramento County ranch is set aside and said LaVerne Charles Scheidel is forced to reconvey the title of said property to Abbie F. Leeper, said LaVerne Charles Scheidel should be repaid the sum of $10,760 so paid by him for said property; that he should also be reimbursed for any legitimate expenses relating to said sale and should receive interest on said sum of $10,760. If interest is so allowed by him said Scheidel should account and pay to Abbie F. Leeper for any income from said property; that the amounts recovered by Plaintiffs herein should be paid first to said Scheidel and the remainder to Abbie F. Leeper." The prayer contained the same request for equitable consideration of Scheidel. On the authority of Seeger v. Odell, supra, we hold that the foregoing constituted a sufficient offer of restoration. In connection with the foregoing and particularly as to the distinctions between an action at law upon a unilateral rescission and an action to obtain an equitable decree adjudging rescission or restitution see California Law Review, Vol. 36, page 606 et seq. and Alder v. Drudis, 30 Cal.2d 372, 384, 182 P.2d 195, 202, wherein the court said:

> "In granting to plaintiffs the remedy of restitution and in ordering the delivery to them of the polyscopes and letters patent, the court should have made its decree for this specific restitution conditional upon the return by plaintiffs to defendants of the $5,000 received. The purpose of restitution

as a remedy for breach is the restoration of the status quo ante as far as is practicable, and in the absence of qualifying circumstances, the plaintiff must return any consideration he has received in order to obtain specific restitution. While there is no literal rescission of the contract, the result reached by the restitutionary remedy approximates that reached by rescission. It is not necessary that plaintiff should have made an offer to return the consideration, but the decree for specific restitution may be made conditional upon such return. Rest., Contracts, sec. 349, p. 596; sec. 354, p. 611; 5 Williston on Contracts, rev. ed., sec. 1460A, pp. 4082 et seq. California authorities dealing with the rescission of contracts illustrate this rule."

[10] As to laches or stale claim, another name for laches, the doctrine is defensive in nature and cannot be raised by demurrer unless the facts claimed to constitute proof of laches as a matter of law appear on the face of the complaint. Under such circumstances alone laches can be raised by demurrer. Otherwise it is a defense which must be pleaded. The rule is similar to the rule permitting the statute of limitations to be raised by demurrer if the facts constituting or showing limitation as a matter of law appear on the face of the pleading. In Meigs v. Pinkham, 159 Cal. 104, 111, 112 P. 883, 886, the court said:

"As to laches. Under our law, as the statute of limitations is applicable to both legal and equitable actions, there can be no laches in delaying the bringing of an action if it is brought within the period of limitations [citing cases], unless there are some facts or circumstances attending the delay which have operated to the injury of the defendants. Nothing of the kind appears here. It is neither alleged nor asserted that defendants have in any way been injured, or at all affected, with respect to the relation of their lands to this dam and ditch by anything the plaintiff did or did not do."

In Zakaessian v. Zakaessian, 70 Cal.App. 2d 721, 725, 161 P.2d 677, 680, the court said:

"However, it is a well-settled rule of law that the defense of laches can be raised by a general demurrer. [Citing cases] It remains to be determined if the statement of facts constituting this cause of action shows such delay in the assertion of plaintiff's rights that the defense of laches can be said to exist as a matter of law. The most recent expression of the Supreme Court on the matter of laches is in Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062. At page 736, of 23 Cal.2d, at page 681 of 146 P.2d the court said: 'The policy of this state with respect to lapse of time is embodied in statutes applicable to both legal and equitable actions, and mere lapse of time, other than that prescribed by such statutes, does not bar relief. * * *' * * *

"The only possible prejudice to the defendants which might give rise to an estoppel in the set of facts being considered now, which appears from the face of the complaint other than that present in mere lapse of time, is presented in the death of Karkin Zakaessian, the predecessor in interest of defendants and the other party to the misunderstood transaction. The earlier cases in California, where laches has been held to appear on the face of the complaint and wherein there is no discussion of the necessity that prejudice to the defendant appear on the face of the complaint, involve much greater periods of time than that here shown, generally more than half of a normal lifetime. * * * Here there is a delay of 16 years without any increase in value being shown on the face of the complaint. * * * If the defendants in their answer and proof show a great increase in value and improvements to the property, plus possession for the elapsed 16 years, the plaintiff's cause may be barred by laches,

but it can not be said as a matter of law on the basis of the facts now before us that there is such prejudice to defendants shown on the face of this complaint as to permit the assertion of that defense by general demurrer. * * * For the foregoing reasons the demurrer to the complaint here under consideration should not have been sustained on the ground that laches appeared from the face of the complaint."

[11] On the authority of the foregoing decisions we hold that laches does not appear on the face of the complaint in this case, and therefore the defense cannot be raised by demurrer.

For the reasons given, the judgment appealed from is reversed.

SCHOTTKY and PEEK, JJ., concur.



168 Cal.App.2d 559

JACKSON & PERKINS CO. of California, a corporation, Plaintiff and Appellant,

v.

STANISLAUS COUNTY BOARD OF SUPERVISORS, Milo F. Bradshaw, John B. Melugin, Clinton C. Wilson, Kenneth C. Ables and John Delphia; Ed Whitmore, Stanislaus County Tax Collector and Stanislaus County Treasurer; Steve Hossli, Stanislaus County Auditor; K. V. Broadwell, Stanislaus County Assessor; Newman School District; West Stanislaus Fire District; Newman Sanitary District, and Westside Mosquito District, Defendants and Respondents.

Civ. 9515.

District Court of Appeal, Third District, California.

March 10, 1959.

Action by nursery to recover ad valorem taxes paid under protest. The Superior Court, Stanislaus County, Gregory P. Maushart, J., rendered judgment adverse to nursery, and it appealed. The District Court of Appeal, Van Dyke, P. J., held that rose plants cultivated by nursery for one or two years prior to their sale were not growing crops within constitutional provision exempting growing crops from taxation and plants were subject to ad valorem tax.

Affirmed.

1. Taxation ⇐204(2)

Statutes exempting persons or property from taxation are to be strictly construed and exemptions are not to be extended by judicial construction to property other than that designated by law.

2. Taxation ⇐222

Rose plants cultivated by nursery for one or two years prior to their sale were not "growing crops" within constitutional provision exempting growing crops from taxation and plants were subject to ad valorem tax. West's Ann.Const. art. 13, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Growing Crops".

Ralph M. Brown of Brown, Brown & Bacon, Modesto, for appellant.

Frederick W. Reyland, Jr., Stanislaus County Counsel, Modesto, and Associate Counsel, J. F. Coakley, Dist. Atty., and R. Robert Hunter, Chief Asst. Dist. Atty., Oakland, for respondents.

VAN DYKE, Presiding Justice.

Appellant corporation appeals from a judgment adverse to it rendered in an action brought by it against respondents to recover ad valorem taxes paid under protest.

Appellant is a Delaware corporation, which does business in California and elsewhere. It is in the nursery business and has approximately 10,000 acres of land in cultivation in various states. In its nurseries it principally raises and sells all types of products produced and sold by such a business, including rose plants. For the latter purpose it operates about 800 acres of

land in Stanislaus County. Its president, Mr. Clarence Perkins, testified as follows: Although it is possible to plant rose bushes from seed, that method is followed only for a few varieties because generally roses do not come true from seed. It is necessary to adopt the method of budding on wild stocks and this method has been common for at least 50 years. The nurseryman intending to raise roses first prepares the ground after testing the soil for fertility content. The ground must be leveled for irrigation, must be sub-soiled and pre-irrigated. It is then furrowed and planted to cuttings taken from wild stock. The cutting is first de-eyed by removing the bottom eyes to keep the cutting from throwing out wild shoots. The cuttings are about 8 inches in length, are planted in rows 4 feet apart and are placed 5 to 8 inches apart in the row. This work is completed in the fall. During the winter the land is kept weeded. In the spring and through the summer the cuttings are budded to the specific types of roses desired. It takes from one to two years to complete the plants to the point where they are salable. Plants intended for greenhouse culture to produce cut flowers are matured in about a year. Those intended for open air planting are ready in two years. If the plants stay in the ground longer they become commercially valueless. The plants require constant care up to harvest. When land has been used to produce rose plants and the plants have been taken off another crop is put in the land to fertilize the soil before it is again used for roses. During culture the plants are subject to many hazards, such as spring winds that dry cuttings, frost, excessive rain, drought, adverse soil conditions, nematodes, vernacular, wilt, Crown gall and the like. Appellant's experience in one year showed that out of two and one-half million plants about one-half million were lost during the growing season. Nurserymen plant, cultivate and propagate plants for sale rather than seeking profit from the product of the plants. Harvesting is done with a machine called a digger that is hooked on the back of a tractor. It has a large U-shaped blade that goes into the ground about 2½ feet. It has a lifter on the blade which lifts the plants and soil up as the machine runs and from there they are pulled out of the soil by hand. The plants are then bundled and sold. They are dormant when harvested.

Article XIII, Section 1, of the California Constitution provides that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value except that "growing crops" shall not be taxed.

The Constitution makes no effort to give specific definition to the phrase "growing crops". The 1849 Constitution contained no provisions for exemption of any private property from taxation. It provided simply that taxation should be equal and uniform throughout the state and that all property in the state should be taxed in proportion to its value. During the period from 1849 to 1879 the legislature enacted various exemption statutes, including a statute enacted in 1854 exempting mining claims and growing crops from taxation. The statute was held unconstitutional and void in so far as it exempted growing crops in the case of People v. Gerke, 35 Cal. 677. Said the court:

> "In the case of People v. McCreery, 34 Cal. 432, 433, we held the Revenue Laws of this State to be unconstitutional, so far as they exempt private property from taxation. It follows that, in reading those laws, all parts thereof relating to the exemption of private property must be disregarded.
>
> "The property in question in this case was private property, and was therefore taxable."

In 1884, the Supreme Court decided the case of Cottle v. Spitzer, 65 Cal. 456, 4 P. 435, holding that growing fruit trees were not within the meaning of the phrase "growing crops" as used in the Constitution. Said the Supreme Court, adopting an opinion rendered at trial of the cause by Judge Belden, 65 Cal. at page 461, 4 P. at page 438:

"'* * * What, then, was understood by the convention which framed our present constitution, and by the people who ratified it, by the term "growing crops?"

"'By lexicographers "crop" is defined as, "that which is gathered from a single field, or of a single kind of grain or fruit, for a single season; especially the valuable product of what is planted in the earth; fruit; harvest." [Webster.] "That which is gathered as fruit; the harvest." [Worcester.] In popular parlance the word has the same universal meaning, and the phrases "cropping contracts," "interest in crops," "harvesting crop," and the like are used in the precise sense in which they are defined in the dictionaries. This phrase has also received a practical and general construction in the action of public officials. In 1851 the legislature attempted, with other classes of property, to exempt "growing crops" from taxation and from that time until the decision in People v. McCreery, in 1867, this exemption was conceded by the assessors. During all this period it is a matter of universal knowledge that this exemption was only asserted and allowed for annual and immature crops, and it was never pretended that trees or vines of perennial growth came within it.

* * * * * *

"'* * * The members of this convention [Constitutional Convention of 1879] could but have been aware of the growing importance of the vine and fruit interest of the state. It was reported to them that fifty millions of capital was then employed in grape culture alone, and yet in all the debates upon this question, both upon the part of those who favored and by those who opposed this exemption, constant reference is made to a crop to be sown and harvested within the same year, and not even a suggestion that trees or vines of perennial growth were referred to.'"

In 1894 the Constitution was amended to include as exempt from taxation fruit and nut-bearing trees under the age of 4 years when planted in orchard form, and grape vines under the age of 3 years when planted in vineyard form. The limitations requiring planting in orchard form or in vineyard form indicates that it was not intended to include nursery trees when growing as such. Cottle v. Spitzer appears to be the only taxation case which has directly passed upon the meaning of the phrase "growing crops" as used in the Constitution. But several decisions have considered the phrase in other connotations. In Hagenburger v. City of Los Angeles, 1942, 51 Cal.App.2d 161, 124 P.2d 345, it was held in a zoning ordinance case where the ordinance zoned certain property for "farming", that the growing of nursery stock came within the meaning of the word "farming" as used in the ordinance. Story v. Christin, 14 Cal.2d 592, 95 P.2d 925, 926, 125 A.L.R. 1402, though not a taxation case, dealt with the question of whether or not nursery stock (in that case trees growing in a nursery) constituted a "growing crop". The action was one for conversion of nursery stock, the alleged conversion having occurred when the defendant as conditional vendor cancelled the conditional sale contract under which plaintiff occupied and used defendant's land to grow nursery stock. Upon cancellation of the contract for breach of its terms, the conditional vendor reentered the property and prevented the plaintiff, the conditional purchaser, from removing his nursery stock. Defendant contended the nursery stock, which consisted of trees planted closely together in rows for development pending sale and transplanting to orchards, constituted "a growing crop unsevered from the land" at the time the conditional purchaser's right to possession was terminated and as such was a part of the soil and belonged to the conditional vendor. The trial court dismissed plaintiff's action for conversion upon the ground that the

complaint did not state a cause of action. The Supreme Court reversed, holding that the nursery trees had the characteristics of stock in trade or a stock of merchandise. Said the court, 14 Cal.2d at page 595, 95 P. 2d at page 926:

> "Many years ago, it was held that in this state the word 'nursery' as used in respect to horticulture, 'is a place where young trees are propagated for the purpose of being transplanted * * *.' (Attorney-General v. State Board of Judges, 38 Cal. 291, 296.) It is a matter of common knowledge that in the nursery business the young trees often remain in the soil for much longer than one year. There is no annual sowing and reaping. The purpose of planting them is that they may later be transplanted. Such trees are attached to the soil by roots because only in this manner may they be kept ready for sale. Of course, they grow and develop in the meantime, but they are not a profit of the land in the same sense as an annual crop matured from seed planted in the ground and harvested within the year and do not constitute a 'crop' within the legal meaning of that term."

[1] The factual situation disclosed in Story v. Christin is very similar to that disclosed by the record here. Other cases recognizing that nursery stock has the characteristics of personal property are Asato v. Emirzian, 177 Cal. 493, 171 P. 90, and Kirkman Nurseries v. Sargent, 42 Cal.App. 290, 183 P. 591. In Miethke v. Pierce County, 1933, 173 Wash. 381, 23 P. 2d 405, 408, where a nursery company brought suit to recover taxes paid on nursery stock, claiming that the nursery stock was a "growing crop", the court held that nursery stock did not come within a statutory exemption excluding "crops". The Washington court was concerned with trees being produced in a nursery for transplanting which would mature for that purpose in differing periods of time extending from 2 years to 13 years. The court discussed the meaning of the word "crop" much as did our Supreme Court in Cottle v. Spitzer, supra, as including only those crops which require an annual planting or sowing or an annual harvesting. After stating the well-settled rule that statutes exempting persons or property from taxation are to be strictly construed and that exemptions are not to be extended by judicial construction to property other than that designated by the law, the court said:

> "* * * There is no reason why the stock of nurserymen, growing or otherwise, should not be listed and assessed as merchandise the same as the stocks of merchants which are assessed annually, as well as the lands on which situated. The Legislature had the undoubted right and power to define nursery stocks as merchandise and to exempt growing crops on cultivated lands."

The court in the Miethke case rejected the argument that to exempt growing crops and to tax nursery stock resulted in discrimination and lack of uniformity, saying:

> "* * * All annual growing crops on real estate are exempted by the law before us, and all nursery stocks are taxed. Uniformity and equality exist in those classes, and what was to be taxed and what to be exempted was purely a matter of legislative policy."

It appears also that according to administrative interpretation nursery stocks have been consistently taxed as personal property and as not being within the exemption of "growing crops". The county assessor of Stanislaus County testified that so long as he had been in office, a period ranging back to 1948, he had, in accordance with the directions in the "Assessor's Handbook", so taxed nursery stock.

[2] We conclude that the rose plants were, for taxation purposes, not growing crops, but were to be taxed as falling without the exemption.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

168 Cal.App.2d 378

R. Pierce WILSON, Roberta Wilson and Howard Wilson, Plaintiffs,

R. Pierce Wilson and Roberta Wilson, Appellants,

v.

Robert R. BARRY; Plumas Mining Company, a corporation; Plumas Lumber Company, a corporation, et al., Defendants and Respondents.

Civ. 9414.

District Court of Appeal, Third District, California.

March 5, 1959.

Proceeding on motion for an order dismissing an action for failure to bring it to trial within five years. The Superior Court, Plumas County, Bertram D. Janes, J., granted the motion and plaintiffs appealed. The District Court of Appeal, Warne, J. pro tem., held that where record did not show that plaintiffs could not have brought the action to trial within five-year period, nor was there any showing that plaintiffs, after learning of court's continuance of trial to a date which was not within the five-year period called the court's attention to such fact, nor was there any showing that plaintiffs made any objection thereto or sought to have it advanced to a date prior to the running of the statute, court properly granted motion to dismiss, notwithstanding the fact that the continuance beyond the five-year period was made by the court on its own motion.

Judgment affirmed.

Dismissal and Nonsuit ⇐60(3)

Where record did not show that plaintiffs could not have brought their action to trial within five-year period, nor was there any showing that plaintiffs, after learning of court's continuance of trial to a date which was not within the five-year period called the court's attention to such fact, nor was there any showing that plaintiffs made any objection thereto or sought to have it advanced to a date prior to the running of the statute, court properly granted motion to dismiss, notwithstanding the fact that the continuance beyond the five-year period was made by the court on its own motion. West's Ann.Code Civ.Proc. § 583.

Wells & Baldwin, Sacramento, for appellants.

Walter F. Pettit, San Francisco, for respondents.

WARNE, Justice pro tem.

This is an appeal from an order dismissing the action for failure to bring it to trial within the five-year period as provided by Section 583 of the Code of Civil Procedure.

Two former appeals were before this court. The first appeal was from an order granting defendants' motion to withdraw alleged or unauthorized appearances made in their behalf. The order granting the withdrawal of appearances was reversed as to defendant Barry but affirmed as to all defendants except defendant Barry. Wilson v. Barry, 102 Cal.App.2d 778, 228 P.2d 331. The second appeal was from an order dismissing the action for failure to bring it to trial within the two-year period as provided in Section 583 of the Code of Civil Procedure. The judgment was reversed. Wilson v. Barry, 119 Cal.App.2d 621, 259 P.2d 991.

The following is a chronology of the procedure in this case:

The complaint was filed on August 20, 1948, but no summons was issued nor was any attempt made to serve defendants;

Defendants demurred to the complaint on April 30, 1949, and also at that time made a motion for summary judgment with notice and supporting affidavits;

A first amended complaint was filed on August 18, 1949, and the demurrer was interposed thereto on August 29, 1949;

On October 5, 1949, a motion to withdraw unauthorized appearances was filed, with notice and supporting affidavits;

On December 8, 1949, the demurrer to the first amended complaint was overruled

and defendants were given 20 days in which to answer;

On December 16, 1949, the motion to withdraw unauthorized appearances was granted by the trial court;

Notice of the above referred to first appeal was filed by plaintiffs on February 14, 1950;

On March 12, 1951, the above referred to opinion of this court was filed; (102 Cal.App.2d 778, 228 P.2d 331.)

On April 4, 1951, defendants filed a memorandum required to set cause for trial;

Remittitur was filed on May 14, 1951;

On July 12, 1951, defendant Barry filed his answer to the amended complaint;

On July 19, 1951, defendants, through their attorney, Frank M. McAuliffe (who was their attorney throughout the litigation until after the filing of the second appeal), filed and served a Notice of Time and Place of Trial, to the effect that the trial was set for August 14, 1951;

On August 29, 1951, defendant filed and served notice that the trial was set for October 3, 1951;

On September 20, 1951, defendants filed a motion to dismiss, with notice and supporting affidavits;

On October 3, 1951, the case was called to be heard on its merits, at which time the trial court heard the motion to dismiss and granted same;

On December 3, 1951, notice of the second appeal was filed;

On August 10, 1953, opinion of this court was filed reversing order of trial court; (119 Cal.App.2d 621, 259 P.2d 991.)

On October 9, 1953, remittitur issued by this court;

On October 13, 1953, remittitur filed in trial court; plaintiff filed a memorandum to set cause for trial;

On October 19, 1953, trial court, by minute order, set the case for trial on March 9, 1954; and all parties were notified in writing by clerk;

On March 9, 1954, the cause was called for trial. Neither plaintiffs nor their counsel appeared for trial. Robert R. Barry, one of the defendants, was present, as was Theodore G. Elges, Esq., apparently of counsel for defendants, but described in the minutes as "amicus curiae;" Mr. Elges drew the court's attention to the fact that no notice of time and place of trial had been served by plaintiffs or received by defendants; The court vacated the order setting the case for trial on March 9, 1954;

Thereafter, the record is devoid of activity on plaintiffs' part until on March 16, 1956, plaintiffs filed a motion entitled "Plaintiffs' Motion—to Tax Cost—Set for Trial—Frame Issues—Appoint Care-taker—Take Depositions, Etc." (Among other subjects of the motion, plaintiffs moved to set the cause for trial before a jury at the earliest convenient date, pointing out that the case had been twice appealed by plaintiffs and that remittiturs had been filed by this court upon two occasions);

On March 26, 1956, plaintiffs' motion of March 16, 1956, was called; Mr. Carroll Single, Esq., attorney for plaintiffs was present; the defendants were not present, nor were they represented by their counsel; Mr. Single addressed the court relative to the motion; the court directed that the case be placed on the civil active list and continued all pending matters to April 9, 1956;

On April 9, 1956, plaintiffs' motion of March 16, 1956, was again called, Hon. A. K. Wylie, Judge Assigned, presiding; Mr. Single was heard in support of the motions, and Mr. Winslow Christian, Esq., of counsel for defendants, argued against the motions; the court continued the matter to 4:00 p. m. of said date, to be called in chambers, at which time the court ordered *inter alia* that the case be set for trial by jury on a date to be set by Judge Janes;

On April 13, 1956, the court ordered the case set for trial on July 16, 1956;

On April 18, 1956, the court, upon its own motion, reset the case for trial on September 25, 1956;

On April 20, 1956, plaintiffs filed Notice of Time and Place of Trial, to the effect

that trial was set for July 16, 1956, without proof of service upon defendants;

On July 16, 1956, no appearance made and no minute order entered;

On July 27, 1956, the court, upon its own motion, due to the priority of criminal matters, continued the case for trial from September 25, 1956, to October 29, 1956;

On October 8, 1956, the court, upon its own motion, continued the case for trial from October 29, 1956, to the next day, October 30, 1956;

On October 22, 1956, defendants filed a motion to dismiss under Code of Civil Procedure, sec. 583, together with notice and supporting affidavits, noticing said motion for hearing on October 30, 1956;

On October 23, 1956, pursuant to the provisions of the Code of Civil Procedure, sec. 631, the clerk notified the defendants that plaintiffs, who had demanded a jury trial, had failed to deposit jury fees in accordance with requirements of said section;

On October 30, 1956, plaintiffs filed a discharge of their attorney, Carroll Single, Esq., accepted in writing by said attorney; the matter came on this date for trial, and for hearing of defendants' motion to dismiss; R. Pierce Wilson, one of the plaintiffs, was present without counsel, plaintiffs having this date discharged Mr. Single as their attorney; Walter F. Pettit, Esq., counsel for defendants, appeared for defendants; plaintiffs not being represented by counsel, the court continued the motion to dismiss for hearing to November 13, 1956, and advised plaintiff R. Pierce Wilson to be prepared for the hearing on that date; the court also ordered the matter continued for trial to said date;

On November 13, 1956, the matter came before the court upon defendants' motion to dismiss, etc.;

On May 1, 1957, order dismissing action filed.

Section 583 of the Code of Civil Procedure provides that:

"* * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended and except where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable * * * upon due diligence, in which event said period of absence or concealment shall not be part of said five-year period. * * *"

In Rose v. Knapp, 38 Cal.2d 114, 117, 237 P.2d 981, 983, the court said: "The provision of section 583, requiring dismissal if an action is not brought to trial within five years after the filing of the complaint unless the parties have stipulated for an extension of the period, is mandatory, but it is subject to implied exceptions. As stated in Christin v. Superior Court, 9 Cal. 2d 526, 532–533, 71 P.2d 205, 208, 112 A. L.R. 1153, 'The purpose of the statute is plain: to prevent *avoidable* delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years. * * *' and one exception has been recognized 'where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile.' (Citing cases.) What is impossible, impracticable or futile must, of course, be determined in the light of the facts of the particular case." See, also, Southern Pacific Company v. Superior Court of Sacramento County, 157 Cal.App. 2d 168, 320 P.2d 911. The record shows that the instant case was set for trial on two occasions, the first time it was set for March 9, 1954. On this occasion the court vacated the order setting it for trial, since, when called, neither plaintiffs nor their counsel, were present. Thereafter, nothing was done to have the case again set for trial until March 16, 1956, when plaintiffs filed a motion to set the case for trial before a jury and the court pursuant

to said motion, on April 13, 1956, ordered the case set for jury trial on July 16, 1956. However, on April 18, 1956, the court, upon its own motion, reset the case for trial on September 25, 1956, which after deducting the time jurisdiction of the trial court was suspended by the two appeals was one day after the expiration of the five-year period provided by section 583. The record does not disclose why the trial date was continued from July 16, 1956, to September 25, 1956, but it does show that on July 27, 1956, "due to the priority of criminal matters", the case was ordered continued for trial from September 25, 1956 to October 29, 1956.

Plaintiffs urge that such action of the trial court in continuing the case beyond the five-year period brings the matter within the purview of such cases as Christin v. Superior Court, supra, wherein it is stated, 9 Cal.2d at page 530, 71 P.2d at page 207, that "despite the mandatory language of the statute, *implied exceptions* have been recognized where it was *not possible* to bring the cause to trial." However, as stated in Bank of America Nat. Trust & Savings Ass'n v. Moore & Harrah, 54 Cal.App. 2d 37, 41, 128 P.2d 623, 625: "The obvious weakness in plaintiff's position is that the record does not show that plaintiff *could not* have brought the action to trial within the five-year period." Nor is there any showing that plaintiffs, after learning of the court's continuance beyond the July 16, 1956, setting, called the court's attention to the fact that the continuance to September 25, 1956, was not within the five-year period. Further, there is no showing that plaintiffs made any objection thereto or sought to have it advanced to a date prior to the running of the statute. Under such circumstances, we feel it may be said that if the plaintiffs, upon learning of the postponement beyond the July 16th date, had called the court's attention to the consequences which would flow from it they could undoubtedly have secured an earlier date for the trial, or possibly a stipulation from opposing counsel waiving the benefit of the statute. See Ravn v. Planz, 37 Cal. App. 735, 736, 174 P. 690 and Bank of America Nat. Trust & Savings Ass'n v. Moore & Harrah, supra.

We conclude that the trial court properly granted the defendants' motion to dismiss.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



168 Cal.App.2d 326

Catherine G. COOPER, Plaintiff,

v.

Lawrence J. COOPER, aka Laurence J. Cooper, aka Lawrence John Cooper, Darle M. Cooper, aka Darle Manford Cooper, John F. Phillips, the Spouse of John F. Phillips, John F. Phillips dba Angeles Bond Adjusters, Affiliated Merchants, a corporation, G. F. Stoneman and the Spouse of G. F. Stoneman, Defendants.

Catherine G. COOPER, Plaintiff and Cross-Defendant,

and

Lawrence J. Cooper, Defendant and Cross-Defendant, Appellants,

v.

George F. STONEMAN and Vivian A. Stoneman, Cross-Complainants and Defendants,

Darle M. Cooper, Defendant and Cross-Defendant,

and

John F. Phillips and Mrs. John F. Phillips, Defendants, Respondents.

Civ. 23213.

District Court of Appeal, Second District, Division 3, California.

March 3, 1959.

Rehearing Denied April 2, 1959.

Hearing Denied April 29, 1959.

Suit by woman to quiet title to realty wherein defendants cross-claimed alleging that debtor had placed property in woman's

name with intent to defraud his creditors. The Superior Court, Los Angeles County, Joseph W. Vickers, J., rendered judgment for defendants, and woman and debtor appealed. The District Court of Appeal, Vallée, J., held that evidence sustained findings that all funds paid toward purchase of property had been funds belonging to debtor, that property was owned by debtor and not by woman, that taking of title in name of woman had been for purpose of concealing from debtor's former wife fact that debtor was true owner of property and evading judgment for child support against debtor.

Affirmed.

1. Trial ⇐29(1)

Woman who admittedly lived with man as his wife although she was not married to man and who brought action to quiet title to property which man had caused to be placed in her name was not deprived of a fair trial, because court, after it had stated what findings and judgment were, stated that if man had behaved himself as he should have he wouldn't be in any of the trouble and the same was true of the woman.

2. Judges ⇐49(1)

Conviction in mind of judge, based on his observation of witnesses and the hearing of their testimony, does not amount to prejudice against a litigant.

3. Evidence ⇐589

Trial judge was entitled to disbelieve testimony of parties to action, but fact that he disbelieved their testimony did not furnish affirmative evidence supporting findings adverse to them.

4. Appeal and Error ⇐901

Contention of appellants that findings of fact were contrary to evidence required them to demonstrate that there was no substantial evidence to support the challenged findings.

5. Appeal and Error ⇐907(2)

A reviewing court starts with presumption that the record contains evidence to sustain every finding of fact.

6. Appeal and Error ⇐989

It is not province of reviewing court to search record in order to ascertain whether it contains evidence that will sustain a contention made by either party to the appeal.

7. Appeal and Error ⇐757(3)

Where an appellant claims that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all of the material evidence on that point and not merely his own evidence, and, if that is not done, the error assigned is deemed waived.

8. Husband and Wife ⇐131(1), 133½

Even if property were presumed to be separate property of woman because title to property was in her name, presumption was rebuttable, and whether it was rebutted was a question of fact for trial court.

9. Fraudulent Conveyances ⇐290

Since direct proof of intent to defraud creditors is often an impossibility because real intent of parties and facts of a fraudulent transaction are peculiarly in knowledge of those sought to be charged with fraud, proof indicative of fraud may be found in circumstances surrounding the transaction and the relationship and interest of the parties.

10. Fraudulent Conveyances ⇐57(1)

Fact that debtor was not rendered insolvent by purchase of property placed in name of another was immaterial to question whether conveyance was in defraud of creditors if intent of debtor to hinder, delay, or defraud a creditor were shown.

11. Evidence ⇐589

In suit by woman to quiet title to property, wherein defendants cross-claimed alleging that title was placed by debtor in name of woman with intent to defraud creditors, court was not compelled to accept as true testimony of woman as to source of funds used in purchase of property.

12. Divorce ⇐311

In suit by woman to quiet title to realty, wherein defendants cross-claimed alleging that debtor had caused title to be placed in name of woman with intent to

defraud creditors, evidence sustained finding that all funds paid toward purchase of realty had been funds belonging to debtor, that no funds belonging to woman had been invested in property, that property was owned by debtor and not by woman, that taking of title in name of woman had been for purpose of concealing from debtor's former wife fact that debtor was true owner of property and evading judgment for child support against debtor.

A. W. Brunton, Los Angeles, and Harry V. Goza, Jr., Norwalk, for appellants.

Title & Tannenbaum and Julius M. Title, Beverly Hills, for respondents George F. Stoneman and Vivian A. Stoneman.

No appearance for respondents Darle M. Cooper, John F. Phillips, and Mrs. John F. Phillips.

VALLÉE, Justice.

Plaintiff, Catherine G. Cooper, brought this suit to quiet title to an improved parcel of realty, called the Margate Street property. She named as defendants Lawrence J. Cooper, and George F. Stoneman and his wife, Vivian A. Stoneman, among others. Lawrence J. Cooper did not answer the complaint. The Stonemans answered and cross-complained, alleging that: about March 30, 1951 Lawrence J. Cooper became the owner of the property; with intent to hinder, delay, and defraud his creditors, he caused the title to be placed in the name of Catherine G. Cooper; on information and belief, that while Catherine G. Cooper and Lawrence J. Cooper held themselves out as husband and wife, they have never married; on information and belief, the considerations paid for the property were the sole and separate funds of Lawrence J. Cooper; on information and belief, by the purchase of the property Lawrence J. Cooper was rendered insolvent; at the time of the purchase Catherine G. Cooper knew the property was being placed in her name for the purpose of hindering, delaying, and defrauding the creditors of Lawrence J. Cooper.

The cross-complaint further alleged: about September 8, 1954 a judgment was rendered in an action in the superior court of the County of Los Angeles in which John F. Phillips was plaintiff and Lawrence, defendant; on October 11, 1955 the property was sold under execution issued in that action to the Stonemans, and they are the owners. The cross-complaint also alleged that since October 11, 1955 the property has been occupied by lessees of Catherine and Lawrence and they have received $85 a month rent.

In her answer to the cross-complaint Catherine denied all its allegations except she admitted she and defendant have never married and are not husband and wife, and that she has received the rents from the property. In his answer to the cross-complaint Lawrence denied any claim of ownership in the property and alleged it was purchased by Catherine with her separate funds; and that he was not then and is not now insolvent.

The trial court found: Lawrence was the sole purchaser and became the sole owner of the property; all of the funds paid toward the purchase were funds belonging to Lawrence in which Catherine had no right, title, or interest; no funds whatsoever belonging to Catherine have been invested in the property at any time; Catherine did not at any time acquire any interest therein; Catherine and Lawrence received all the rents; they were domiciled in Iowa and have never been domiciled in California; the property was purchased in Catherine's name for the purpose of concealing Lawrence's ownership in the property from his former wife, to whom he was indebted for child support, and Catherine knew it was being placed in her name for that purpose.

The court further found: at the time of the purchase Catherine and Lawrence were and for many years had been living together as husband and wife but had never been and were not husband and wife; Lawrence had previously been married to Lula Bond; that marriage had been dissolved by a decree of divorce in the superior court

of the County of Los Angeles many years prior to the purchase; in that divorce action Lula Bond had secured a judgment against Lawrence for monthly payments for support of minor children; at the time of the purchase Lawrence owed several thousand dollars on that judgment.

The court further found: in 1954 Lula Bond assigned her right of action on the delinquent judgment to Phillips, who sued Lawrence and recovered a judgment against him for $4,969.16; by virtue of a writ of execution issued on that judgment, all interest of Lawrence in the property was sold to the Stonemans on October 11, 1955 for $5,369.69; the Stonemans are the owners of the property; since October 11, 1955 Catherine and Lawrence have collected $2,035 rent from tenants of the property.

Judgment was that the Stonemans are the owners of the property subject to a deed of trust, and that they recover $2,035 from Catherine and Lawrence. The latter appeal.

[1, 2] Appellants first assert they did not have a fair trial. They say the statement of the trial judge quoted in the margin which was made after he had stated what the findings and judgment were to be "expressed his state of mind throughout the trial and impaired his impartiality and swayed his judgment."[1] We find no basis for the assertion. "It is well settled in this state that the expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice." Kreling v. Superior Court, 25 Cal.2d 305, 310–311, 153 P.2d 734, 737. Conviction in the mind of a judge, based on his observation of the witnesses and the hearing of their testimony, does not amount to prejudice against a litigant.

Appellants contend the findings that all of the funds paid toward the purchase of the property were funds belonging to Lawrence, that no funds belonging to Catherine had been invested in the property, that the property was owned by Lawrence and not by Catherine, and that the taking of title in the name of Catherine was for the purpose of concealing from Lula Bond the fact that Lawrence was the true owner of the property and to evade the judgment for child support, are contrary to the evidence. They say the evidence without conflict shows that all the money paid on the purchase price of the property was the separate property of Catherine, and that the evidence is conclusive that the property was not purchased and title taken in her name to hinder, delay, or defraud Lawrence's creditors.

[3] The trial judge, at the conclusion of the evidence, stated he did not believe the testimony of appellants. Respondents say the trial judge was entitled to disbelieve their testimony. That is true. But the fact that he disbelieved their testimony does not furnish affirmative evidence supporting the findings. "Disbelief does not create affirmative evidence to the contrary of that which is discarded. 'The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative.'" In re Estate of Bould, 135 Cal.App. 2d 260, 264, 287 P.2d 8, 10, 289 P.2d 15. The question is: Was there any substantial affirmative evidence which supports the findings? In other words, does the relationship of the parties, together with the

1. The statement was: "The Court: I have no evidence before me that would justify any formal action, but I would suggest to Mr. Lawrence J. Cooper that he start living now as he should have started back in 1936, to conduct himself as a Christian gentleman and avoid any future trouble. If he had just behaved himself and taken care of his family as he should, he wouldn't be in any of this trouble. The same is true of Mrs. Catherine Cooper, if she had lived as she was undoubtedly taught in her childhood days. You will have to take care of any trouble that arises. They are in trouble enough now. If they want more, I suppose they can ask for it."

other circumstances surrounding and incident to the transactions, constitute evidence which of itself warranted inferences which support the findings?

[4–7] Appellants' contention requires them to demonstrate that there is no substantial evidence to support the challenged findings. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550. Appellants, however, recite only evidence favorable to them and argue the case as though we were the judges of the weight of the evidence. It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. It is not the province of a reviewing court to search the record in order to ascertain whether it contains evidence that will sustain a contention made by either party to the appeal. Where an appellant claims that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all of the material evidence on the point and not merely his own evidence. If this is not done the error assigned is deemed waived. Tesseyman v. Fisher, 113 Cal.App.2d 404, 407, 248 P.2d 471. Notwithstanding appellants' disregard of the rules, we have examined the record.

In April 1938 Lula Bond, Lawrence's former wife, obtained a judgment against him for child support. It was stipulated that as of November 1, 1950 Lawrence was delinquent in child support payments in the sum of about $4,855 under this judgment.

Lawrence testified he was not married to Catherine. Catherine admitted in her answer to the cross-complaint and testified at the trial that she was not married to Lawrence. They began living together about April 1936.[2] They have been residents of Sioux City, Iowa, since that time. Catherine testified that at that time she had about $10,000 in the form of currency which she had received as a gift from her deceased sister. Her testimony in this respect was not corroborated. She kept the $10,000 in her home until about 1945. About 1947 Catherine and Lawrence opened a joint tenancy account in Security National Bank, Sioux City. On November 22, 1950 an account was opened in Woodbury County Savings Bank, Sioux City, with an initial deposit of $5,000. This account was in the names of Catherine G. Cooper, Marie A. Wright, and Lawrence J. Cooper. Plaintiff could not draw on the account without either the signature of Lawrence or Mrs. Wright. Mrs. Wright was a cousin of Lawrence, and his employee. Catherine testified the money in the Woodbury bank account belonged to her alone but she could offer no explanation why her account should require either of the two other signatures.

In January 1951 Catherine and Lawrence, then residents of Sioux City, Iowa, came to California on a visit; and the following month the property in question, known as the Margate Street property, was purchased through escrow. The deed was to "Catherine G. Cooper, a married woman." The purchase price of the property was $11,325. On February 19, 1951, $500 was deposited in the escrow by a check drawn on the Woodbury bank account. $5,021.57 of the purchase price was evidenced by a deed of trust to Prudential Insurance Company. The balance of $5,803.43 was deposited in the escrow also by a check drawn on the Woodbury bank account. The deposit receipt and the original escrow instructions covering the purchase named Lawrence as a purchaser. Lawrence signed the instructions as a buyer. On March 27, 1951 Catherine sent a cashier's check for $88.35 to the escrow holder. The escrow was closed on April 4, 1951.

2. During the trial counsel for appellants sought to amend Lawrence's answer to the cross-complaint to allege a common-law marriage. The court denied the motion when counsel stated the issue was immaterial. We note that a common-law marriage was valid in Iowa. Gammelgaard v. Gammelgaard, 247 Iowa 979, 77 N.W.2d 479; In re Stopps' Estate, 244 Iowa 931, 57 N.W.2d 221; Love v. Love, 185 Iowa 930, 171 N.W. 257.

On May 1, 1951 Catherine sent a cashier's check for $500 and on June 1 a money order for $300 to Prudential. At the time Catherine sent the cashier's check and the money order she and Lawrence had two checking accounts. All other installment payments on the deed of trust were made from checking accounts—some from the joint account at the Security bank in Sioux City but the majority from the Woodbury bank account until some time in 1954 when Catherine opened an account in Norwalk, California, and payments were made from that account. The balance unpaid at the time of trial was about $1,500.

The original deposit receipt prepared by the broker, dated February 15, 1951, shows receipt of $500 as a down payment on the property. A carbon copy of the receipt discloses that on the line starting with the words "Received from" the initials "L. J." in "L. J. & C. G. Cooper" were crossed out and the name "Catherine" appears above. Both Catherine's and Lawrence's signatures appear on the lines provided for "Purchaser." A small "x" appears in front of Catherine's signature but no such mark appears in front of Lawrence's signature. The broker, who testified at the trial, was unable to explain this. He stated he did not put the "x" in front of Catherine's name; that Catherine did not sign the deposit receipt; Lawrence was the only one who signed it; he did not know how Catherine's signature came to be there; and he did not make the correction on the receipt.

On February 19, 1951 the broker caused the escrow officer, Miss Ehlers, to prepare escrow instructions from the information contained on the copy of the deposit receipt. She typed the buyer's instructions showing title to be vested in Catherine and Lawrence as joint tenants and gave the document to the broker to obtain their signatures. A short time later the broker returned with Catherine and advised Miss Ehlers that the two names appearing thereon as joint tenants was incorrect because Catherine was buying the property and it should be in her name only. Miss Ehlers made the correction by crossing out the line reading "Lawrence J. Cooper and Catherine G. Cooper, husband and wife, as joint tenants" and typing below, "Catherine G. Cooper, a married woman." Since the instructions had already been signed by Catherine and Lawrence Miss Ehlers told them they would have to initial the correction. Instead of initialing they signed their names above the correction.

Catherine testified she purchased the property as her future home. On cross-examination she admitted she only went as far as the living room prior to the sale. She also admitted that when she purchased three properties in Iowa she examined the properties carefully inside and out before buying. Lawrence made a complete inspection of the property and discussed details of the purchase with the broker and told him "he was buying." On June 1, 1951 Catherine wrote to Prudential with respect to payments on the deed of trust and stated: "Please mail all future correspondence to the home address and mark Parsonal and address to Mr. & Mrs. L. J. Cooper 1518 Silver Street, Sioux City 17, Iowa." On April 9, 1952 Catherine wrote Prudential enclosing a check and stated: "In February when my husband and I were in L. A. we were in your office and we talked to Mr. Brown, at which time we paid the interest up to February and paid on the contract just leaving a balance of $3,000.00 on the principal. Mr. Brown had promised to send us some type of receipt book with the payments and interest figured on the receipt from February on, as of this date we have never received this book, so would appreciate you continueing on and sending us this booklet of receipts."

Some of the payments to Prudential were made from the joint account of Catherine and Lawrence in the Sioux City Security bank. Some of the rent from the property was deposited in the Woodbury bank account and some in the Sioux City Security bank account, in both of which Lawrence had an interest. In a booklet in evidence Lawrence listed an item of rent from the property together with rents from other

properties owned by him, showing a total of the monthly income from all his properties.

In 1954 Catherine and Lawrence became estranged. Catherine filed an action for divorce in Iowa on March 6, 1954, and Lawrence filed one in Nevada. Lawrence testified that in March 1954 he ransacked Cathine's files in Sioux City and took her papers and records, including documents relating to the property in question, and brought them to California where they conveniently disappeared. On March 19, 1954 he conveyed the property to Darle Cooper, his son by his marriage to Lula Bond. On the same day he executed a lease of the property to the Vincents, who took possession. The lease was executed by "Cooper Washer Parts, Inc., Lawrence J. Cooper, president, and Darle Cooper," as lessors. On March 24, 1954 Catherine wrote Prudential enclosing "a money order for a double payment" and stated: "There has been a divorce action between Mr. Cooper & myself, and until further notice I will make the payments," referring to the payments on the deed of trust.

Lula Bond assigned the judgment for child support to Phillips, a collection agency. On May 13, 1954 Lawrence entered into an agreement in writing with Lula Bond which in substance provided that the Margate Street property be sold and Mrs. Bond was to receive $4,500 "in settlement of case, known as, Judgment of child support here in California * * * to satisfy interest and judgment in full," $2,000 to be applied on the deed of trust, and the balance to be paid to Lawrence. On May 24 Darle Cooper conveyed the property to Phillips. Phillips sued on the child support judgment and on September 8, 1954 recovered judgment against Lawrence for $4,952.16. Execution issued on the judgment, and on October 11, 1955 the property was sold to cross-complainant G. F. Stoneman. On May 28, 1956 Phillips executed a quitclaim deed to G. F. Stoneman.

The salesman who handled the sale of the property for the seller testified that Lawrence told him he had some money he wanted to invest in some property for speculation; Lawrence negotiated the price and payment of half the sewer expense; Catherine did not take any part in the negotiations or discussions concerning the property; Catherine stayed in the car while he and Lawrence went to the office (broker's) and prepared the deposit receipt, which was then signed by Lawrence; Lawrence then gave him a check for $500; about that time Lawrence told him he wanted to rent the property and asked him to locate a tenant. Lawrence told Phillips he owned the property.

In his deposition before trial Lawrence testified: no broker had shown him the property; he had never negotiated for it; it had been purchased by Catherine before he ever saw it; he did not know where the funds came from for the purchase; the rents from the tenants of the property were paid directly to Catherine.

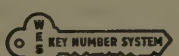
[8–11] Assuming it is true, as appellants argue, that since title to the property was in Catherine it is presumed it is her separate property, the presumption however is rebuttable; and whether it is rebutted is a question of fact for the trial court. Stafford v. Martinoni, 192 Cal. 724, 737–738, 221 P. 919; Nichols v. Mitchell, 32 Cal.2d 598, 604–607, 197 P.2d 550; Tedder v. Johnson, 105 Cal.App.2d 734, 739, 234 P.2d 149; Guerin v. Guerin, 152 Cal.App.2d 696, 704, 313 P.2d 902. Since direct proof of fraudulent intent is often an impossibility because the real intent of the parties and the facts of a fraudulent transaction are peculiarly in the knowledge of those sought to be charged with fraud, proof indicative of fraud may be found in the circumstances surrounding the transaction, the relationship and interest of the parties. Taylor v. Osborne-Fitzpatrick Finance Co., 57 Cal. App.2d 656, 661, 135 P.2d 598. The court found that Lawrence was solvent at the time the property was purchased. The fact that Lawrence was not rendered insolvent by the purchase is immaterial if the intent of the debtor to hinder, delay, or defraud a creditor is shown. Maguire v. Corbett, 119 Cal.App.2d 244, 251, 259 P.2d 507.

The court was not compelled to accept as true the testimony of Catherine as to the source of the funds used in the purchase of the property. Knapp v. Elliott, 81 Cal. App.2d 667, 670, 184 P.2d 934; Maguire v. Corbett, supra, 119 Cal.App.2d 244, 250, 259 P.2d 507.

[12] We think it manifest that the evidence we have recited was sufficient to warrant the trial judge in making the findings in question.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



168 Cal.App.2d 444

FIRESTONE TIRE & RUBBER COMPANY, Los Angeles, California, Respondent,

v.

UNITED RUBBER WORKERS OF AMERICA, LOCAL UNION NO. 100, AFL-CIO,

Charles W. Ramroth, President of the United Rubber Workers of America, Local Union No. 100, AFL-CIO, Appellant.

Civ. 23510.

District Court of Appeal, Second District, Division 1, California.

March 6, 1959.

Proceeding on motion by union for an order confirming an arbitration award wherein employer filed a motion to vacate the award. From an order of the Superior Court, Los Angeles County, Bayard Rhone, J., denying the motion and granting the employer's motion to vacate the award, the union appealed. The District Court of Appeal, Fourt, J., held that where agreement between union and employer provided in effect that when an employee in classification A was temporarily assigned to classification B, he should receive the rate of pay of classification A, or of classification B, whichever was higher, determination that when an employee in classification A was temporarily assigned to classification B he was entitled to receive the rate of pay of classification C was not within the power of the Board of Arbitration and was properly vacated.

Order affirmed.

1. Labor Relations ⇐462, 486

Where agreement between union and employer provided in effect that when an employee in classification A was temporarily assigned to classification B he should receive the rate of pay of classification A, or of classification B, whichever was higher, determination that when an employee in classification A was temporarily assigned to classification B he was entitled to receive the rate of pay of classification C was not within the power of the Board of Arbitration and was properly vacated.

2. Arbitration and Award ⇐29, 31

Arbitrators are not bound to a strict adherence to legal procedures, and they are not required to find facts, give reasons for their awards, or describe the processes by which they arrived at their decisions, but they are not released from obligation to be guided by the basic agreement of the litigants.

3. Arbitration and Award ⇐76

Although every presumption is in favor of the award, and mere unsound reasoning by an arbitrator in reaching a conclusion within the scope of proper arbitration will not invalidate the result, an award is properly vacated when arbitrators exceed their powers.

4. Arbitration and Award ⇐29

An arbitration proceeding is grounded in the mutual assent of the disputants to the resolution of their controversy by such tribunal, and the arbitrators derive their power from the submission agreement.

5. Arbitration and Award ⇐1

The policy of the state is in favor of arbitration.

Tobriner, Lazarus, Brundage & Neyhart, and James Wolf, Los Angeles, for appellant.

Trippet, Yoakum, Stearns & Ballantyne, by Charles Stearns, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from an order denying the appellant's application for an order confirming an arbitration award and granting the motion of respondent for an order vacating the award.

Arbitration proceedings were held between Firestone Tire & Rubber Company, Los Angeles, California, respondent (hereinafter referred to as the Company) and United Rubber Workers of America, Local Union No. 100, AFL–CIO, appellant (hereinafter referred to as the Union), to resolve a dispute between them with reference to the matter of certain wages of certain persons who were employed by the Company and who were members of the Union.

There was an agreement made and entered into between the Company and the Union in November, 1956, and which was, by further agreement, supplemented from time to time. That agreement at the times with which we are here concerned provided under Article XI titled, "Procedure for Adjustment of Grievances," in part as follows:

"*Section* 2

"(a) The final step in the grievance procedure shall be arbitration, which shall be conducted as follows:

"(1) (a) A representative of the Company and the President of the Local Union shall select an impartial arbitrator for any grievance to be arbitrated at the respective local plant. The impartial arbitrator shall hear and determine grievances, either alone or by mutual agreement of the Company and the Local Union contained in the Supplementary Agreement negotiated at the local plant level, as the chairman of a three-man board of arbitration consisting, in addition to such impartial arbitrator, of one member appointed by the Company and one by the Local Union.

* * * * * *

"(2) In the event that any grievance concerning the interpretation or application of this Agreement or any local plant Supplementary Agreement, excepting such grievances as are not arbitrable hereunder, is not satisfactorily settled through the procedure outlined in the local plant Supplementary Agreement, it shall be submitted to arbitration upon written notice to the Company, with a copy to the impartial arbitrator selected in accordance with (1) (a) or (b) above. The grievance to be arbitrated shall be identified and described in said written request.

* * * * * *

"(6) The impartial arbitrator or board of arbitration shall have no power to add to, subtract from, or modify any provision of this Agreement or any Supplementary Agreement negotiated at the local plant level. It is understood that matters involving the general wage scale or differentials in base rates for pieceworkers and maximum daywork rates for dayworkers which are established at the effective date of this Agreement shall not be a subject for arbitration."

[1] The agreement also provided, under Article VI titled "Wage Application Provisions," in part as follows:

"*Section* 14–S

"A dayworker taken from his regular classification at the request of Management to fill a temporary vacancy on another classification shall be paid either his piecework earnings, his Basic Wage Rate, or the Basic Wage Rate of the temporary classification, whichever is the highest, provided a reasonable effort is put forth under the existing conditions. While a dayworker is temporarily assigned to a piecework classification under the above condition, the provisions of Article VII shall be applicable."

The Board of Arbitration in question was selected pursuant to the agreement of the parties, consisting of a representative of the Company, a representative of the Union and a neutral arbitrator. The issue to be arbitrated was stated in writing to be "What is the applicable rate of pay for a Lathe and Mill Machinist, Job 3–41, when he is temporarily working as a Turret Lathe Machinist, Job 3–87?"

A hearing was held by the board of arbitration and the arbitrators set forth, in their report, that among the classifications in Department 3B there are the following:

General Machinist	—	Wage Rate — $2.55 per hour
Turret Lathe Machinist	—	" " — 2.49 " "
Lathe and Mill Machinist	—	" " — 2.49 " "

The decision of the arbitrators was as follows:

> "The applicable rate of pay for a Lathe and Mill Machinist when temporarily working as a Turret Lathe Machinist is the General Machinist rate."

The Company appointed arbitrator dissented from the decision. The Union made a motion and application for an order to confirm the arbitration award. The Company filed a memorandum in opposition to the motion to confirm the award and made a motion to vacate the award under the provisions of section 1288, Code of Civil Procedure.

The trial court made an order wherein it denied the motion of the Union to confirm the award, and granted the motion of the Company to vacate the award. The memorandum prepared by the trial judge at the time of his decision discloses that he was of the belief that the award as made was not within the power of the board of arbitration.

The appeal is from that order.

The Union contends that:

(a) the merits of the award are not subject to review, and

(b) the award was within the power of the board of arbitration.

There is, under the particular circumstances of this case, no contention upon the part of the Company that the merits of the award are subject to review.

Each side essentially agrees that the only question for determination is whether the arbitrators disregarded the terms of their employment and the scope of their authority as set forth in the arbitration contract.

We believe the trial court was correct in vacating the order.

The question as submitted to the arbitration board was precisely and concisely stated. The language used was clear and even specified the particular job classifications by number and designation. Reduced to the simplest of terms, the question put was, what is the applicable rate of pay for an employee in classification A (lathe and mill machinist) when he is temporarily working in classification B (turret lathe machinist)?

The agreement between the Union and the Company (Art. VI, Sec. 14–S) provided in effect that when an employee in classification A is temporarily assigned to classification B, he shall receive the rate of pay of classification A, or of classification B, whichever is higher. The agreement did not provide that a board of arbitration can decide that while so temporarily employed in classification B, the employee shall receive the rate of classification C (general machinist).

There is no question here as to any classifications of jobs, or as to whether the employees in question were dayworkers (hourly workers) paid as provided for in Article VI, Section 1(b) of the agreement.

The arbitration board in this case, in effect, took upon itself the authority of deciding to which classification the employee (the lathe and mill machinst) was temporarily transferred. The parties previously had determined that matter in the agreement and it was so set forth in the question which was to be decided by the board (namely from classification Job 3–41 to classification Job 3–87) and the board had

no authority to make such a determination. In other words, the board attempted to add to, subtract from or modify the contract of the parties in excess of the powers expressly conferred upon it. See Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 184, 260 P.2d 156; Christenson v. Cudahy Packing Co., 198 Cal. 685, 692, 247 P. 207; Screen Cartoonists Guild, Local 852 v. Walt Disney Productions, 74 Cal. App.2d 414, 168 P.2d 983.

[2, 3] It was appropriately said in Drake v. Stein, 116 Cal.App.2d 779, at page 785, 254 P.2d 613, at page 617:

"Arbitrators are not bound to a strict adherence to legal procedures. They are not required to find facts, give reasons for their awards, or describe the processes by which they arrived at their decisions. Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 232, 174 P.2d 441. But they are not, because of such freedom, released from the obligation to be guided by the basic agreement of the litigants. When appellants agreed in clear and unambiguous language to transfer a specific parcel of real estate and a policy of title insurance for the faithful performance of certain services by respondent it was not intended thereby to authorize the future arbitrators to award something else to respondent in case of an arbitration. But that is exactly what was done by [the arbitrator]. Instead of the lot, he awarded to respondent the sum of $7,500 in cash. * * * Even with such a broad arbitration clause as paragraph 16, how could there be any doubt that Drake had only the right to a certain specific piece of property as his compensation under the contract?

"Although every presumption is in favor of the award, Popcorn Equip. Co. v. Page, 92 Cal.App.2d 448, 207 P.2d 647, and mere unsound reasoning by an arbitrator in reaching a conclusion within the scope of proper arbitration will not invalidate the result, McKay v. Coca-Cola Bottling Co., 110 Cal.App 2d 672, 243 P.2d 35, an award is properly vacated when arbitrators exceed their powers. See Screen Cartoonists Guild [Local 852] v. Walt Disney Productions, 74 Cal.App.2d 414, 168 P.2d 983; Bierlein v. Johnson, 73 Cal.App. 2d 728, 166 P.2d 644."

The Union relies heavily upon three cases, namely, Straus v. North Hollywood Hospital, Inc., 150 Cal.App.2d 306, 309 P.2d 541, Lang v. Badger, 157 Cal.App.2d 345, 320 P.2d 906, and McKay v. Coca-Cola Bottling Co., 110 Cal.App.2d 672, 243 P.2d 35. In our opinion, none of the cases is particularly helpful to the appellant. In none of the cases cited are the facts comparable to the facts in the instant case.

[4] In the Straus case, supra, an award was made that the contract between the hospital and the doctor be terminated, and that the doctor should receive from the hospital a certain money payment. The hospital, in contesting the award, said that it agreed to the termination of the contract and admitted that "the submission agreement 'would permit a cash award under the circumstances.'" The contract of the parties did not preclude the granting of the money award, and therefore, the arbitrators acted within their authority in that respect. In the case presently before us for decision, the parties expressly prescribed the factual elements which the board could consider, and by their agreement they expressly provided the hourly pay scale. Art. VI, Section 14–S. As said in the Straus case, supra, 150 Cal.App.2d at pages 309 and 310, 309 P.2d at page 544, "An arbitration proceeding is grounded in the mutual assent of the disputants to the resolution of their controversy by such tribunal, and *the arbitrators derive their power from the submission agreement.*" (Emphasis added.)

In Lang v. Badger, 157 Cal.App.2d 345, 320 P.2d 906, the question which was submitted to the arbitrators was not concise and precise, as in the instant case. In Lang, supra, the parties stipulated (157 Cal.App.2d at page 348, 320 P.2d at page 908) " 'that any and all disputes which have

arisen by reason of that certain building contract * * * will be submitted to arbitration in accordance with said * * * contract, * * *.'" The building contract provided that (157 Cal.App.2d at page 347, 320 P.2d at page 907) "all questions [under the contract] are subject to arbitration." This court, under the circumstances of Lang, supra, namely a vague, unqualified arbitration contract) applied liberal rules of interpretation. There is nothing vague or indecisive in the instant contract or the submission agreement presently before us.

In McKay v. Coca-Cola Bottling Co., supra, the court simply held that although the reasoning used by the arbitrators was bad, their award was, in fact, within the authority granted them by the parties.

As stated in Drake v. Stein, supra, 116 Cal.App.2d at page 785, 254 P.2d at page 618, "Although * * * mere unsound reasoning by an arbitrator in reaching a conclusion within the scope of proper arbitration will not invalidate the result, McKay v. Coca-Cola Bottling Co., 110 Cal. App.2d 672, 243 P.2d 35, an award is properly vacated when arbitrators exceed their powers."

The Union accuses the Company of bad faith in moving to vacate the award, claiming in effect that if the Company was of the view that there was only one answer to the question it should not have permitted the matter to go to arbitration. Most litigants are fairly strong in their belief that their views are the correct views and that any other view is contrary to the law and the facts. It would seem that although one of the parties is absolutely certain that there is only one correct answer to a dispute, that the dispute may, nevertheless, be arbitrable. In Butte Miners' Union No. 1 of International Union of Mine, Mill and Smelter Workers v. Anaconda Company, D.C., 159 F.Supp. 431, the court was confronted with an argument that no arbitrable dispute existed because the company had a perfect contractual defense to the claim of the union. In ordering arbitration, the court said (at page 436):

"It is also urged by defendant that no bona fide dispute exists because the pension plan by its terms requires the termination of employment of employees 68 years of age or older, even though they are not entitled to a pension. While a frivolous or patently baseless claim should not be ordered to arbitration, Local 205 [United Elec. Radio and Mach. Workers of America v. General Electric, 1 Cir., 233 F.2d 85, the controversy here is not of that type. Indeed, defendant admits that a dispute exists but in effect argues that because it has a defense in the pension agreements to the claim of plaintiffs that it is not a bona fide dispute. The fact that a defense may exist to a claim does not make the claim frivolous or baseless, and the validity of the defense should be decided by the tribunal to which the parties have agreed to submit their disputes—in this case, the arbitrators—and the Court should not usurp that function under the guise of determining whether there is an arbitrable issue."

And in Potoker v. Brooklyn Eagle, 2 N.Y.2d 553, 161 N.Y.S.2d 609, 141 N.E.2d 841, at page 844, the court said: "* * * the issue is not whether petitioner is right, but whether it is entitled to have the issues determined in the forum (arbitration) designated in the agreement."

One writer expressed the view in 30 Rocky Mountain Law Review, 247, 261, in referring to a typical arbitration clause in collective bargaining agreements, as follows:

"* * * Its words do not restrict its scope to meritorious disputes or two-sided disputes, still less are they limited to disputes which a judge will consider two-sided. Frivolous cases are often taken, and are expected to be taken, to arbitration. What one man considers frivolous another may find meritorious, and it is common knowledge in industrial relations circles that grievance arbitration often

serves as a safety valve for troublesome complaints. Under these circumstances it seems proper to read the typical arbitration clause as a promise to arbitrate every claim, meritorious or frivolous, which the complainant bases upon the contract. The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even a frivolous grievance and by the dangers of excessive judicial intervention."

[5] The policy in this state is to favor arbitration. O'Malley v. Petroleum Maintenance Co., 48 Cal.2d 107, 308 P.2d 9; Myers v. Richfield Oil Corp., 98 Cal.App.2d 667, 671, 220 P.2d 973; United States Plywood Corp. v. Hudson Lumber Co., 124 Cal.App.2d 527, 530, 269 P.2d 93.

The order is affirmed.

WHITE, P. J., and LILLIE, J., concur.



168 Cal.App.2d 191

SANFRAN COMPANY, a corporation, Plaintiff and Respondent,

v.

REES BLOW PIPE MANUFACTURING COMPANY, a corporation, Defendant and Appellant.

Civ. No. 17589.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1959.

Purchaser's action against vendor for wilful or negligent misrepresentation that the building purchased was a class "C" concrete and frame building under San Francisco Building Code and that building had sidewalls, and for fraudulent concealment of missing walls and building code violations. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., determined that the plaintiff was entitled to judgment in the amount of $25,000 on the second cause of action. The defendant appealed. The District Court of Appeal, Kaufman, P. J., held that there was no conflict between the finding of inducement in the second cause of action and the finding of no reliance in the first cause.

Affirmed.

1. Judgment ⇐256(1)

Where a complaint presents two causes of action, on either of which the plaintiff can recover, and the findings though adverse to one theory are favorable to the other, judgment in favor of the plaintiff is proper.

2. Appeal and Error ⇐931(7)

Where one finding sustained by sufficient evidence will support the judgment, an appellate court will presume the judgment was based on such finding, and questions relative to the other findings become immaterial on appeal.

3. Fraud ⇐66

In purchaser's action against vendor for wilful or negligent misrepresentation that the building purchased was a class "C" concrete and frame building under San Francisco Building Code and that building had sidewalls, and for fraudulent concealment of missing walls and building code violations, the finding of inducement in second cause of action and finding of no reliance in the first cause of action were not inconsistent. West's Ann.Civ. Code, § 1710, subd. 3.

4. Fraud ⇐17

Where vendor represented to purchaser that building sold was a class "C" concrete and frame building under San Francisco Building Code, vendor's failure to disclose the missing and partial sidewall or the other building code violations constituted "deceit" within statute providing that deceit is the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication

of that fact. West's Ann.Civ.Code, § 1710, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Deceit".

5. Fraud ⇐66

In purchaser's action against vendor for wilful or negligent misrepresentation that the building purchased was a class "C" concrete and frame building under San Francisco Building Code and that building had sidewalls, and for fraudulent concealment of missing walls and building code violations, trial court's finding that as a result of the concealment the vendor induced the purchaser's assignor to enter into the purchase agreement and induced the purchaser to perform the obligations of such agreement was sufficient for the second cause of action and no finding of reliance was required. West's Ann.Code Civ.Proc. §§ 1709, 1710, subds. 1, 3.

6. Fraud ⇐64(5)

In purchaser's action against vendor for wilful or negligent misrepresentation that the building purchased was a class "C" concrete and frame building under San Francisco Building Code and that building had sidewalls, and for fraudulent concealment of missing walls and building code violations, evidence raised question for trier of fact as to whether the absence of sidewalls and building code violations were patent.

7. Fraud ⇐64(5)

In purchaser's action against vendor for wilful or negligent misrepresentation that the building purchased was a class "C" concrete and frame building under San Francisco Building Code and that building had sidewalls, and for fraudulent concealment of missing walls and building code violations, evidence raised issue of fact as to whether the sidewalls and building code violations were hidden defects which could have been discovered by the purchaser in his investigations.

8. Trial ⇐375

In purchaser's action against vendor for wilful or negligent misrepresentation that the building purchased was a class "C" concrete and frame building under San Francisco Building Code and that building had sidewalls, and for fraudulent concealment of missing walls and building code violations, the trial court's view of the premises was sufficient evidence to support trial court's implied finding that the sidewalls and building code violations were hidden defects which could not have been discovered by the plaintiff in his investigations.

9. Fraud ⇐58(2)

In purchaser's action against vendor for wilful or negligent misrepresentation that the building purchased was a class "C" concrete and frame building under San Francisco Building Code and that building had sidewalls, and for fraudulent concealment of missing walls and building code violations, evidence supported finding that vendor concealed the fact that the building had no sidewalls.

10. Appeal and Error ⇐1071(5)

In purchaser's action against vendor for wilful or negligent misrepresentation that the building purchased was a class "C" concrete and frame building under San Francisco Building Code and that building had sidewalls, and for fraudulent concealment of missing walls and building code violations, where the trial court's finding that defendant had knowledge of the missing walls was supported by the evidence, any error in the finding that vendor had knowledge that its acts and the building were in violation of the area and permit requirements of the code would be harmless.

11. Fraud ⇐17

Mere nondisclosure, when combined with statements of fact which are likely to mislead in the absence of such further disclosure, is actionable under statute providing that deceit is the suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact. West's Ann.Civ.Code, § 1710, subd. 3.

12. Fraud ⇐58(2)

In purchaser's action against vendor for wilful or negligent misrepresentation that the building purchased was a class "C" concrete frame building under San Francisco Building Code and that building had sidewalls, and for fraudulent concealment of missing walls and building code violations, finding that vendor had knowledge that its acts and the building were in violation of the area and permit requirements of the code was not vitiated by absence of evidence of affirmative concealment. West's Ann.Civ.Code, § 1710, subd. 3.

13. Corporations ⇐428(8)

Corporation's representative who obtained building permit was bound to know the contents of that permit and this knowledge must be imputed to the corporation and no subsequent change of officers could take away this knowledge.

14. Corporations ⇐428(8)

Knowledge by any agent of corporation, whether presently an officer or not, is the knowledge of the corporation. West's Ann.Civ.Code, § 2332.

15. Fraud ⇐58(1)

In purchaser's action against vendor for the latter's fraudulent concealment that building purchased had missing walls and that there were violations of San Francisco Building Code, evidence supported trial court's findings of materiality of the concealed facts.

16. Fraud ⇐18

Concealment is material where the knowledge suppressed is so important and obviously so well in the recollection of the party withholding it that its mere representation amounts to fraud. West's Ann. Civ.Code, § 1710, subd. 3.

17. Fraud ⇐62

In purchaser's action against vendor for the latter's fraudulent concealment that building purchased had missing walls and that there were violations of the San Francisco Building Code, evidence sustained finding that the purchaser's out-of-pocket losses, measured by the difference between the purchase price and the market value at the time of sale, were in the amount of $25,000. West's Ann.Civ.Code, § 3343.

Wallace & Parker, Henderson R. Wallace, Louis F. DiResta, San Francisco, for appellant.

Athearn, Chandler & Hoffman, Theodore P. Lambros, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

Plaintiff corporation, Sanfran Company, as the purchaser of real property, filed this action against the vendor, defendant corporation Rees Blow Pipe Manufacturing Company, and the vendor's real estate brokers, Norris, Beggs & Simpson, and their employee, C. N. Gustafson. The complaint set forth two causes of action; the first, for wilful or negligent misrepresentation that the building at 340–7th Street, purchased from the defendant, was a Class "C" building under the Building Code of the City and County of San Francisco, and that the building had side walls; the second for fraudulent concealment of the missing walls and the Building Code violations. Before trial, respondent dismissed the complaint as to the brokers and their employee.

The case was tried by the court without a jury. The court made findings of fact and concluded that the plaintiff was entitled to take nothing under the first cause of action, but was entitled to judgment in the amount of $20,000 on the second cause of action. This appeal is taken on the grounds that the judgment on the second cause of action is not supported by the findings, as the findings are inconsistent and are not supported by the evidence.

Plaintiff and Baydis Realty are connected with United Parcel corporation, which is in the parcel delivery business. The property which the plaintiff purchased from the defendant consists of two parcels; the first, at 340–7th Street, is comprised of a T-shaped lot and building, around the corner from the United Parcel property at 1144 Harrison Street in San Francisco;

the second, a smaller parcel of 1,600 square feet, fronts on Langton Street and is directly opposite the rear door of the first parcel and contiguous to the rear portion of the United Parcel property. This dispute centers on the first parcel, the building at 340–7th Street. In order to clarify the issues presented, it is necessary to describe first, the details of the construction of defendant's building and the significant provisions of the various building ordinances of the City and County of San Francisco in effect during the construction of defendant's building, and second, the series of events which led to the transaction between the parties.

Under the ordinances, buildings are classified as follows: those with concrete walls are called Class "C" or Type 3, and those with wooden walls are called frame or Type 5 buildings. The building law imposes area limits according to these classifications. A frame or Type 5 building without an automatic fire alarm or sprinkler system is subject to an area limitation of 10,000 to 12,000 square feet. The building law also provides that no wall or part of a wall in any building shall be removed to produce a larger area than permitted. A permit must be obtained for the construction, alteration, repair, moving or demolition of any structure. A building must have side walls.

In 1907, in conformance with a building permit, defendant's predecessor erected a wooden frame corrugated iron covered building for use as a tin shop, on a small lot on the west side of 7th Street. (In 1909, Ordinance 1008, [New Series] known as "The Building Law" was enacted and became effective on January 1, 1910.) In 1911 defendant was organized as a corporation and acquired the above mentioned property, which then had an area of 2,000 to 4,000 feet. Between 1911 and 1923, the defendant acquired additional lots adjoining the original one. Defendant made several successive additions, thus extending the original building over the additonal lots acquired. Only some of these are of significance in this dispute.

In 1923, defendant made a 50 by 70 foot addition to the south end of the building. Under a 1922 amendment of the 1909 ordinance, frame buildings were limited to an area of 10,000 square feet. (Ordinance 5711 [New Series] effective October 19, 1922, and amending § 80 of Ordinance 1008; In 1939, Ordinance 1.075 enacting the San Francisco Municipal Code became effective.) The Building Code contained area limitations substantially the same as the prior law. Defendant's application was denied initially, but later granted upon the condition that a divisional wall be erected. The floor area of the building was thus extended to approximately 11,800 square feet, apparently in violation of the provisions of both ordinances.

In 1938, Lloyd Rees, defendant's present secretary took over the active management of defendant's San Francisco operation. In 1939, 1940 or 1941 the division wall required by the 1923 permit was removed under his supervision. Lloyd Rees testified that he did not know why the wall was removed, or that it had been required by the prior permit.

In 1941, section 265 of the Building Code was amended to allow frame buildings to have an area of 50,000 square feet under certain circumstances. (Ordinance 1318, [Series of 1939]) In 1941 defendant acquired a lot on the north side of its property, thus extending the area to its present shape. Defendant made an addition to the north end of the existing building. The plans and specifications showed that no wall was to be erected on the north where the addition would abut the solid concrete wall of the building of the adjacent property owner, nor on the south side where the addition would abut the existing building. The addition was built pursuant to a permit, which was apparently illegal because a frame building must have exterior walls.

Late in 1941, section 265 of the Building Code, relating to area limitations was amended to allow 12,500 square feet in frame buildings fronting on two streets. This amendment permitted a 50 per cent

increase in area if the building is equipped with an automatic fire alarm system and a 100 per cent increase if equipped with automatic sprinklers. (Ordinance 1432, [Series of 1939] approved Nov. 12, 1941, effective Dec. 12, 1941.) Defendant's building was not equipped with either, and thus subject to the initial area limitation of 10,000 square feet.

In 1942, defendant acquired further property facing on 7th Street and adjacent to the city firehouse. Defendant applied for a building permit for the addition of a storage warehouse. The plans and specifications called for a wall on the southside, adjacent to the wall of the firehouse. This wall was not carried the full height of the building as required by the specifications, but the construction was approved. Defendant admits this violation of the permit. Upon completion of the warehouse addition, the building had an area of 24,825 square feet.

In 1947, the Building Code was completely revised. (Ordinance 4547 [Series of 1939], effective Sept. 11, 1947, known as "The Building Code of 1947") Section 304 of the Building Code of 1947 made changes in the issuance of permits; Section 304 for the first time provided that "* * * Approval does not constitute approval of any violation of this code or of any other law or ordinance." On September 22, 1947, defendant filed an application for a building permit for the erection of a second floor to the one story concrete wall office building first erected in 1921. The plans and construction were approved even though this addition brought the total area to 26,825 square feet.

In January 1954, defendant authorized the real estate brokerage firm of Norris, Beggs & Simpson to obtain a site for a new factory in Berkeley and exchange or sell the 7th Street and Langton Street properties therefor. Miller and Gustafson of Norris, Beggs & Simpson prepared two circulars listing defendant's property for sale. The first of these dated January 11, 1954 describes the property at 340–7th Street as follows: "One story Class 'C' Building, containing approximately 26,825 square feet." The second states, "Improvements: One Story Class 'C' Concrete and Frame Building. Lot Size: 24,825 Square Feet, Total Building Area—26,825 Square Feet." After finding a suitable site owned by San Francisco Sulphur Company (Stauffer Chemical Co.), defendant gave the broker an exclusive authorization to sell the 7th Street property.

At about the same time, United Parcel wished to expand its main garage and package-sorting facility at 1144 Harrison Street. United Parcel retained Frank P. Gomez as its real estate broker to acquire property for this purpose. As early as January 1954, Mr. Gomez had received the first of the above mentioned circulars and turned it over to Mr. Morton, the San Francisco Manager of United Parcel. Later, Lloyd Rees, defendant's secretary, prepared a plot plan for distribution to prespective customers. Mr. Morton and Mr. Schlinger (Vice-president in charge of West Coast Operations of United Parcel as well as vice-president of both Baydis Realty and Sanfran Company) used this plot plan. At a meeting in Los Angeles in May, Mr. Gomez, Mr. Gustafson and Mr. Schlinger discussed the acquisition of defendant's properties. At this meeting, the parties had a copy of the second circular and the above mentioned plot plan. At this time United Parcel was not interested in the defendant's properties, as there was some possibility of acquiring other nearby properties with the city's proposed South of Market Redevelopment. Sometime thereafter, it became apparent that United Parcel would not be able to acquire these other properties. Mr. Schlinger indicated to Mr. Gomez that it might therefore be desirable to obtain the only available property of large size in the block, the defendant's.

C. Russell Rees and Lloyd Rees, defendant's officers, who handled the transaction, did not tell any of Norris, Beggs & Simpson's representatives or plaintiff's representatives about the missing walls or building code violations. Lloyd Rees, however, testified he thought he had indirectly indi-

cated that one wall belonged to the adjacent fire house. Various representatives of both plaintiff and defendant (including Miller, Gustafson, Gomez, Schlinger, Morton and others) made a total of 28 visits to the premises without detecting the missing walls or code violations.

After further negotiations, Baydis Realty agreed to purchase defendant's property for $158,150 by a written contract dated June 11, 1954. This purchase was a part of a three-way transaction, whereby defendants acquired the Berkeley property from San Francisco Sulphur (Stauffer Chemical). The contract was assigned to the plaintiff who assumed the obligations of the agreement and paid the purchase price on June 25, 1954.

Sometime in July, plaintiff's engineer Baker and Hoyt (a civil engineer and contractor employed by plaintiff) looked over the building to discuss the necessary alterations that would have to be made. At this time, they discovered the missing walls.

On September 28, 1954, the plaintiff filed an application with the Department of Public Works of the City and County of San Francisco to change the use of the building from manufacturing to the proposed use as a commercial garage. Under the applicable ordinances it was necessary to have a Class "C" building for use as a commercial garage, a use classified by the ordinance as one more hazardous than defendant's prior use for light sheet metal manufacturing. In October 1954, this application was disapproved by the Building Inspector on the grounds that the building violated certain provisions of the San Francisco Building Code, relating to area, ventilation, and the type of construction required for buildings used as garages. On April 19, 1955, plaintiff filed this action for its out-of-pocket losses, measured by the difference between the purchase price and the market value at the time of the sale.

The first contention on appeal is that in view of the court's findings of fact and conclusions of law on the first cause of action, the judgment on the second cause of action is not supported by the findings. On the first cause of action, which was for fraudulent misrepresentation, the court found: that the defendant represented to the plaintiff that the building at 340–7th Street was a Class "C" building under the Building Code of the City and County of San Francisco (a building with exterior walls of brick, stone and concrete and an interior frame of combustible material); that this representation was a material one, as it affected the use of the building; that "the representation that the building was a Class 'C' building was false because the building had no side walls and the front and back walls were wood rather than brick, stone or concrete; that the representation was also false because the building, due to the absence of side walls, was not a Class 'C' building; that defendant had no reasonable ground for believing the representation to be true; that the defendant made the representation with intent to induce plaintiff's assignor to rely on the representation and to enter into an agreement for purchase and sale." The court further found that "[i]t is not true however that plaintiff's assignor reasonably believed the representation to be true and in reliance thereon entered into said agreement of June 11, 1954; nor is it true that plaintiff in reliance on said particular representation entered into and performed said agreement." The court also found that it is not true that defendant affirmatively represented to plaintiff's assignor by plot plan or otherwise that the building at 340–7th Street had side walls.

On the second cause of action, the court found: that on January 11, 1954, and several days later, defendant represented that the building was a Class "C" building; that prior to June 11, 1954, defendant gave plaintiff's assignor a plot plan of the building that "having volunteered to speak" defendant thereby obligated itself to make a full and fair disclosure and to conceal no facts within its knowledge materially qualifying those stated or affecting the desirability of the property; that "defendant did not disclose and concealed that the building had

no side walls and that defendant's acts and the building as sold were in violation of the wall, area and permit requirements of 'The Building Law' passed December 22, 1909, as amended from time to time and 'The Building Code' of the City and County of San Francisco passed August 12, 1947, as amended from time to time;" that the "defendant had knowledge of these facts and concealed them with intent to induce plaintiff's assignor to enter into the sales agreement of June 11, 1954; that plaintiff's assignor and plaintiff had no knowledge of these facts and defendant knew and should have known they didn't have knowledge of these facts; that the facts so concealed by defendant were material because they affected the usability, desirability, and value of the property; that as a result of said concealment defendant induced plaintiff's assignor to enter into said agreement and induced plaintiff to perform the obligations of the agreement; that the plaintiff paid the purchase price of $158,150 on June 25, 1954; that the fair market value of said property as of that date was $138,150; * * * that as a result of defendant's fraudulent concealment plaintiff has been damaged in the sum of $20,000." (Findings of Fact and Conclusions of Law)

Defendant's first major contention on appeal is that the findings and judgment on the second cause of action are inconsistent with the findings on the first cause of action. Specifically, defendant argues that the finding of inducement on the second cause of action is inconsistent with the finding of no reliance on the first cause, and cannot be supported in the absence of a finding on reliance as to the second cause; that defendant had no duty to speak; and that plaintiff's failure to carry out his duty of full inspection, precluded a judgment in his favor on the second cause of action. We will examine these arguments in the order stated.

[1, 2] The first question is whether there is any conflict in the findings and whether such conflict is irreconcilable with respect to matters which are material to the merits of the case. We cannot agree with the defendant that in the instant case there is such a conflict in the findings, that the findings cannot be construed to support the judgment. The two causes of action are based on two different theories. Where a complaint presents two causes of action, on either which the plaintiff can recover, and the findings though adverse to one theory are favorable to the other, a judgment in favor of the plaintiff is proper. Cass v. Ocean Park Bath Co., 45 Cal.App. 656, 188 P. 616. Where one finding sustained by sufficient evidence will support the judgment, an appellate court will presume the judgment was based on such finding, and questions relative to the other findings become immaterial on appeal. Logan v. Forster, 114 Cal.App.2d 587, 250 P.2d 730.

[3, 4] There is nothing inconsistent about the finding of inducement in the second cause of action and the finding of no reliance in the first cause. Defendant represented the building as a Class "C" concrete and frame building. While the plaintiff knew that the walls were not concrete, plaintiff did not know about the missing and partial side wall or the other Building Code violations. Defendant's failure to disclose these matters, meets the test for deceit under subsection 3 of Civil Code, sec. 1710. De Spirito v. Andrews, 151 Cal.App.2d 126, 311 P.2d 173; Unger v. Campau, 142 Cal.App.2d 722, 298 P.2d 891; Curran v. Heslop, 115 Cal.App.2d 476, 252 P.2d 378; Milmoe v. Dixon, 101 Cal.App.2d 257, 225 P.2d 273. As pointed out in the De Spirito and Milmoe case, supra, plaintiffs were privileged to assume that the building had walls and complied with the building codes.

The second question is whether a finding of reliance on the first cause of action is essential to the correctness of the findings and judgment on the second cause of action. See In re Estate of Harvey, 164 Cal.App.2d —, 330 P.2d 478, and cases cited therein.

Section 1709 of the Civil Code is as follows:

"One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

Section 1710, so far as relevant, is as follows:

"A deceit, within the meaning of the last section, is either:

"1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

* * * * * *

"3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact."

[5] The first cause of action for misrepresentation is based on subsection 1 of the above section; the second, for concealment, on subsection 3. In misrepresentation cases, causation is frequently presented in terms of "reliance". (Harper & James, The Law of Torts, Vol. 1, § 7.13 at p. 583.) In concealment cases, causation is usually spoken of in terms of "inducement." (See Restatement of Torts, §§ 525, 551.) In the instant case, the court found that: "It is true that as a result of said concealment, defendant induced plaintiff's assignor to enter into said agreement and induced plaintiff to perform the obligations of said agreement." It follows that the above quoted finding is sufficient for the second cause of action and that no finding of reliance was required.

[6] Defendant next argues that he was under no duty to disclose any facts except as they might materially qualify the representation made. In De Spirito v. Andrews, 151 Cal.App.2d 126, at page 130, 311 P.2d 173, at page 176, the court said:

"'It is a general rule that a vendor not in a confidential relation to the buyer is not under a duty to make full disclosure concerning the object which he would sell. However, it is a universally recognized exception that if he undertakes to do so he is bound not only to tell the truth but he is equally obligated not to suppress or conceal facts within his knowledge which materially qualify those stated. If he speaks at all, he must make a complete and fair disclosure. Rogers v. Warden, 20 Cal.2d 286, 289, 125 P.2d 7; Macco Construction Co. v. Fickert, 76 Cal.App.2d 295, 299, 172 P.2d 951; Dyke v. Zaiser, 80 Cal.App. 2d 639, 652, 182 P.2d 344; Boas v. Bank of America, 51 Cal.App.2d 592, 597, 125 P.2d 620.'"

As pointed out in Kuhn v. Gottfried, 103 Cal.App.2d 80, 81, 229 P.2d 137, 138, any facts which affect the desirability of the property to be sold, are facts "which materially qualify these stated." Defendant admitted that the double lines on the plot plan could be interpreted to mean walls.

Defendant further argues that the absence of side walls and building code violations were patent. This, however, is an issue of fact which was properly resolved by the trial court in favor of the plaintiff. "Where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee." Rothstein v. Janss Investment Corp., 45 Cal.App.2d 64, 113 P.2d 465, 467; Dyke v. Zaiser, 80 Cal.App.2d 639, 182 P.2d 344. Under the evidence here presented, the court could conclude that the fact of missing walls and code violations were not within the reach of the diligent attention and observation of the plaintiff.

[7, 8] Defendant next argues that under the rule of Ruhl v. Mott, 120 Cal. 668, 53 P. 304, after plaintiff learned that the building was not Class "C", plaintiff was required to make a full investigation. The record indicates that plaintiff made numerous visits to the premises. It does not follow, however, that the inspection precludes a judgment in favor of the plaintiff. Whether the investigation made by the plaintiff was a properly full one after his

discovery that the building was not Class "C", was an issue of fact for the trial court. Despite the evidence of plaintiff's repeated visits, the court found that the plaintiff had no knowledge of the missing walls and building code violations. It is implicit in the above finding that the side walls and building code violations were hidden defects which could not have been discovered by the plaintiff in his investigations. Carpenter v. Hamilton, 18 Cal.App. 2d 69, 62 P.2d 1397, relied on by the defendant, has been held applicable only to visible defects (Hefferan v. Freebairn, 34 Cal.2d 715, 720, 214 P.2d 386) or where the purchaser on inspection learns the true facts. Burkett v. J. A. Thompson & Son, 150 Cal.App.2d 523, 525, 310 P.2d 56. Furthermore, the trial court viewed the premises. This is of itself sufficient evidence to support its implied finding of latent defects. Sparling v. Housman, 96 Cal.App.2d 159, 214 P.2d 837.

[9] Defendant's second major contention on appeal is that certain findings are not supported by the evidence. The first finding so attacked is a part of Finding II that the defendant concealed the fact that the building at 340–7th Street had no side walls. Defendant's vice-president, C. Russell Rees, testified that he knew about the absence of the side walls but did not think to tell anyone about it. Defendant's secretary and plant superintendent, testified that he did not tell plaintiff's engineer that one wall belonged to the fire house rather than the building. Furthermore, as indicated in the Statement of Facts at the beginning of this opinion, the removal of the 1923 wall and the violation of the 1941 permit, occurred while defendant's officer Rees was secretary of the corporation and plant superintendent. In the light of the above, defendant's argument as to this portion of Finding III is spurious.

[10] Defendant next argues that the court's findings that the defendant had knowledge that its acts and the building were in violation of the area and permit requirements, are not supported by the evidence. Defendant is not attacking the finding of knowledge of the missing walls, which as indicated above, are amply supported by defendant's admission as well as the evidence. "* * * in the type of case with which we are here concerned, if there be substantial evidence to support the findings with respect to any one material representation or concealment * * * the judgment must be affirmed." De Spirito v. Andrews, 151 Cal.App.2d 126 at page 131, 311 P.2d at page 176, quoting Kuhn v. Gottfried, 103 Cal.App.2d at page 84, 229 P.2d at page 140. Thus, any error in the finding of knowledge as to the building code requirements would be harmless.

[11, 12] We will, however, briefly discuss the contentions made on this point by the defendant. Defendant argues that the finding is vitiated by the absence of evidence of affirmative concealment, and plaintiff's admission at the trial that it did not claim that the officers of defendant corporation were guilty of fraud, but only defendant corporation. Thus, argues defendant, as there is no evidence that the defendant's officers knew of these violations, respondeat superior does not apply and the corporation cannot be held liable for concealment.

Defendant's argument is without merit on both points. First, affirmative fraudulent intent is not required. Mere nondisclosure, when combined with statements of fact which are likely to mislead in the absence of such further disclosure, is actionable. Civil Code, § 1710, subd. 3; Restatement of Torts, § 551, 1957; California Annotations, pp. 63, 64, and cases cited therein.

[13] Second, the corporate representative, who obtained the 1923 Building permit is bound to know the contents of that permit, and this knowledge must be imputed to the corporation. This permit required the construction of a division wall and stated the area limitation of 10,000 square feet. Thus, the corporation had notice and knowledge of these facts and no subsequent change of officers could take away this notice and knowledge. Mechanics' Bank of Alexandria v. Seton, 1 Pet. 299, 309, 26 U.S. 299, 7 L.Ed. 152.

[14] Furthermore, Civil Code, section 2332, provides:

> "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."

Thus, knowledge by any agent of the corporation, whether presently an officer or not, is the knowledge of the corporation. As the corporation had knowledge of the code violations and the missing walls, Watt v. Patterson, 125 Cal.App.2d 788, 271 P.2d 200, relied on by the defendant, is not in point. In that case, the vendor had no knowledge of the violation.

Nor is there any merit to defendant's argument that the issuance of invalid permits can erase knowledge of the missing side walls and the violations of the 1923 and 1942 permits.

[15] Defendant's final contention is that the court's findings of materiality of the concealed facts and damages in the sum of $20,000 are not supported by the evidence. As to materiality, defendant argues that the plaintiff purchased the property because it was the only available plot in the vicinity of its plant at 1144 Harrison Street, of sufficient size for plaintiff's use as a garage for its vehicles, and that plaintiff would have purchased the property regardless of the building law violations and missing walls. The testimony of plaintiff's officer, Schlinger on this point is: "If I had known then what I know now about the property, I would not have bought the property—for that price at least." Schlinger further testified: "If I had known about the required wall which was removed, it would have raised a question in my mind as to whether it was desirable to purchase the property—or it may have been a point for bargaining." There was also evidence that plaintiff had very little time to complete the transaction, as defendant's option on the Berkeley property expired early in June.

Plaintiff's real estate broker testified that he did not know plaintiff was planning to use the building as a garage; "they may have wanted to use it for sorting parcels." There was evidence that defendants knew of the contemplated garage use.

[16] The evidence supports the trial court's finding of materiality. Furthermore, concealment is material where the knowledge suppressed is so important and obviously so well in the recollection of the party withholding it, that its mere representation amounts to fraud. (23 Cal.Jur.2d, § 24, p. 59) Defendant's argument also overlooks the fact that "It is sufficient if the evidence shows that the fraudulent concealment * * * was an inducement to make the purchase, without showing that it was the sole inducement." Curran v. Heslop, 115 Cal.App.2d 476, at page 481, 252 P.2d 378, at page 381.

[17] As to damages, the court found that the plaintiff was damaged in the sum of $20,000. Defendant's argument is that plaintiff was not damaged at all, since plaintiff is now using the building as a garage. However, as plaintiff repeatedly indicated at the trial, it sought only its out-of-pocket losses, and not damages because the building was not usable as a garage. Under Civil Code, section 3343, the damages sought are measured by the difference between the value received and the purchase price. Plaintiff here paid $158,150. Plaintiff's engineer testified that it would cost a minimum of $27,000 to make the necessary changes. One of plaintiff's experts considered this cost and appraised the property at $125,000. Another, testified that aside from the alleged violations of the building laws as a frame building, the property was worth $158,000. Defendant's expert had no opinion as to the value of the building in its illegal state.

The question of damages was one of fact for the trial court. We think under the evidence presented, the trial court reached a proper and fair result on this issue, as well as all the other issues presented by this case.

We conclude that the judgment finds support in the record before us and accordingly, it must be affirmed.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.



168 Cal.App.2d 344

Charles ANDRES and Jane Andres, his wife, Plaintiffs and Appellants,

v.

J. R. ARMSTRONG, Frances E. Armstrong, his wife; Phillip M. Eberhart, dba Eberhart Realty, et al., Defendants and Respondents.

Civ. 18038.

District Court of Appeal, First District, Division 1, California.

March 4, 1959.

Action for fraud. From an order of the Superior Court, Alameda County, Donald K. Quayle, J., setting aside a default and default judgment, the plaintiffs appealed. The District Court of Appeal, Hanson, J. pro tem, held, inter alia, that where defendants' counsel agreed that if answer was not filed "by" certain date plaintiff could take default and an answer was tendered for filing on such date after counsel for plaintiffs earlier that day had obtained entry of default, and plaintiffs' counsel contended that the word "by" in letter in effect meant "before", and defendants' counsel maintained that at least there was an honest difference of opinion between respective counsel as to whether answer could be filed on that date, setting aside default was not an abuse of discretion.

Affirmed.

1. Judgment ⇐163

On defendants' motion to set aside default on ground that it was taken through defendants' and their attorney's mistake, inadvertence, surprise or excusable neglect, wherein there was direct contradiction between statements of counsel as set forth in their affidavits as to when defendants signed proposed answer, it was for trial court to determine which statement was the truth. West's Ann.Code Civ.Proc. § 473.

2. Judgment ⇐363

Code of Civil Procedure provision that a trial court may relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect is remedial in its nature and is to be liberally construed. West's Ann.Code Civ.Proc. § 473.

3. Judgment ⇐363

The policy of the law is to have every litigated cause tried on its merits, and the law looks with disfavor on a party who, regardless of the merits of his cause, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. West's Ann.Code Civ.Proc. § 473.

4. Appeal and Error ⇐935(2), 948, 957(1)

Reviewing courts look with favor on orders excusing defaults and permitting controversies to be heard on their merits and such orders will rarely be reversed, and never unless it clearly appears that there has been a plain abuse of discretion, and burden is on appellant to show such an abuse of discretion.

5. Judgment ⇐163

Even in a case where the showing, under statute permitting trial court to relieve party from judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise or excusable neglect, is not strong, or there is doubt as to setting aside of a default, such doubt should be resolved in favor of the application. West's Ann.Code Civ.Proc. § 473.

6. Appeal and Error ⇐957(1)

An order setting aside a default will not be disturbed unless an abuse of discretion clearly appears, and appellate courts are more inclined towards upholding orders vacating defaults than affirming denials of

such motions, in order to dispose of the cases, where possible, upon their merits. West's Ann.Code Civ.Proc. § 473.

7. Judgment ⇐143(17)

Where defendants' counsel agreed that if answer was not filed "by" certain date plaintiffs could take default and an answer was tendered for filing on such date after counsel for plaintiff earlier that day had obtained entry of default, and plaintiffs' counsel contended that the word "by" in letter in effect meant "before", and defendants' counsel maintained that at least there was an honest difference of opinion between respective counsel as to whether answer could be filed on that date, setting aside default was not an abuse of discretion. West's Ann.Code Civ.Proc. § 473.

Walter H. Medak, Walnut Creek, for appellants.

Breed, Robinson & Stewart, Oakland, for respondents.

HANSON, Justice pro tem.

This is an appeal from an order setting aside a default and default judgment—a type of appeal that is becoming much too common.

The plaintiffs in their complaint filed on May 3, 1957, alleged that they purchased from the defendants a lot for the purpose of erecting a dwelling thereon, which fact was known to defendants; that the defendants represented, among other things, that a paved road would be constructed alongside the property and the lot would be safe to build a dwelling thereon; that the representations were false.

Numerous extensions to answer had been granted by counsel for plaintiffs to counsel for defendants. Finally, on August 12, 1957, plaintiffs' counsel mailed a letter to counsel for defendants in which he stated: "This is to advise that unless I should be served with an Answer in the above matter *by* Thursday, August 15, 1957, that I will enter Default." (Emphasis added.) On receipt of the letter on August 13, 1957, counsel for defendant requested and was granted an additional oral extension which plaintiffs' counsel by his affidavit stated was to authorize him to enter a default *on* August 19, 1957, unless a pleading was filed "*by*" said date and that written confirmation of said agreement was demanded of defendants' counsel. The written confirmation sent reads as follows:

> "Confirming our telephone conversation of this morning it is agreed that if the answer of J. R. Armstrong and wife are not on file *by* August 19, 1957, you will take their default. Default, however, will not be taken against the other defendants, giving us one week to submit an answer on their behalf. [Emphasis added.]
>
> "We thank you for your many courtesies."

The pleading, duly signed and notarized, was tendered for filing on August 19, 1957, but earlier in the day counsel for plaintiff had obtained the entry of a default and so the pleading was refused.

Thereupon, the defendants on August 29, 1957, caused to be filed a motion to set aside the default which recited that the default was taken against defendants through their and their attorney's mistake, inadvertence, surprise or excusable neglect. The motion was accompanied by an affidavit of merits sworn to by defendant J. R. Armstrong, an affidavit by Ned Robinson, the attorney for defendants, and a proposed answer to the complaint which was not signed, but the original thereof which was tendered to the clerk on August 19, 1957, was signed and verified.

To the motion thus filed affidavits in opposition were filed by counsel for the plaintiffs along with an affidavit of his secretary. Upon the hearing before the court on September 10, 1957, the court granted the motion.

The plaintiffs are here contending that there is no ambiguity in the use of the word "by" in the letter of confirmation sent to him by counsel for defendants and that the word "by" as used means, in effect, "before." The answer is that Webster defines

"by" as including "not later than," or "during." The same semantic problem presented itself in Fanta v. Maddex, 80 Cal. App. 513, at page 519, 252 P. 630, at page 633, where the court defined "by" as meaning "not later than." The superior court was of the same opinion in this case in granting defendants' motion.

It is interesting to note that, in his opening brief, plaintiffs' counsel sets out the letter of confirmation, but adds: "No pleadings having been filed *on* Monday, August 19, 1957, default was entered on said date against J. R. Armstrong and Frances E. Armstrong in *accordance with said letter.*" (Emphasis added.) Note in the above that the preposition used by plaintiffs is "on" and not "by." The uncontroverted fact is that default was taken early on August 19th before defendant had presented his answer for filing on that date. As is well stated by counsel for defendants: "But if we assume that literally, semantically, and technically appellants are correct in their contention that 'by' means 'before' the trial court's action was still proper. It seems elemental that regardless of the technical meaning of the word in question that there was an honest difference of opinion between respective counsel presenting a clear case of mistake or inadvertence."

[1] First of all, with respect to the fact that there is a direct contradiction between the statements of counsel as set forth in their affidavits as to when Mr. Armstrong signed the proposed answer, it is submitted that it was for the trial court to determine which statement was the truth.

In the case under submission we are dealing with two apparently competent and so far as is known reputable members of the bar. There is no suggestion in the record or in the briefs of an allegation to the effect that one or the other of them committed perjury. Yet, the indisputable fact remains that each swore to a statement which is diametrically opposed to that sworn to by the other. One of them must be false. But because of the fact that there is nothing that would cause one to doubt the integrity of respective counsel, the logical inference, it is submitted, to be drawn from their contrary statements is only that one is mistaken and not that he is committing perjury. This was probably the conclusion reached by the trial court and that mistake apparently was resolved against plaintiffs and in favor of defendants. Consequently, can it be logically argued that there was no misunderstanding—no apprehending wrongly on the part of Mr. Robinson who believed he had through August 19th?

Instead of presenting a specific argument, plaintiffs in their brief examine each of the grounds set forth in Code of Civil Procedure, section 473, upon which relief from a default and default judgment might be predicated and conclude that none of the grounds exists.

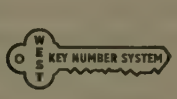
[2–6] In Hover v. MacKenzie, 1954, 122 Cal.App.2d 852, 856, 266 P.2d 60, 62, the court said: "Code of Civil Procedure, section 473 * * * is remedial in its nature and is to be liberally construed. [Citation.] The policy of the law is to have every litigated cause tried on its merits; and it looks with disfavor on a party who, regardless of the merits of his cause, attempts to take advantage of the mistake, surprise, inadvertence, or neglect [the statute uses the term "excusable neglect"] of his adversary. 14 Cal.Jur. 1075, § 116. Reviewing courts have always looked with favor on orders excusing defaults and permitting controversies to be heard on their merits. *Such orders are rarely reversed, and never unless it clearly appears that there has been a plain abuse of discretion.* [Citation.] *Even in a case where the showing * * * is not strong, or where there is any doubt as to the setting aside of a default, such doubt should be resolved in favor of the application.* [Citation.] All presumptions will be indulged in favor of the correctness of the order, and *the burden is on the appellant to show that the court's discretion was abused.* [Citation.]" (Emphasis added.) See also Yarbrough v. Yarbrough, 1956, 144 Cal. App.2d 610, 614, 301 P.2d 426 and citations for a statement of the rule that the order

will not be disturbed *unless an abuse of discretion clearly appears,* and that appellate courts are more inclined towards upholding orders vacating defaults than affirming denials of such motions, in order to dispose of the cases, where possible, upon their merits.

[7] No useful purpose will be served by a detailed recital of the interpretations that have been given to the meaning and applications of the words mistake, inadvertence, surprise, or excusable neglect set forth as grounds for relief in section 473 of the Code of Civil Procedure, and it must suffice to say that, while we have read plaintiffs' brief and argument with care, we see no ground for reversal.

Judgment affirmed.

PETERS, P. J., and BRAY, J., concur.



168 Cal.App.2d 478

Catherine KENNY, Plaintiff and Appellant,

v.

TRUST OIL COMPANY, a corporation, Treasure Company, a corporation, Samarkand Oil Company, a corporation, and Empire Oil Company, a corporation, Defendants,

Trust Oil Company, a corporation, Respondent.

Civ. 23319.

District Court of Appeal, Second District, Division 3, California.

March 6, 1959.

Rehearing Denied April 2, 1959.

Hearing Denied April 29, 1959.

Assignee's action to recover reasonable compensation for legal services rendered by assignors. The Superior Court of Los Angeles County, Walter C. Allen, J., rendered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that evidence established that defendant had engaged legal services of assignors and that they had rendered services of substantial value; and held that in absence of finding that there had been a mutual understanding, express or implied, that assignors would not be paid for such services, judgment for defendant could not be upheld.

Reversed.

1. Trial ⇐395(5)

There should be findings upon ultimate facts, namely, facts that are determinative of controversy, but evidentiary findings are surplusage and frequently cause confusion.

2. Attorney and Client ⇐166(2, 3)

In assignee's action to recover reasonable compensation for legal services rendered by assignors, evidence established that defendant had engaged legal services of assignors and that they had rendered services of substantial value; and in absence of finding that there had been a mutual understanding, express or implied, that assignors would not be paid for such services, judgment for defendant could not be upheld.

3. Attorney and Client ⇐167(4)

In assignee's action to recover reasonable compensation for legal services rendered by assignors, finding, that "the consideration for these legal services was the effort of said plaintiff's assignors to improve the value of the shares of stock in the name of (a firm member)", was not equivalent to finding that services had been rendered gratuitously.

4. Corporations ⇐177

The mere fact that an attorney may be a stockholder in corporation for which he renders legal services, and will thus share to some extent in successful results of his efforts, will not justify an inference that he was donating his services to corporation.

5. Corporations ⇐189(13)

In assignee's action to recover reasonable compensation for legal services rendered by assignors, wherein it was corporate defendant's theory that value of its

stock owned by member of assignors' firm was enhanced by services of attorneys and that that was to be their only compensation, question as to whether assignors had been working for themselves rather than for defendant was one of fact, not one of law.

Erskine, Erskine & Tulley, San Francisco, Ernest M. Clark, Jr., Los Angeles, for appellant.

Julius A. Leetham, Los Angeles, for respondent.

SHINN, Presiding Justice.

The present action was instituted by Catherine Kenny as assignee of Morse Erskine, Morse Erskine II and J. B. Tulley, lawyers and co-partners, for the recovery of a reasonable compensation for legal services rendered by the attorneys to defendants Trust Oil Company, Treasure Company, Samarkand Oil Company and Empire Oil Company at the instance and request of the defendants. The first cause of action of the complaint alleged that the defendants became indebted to the attorneys for the reasonable value of legal services in the sum of $15,000, no part of which had been paid. In a second cause of action, it was alleged that the defendants became indebted to the attorneys in the sum of $54.64 on account of moneys advanced for defendants at their instance and request, no part of which had been paid. Defendants answered specifically denying any indebtedness to the attorneys for services rendered or money advanced. Trust Oil Company filed a cross-complaint against the attorneys which, after several amendments, was dismissed. In a trial to the court, judgment of nonsuit was granted in favor of Treasure Company, Samarkand Oil Company and Empire Oil Company. At the conclusion of the trial and the receipt of evidence on behalf of Trust Oil Company judgment was rendered that plaintiff take nothing against said defendant and that it recover its costs of suit. Plaintiff appeals only from that portion of the judgment which denied recovery against Trust Oil Company.

The contentions on the appeal are that there was insufficient evidence to justify the findings which form the basis of the judgment and that the findings do not support the judgment. Those findings are set out in the margin.[1]

[1] Proper and sufficient findings would have been that the attorneys did not ren-

1. "III. That prior to the institution of the present lawsuit, one hundred shares of the stock of the defendant Trust Oil Company, a corporation, was transferred to the name of Herbert W. Erskine, now deceased, and said stock still exists in the name of Herbert W. Erskine, now deceased, and is presently still in escrow under an order of the California Commissioner of Corporations. That said one hundred shares of stock constituted and presently constitute one-tenth of the outstanding corporate stock of the defendant Trust Oil Company, a corporation.

"IV. That the aforesaid Herbert W. Erskine, now deceased, at the time of the institution of the present lawsuit, and also at the time of the alleged rendition of services and expenditures of costs was deceased, but at the time the aforesaid one hundred shares of the defendant Trust Oil Company, a corporation, stock was transferred to him, was acting as attorney for the defendant Trust Oil Company, a corporation, and as a member of the partnership constituting plaintiff's assignors. Upon the death of the said Herbert W. Erskine, said one hundred shares of the defendant Trust Oil Company, a corporation, stock devolved to the legal and testamentary heir or heirs of the said Herbert W. Erskine, deceased. That certain of plaintiff's assignors, to wit, Morse Erskine, Morse Erskine 2d, are the brother and son, respectively, of Herbert W. Erskine, deceased.

"V. That legal services of substantial value were rendered to the defendant Trust Oil Company, a corporation, by the law firm constituting plaintiff's assignors, but that the consideration for those legal services was the effort of said plaintiff's assignors to improve the value of the shares of stock standing in the name of Herbert W. Erskine.

"VI. That the defendant Trust Oil Company, a corporation, did not engage the legal services of or authorize the expenditure of the subject costs for and on its behalf by plaintiff's assignors."

der any legal services nor advance any money at the special instance or request of Trust Oil Company. Findings in this form would have meant that the company did not hire the attorneys and that if services were rendered to the company they were rendered under circumstances which imposed no duty upon the company to pay for them. But instead of negativing the allegations of the complaint with respect to the ultimate facts, which would have furnished the best support for the judgment, the findings evade those facts and do not effectively determine the issue of defendant's liability. There is nothing uncommon in this situation. We have repeatedly commented upon the fact that attorneys consistently ignore the settled rule that there should be findings upon the ultimate facts, namely, the facts that are determinative of the controversy, and that evidentiary findings are not only surplusage but frequently cause confusion.

[2] The finding "that legal services of substantial value were rendered to the defendant Trust Oil Company, a corporation, by the law firm" would imply an obligation on the part of the company to pay for the services. The finding "that the defendant Trust Oil Company, a corporation, did not engage the legal services of * * plaintiff's assignors" does not negative the inference that the company accepted and received the benefit of the services. It was clearly established by the evidence that the attorneys did render services of substantial value.

The finding that the company did not engage the legal services of the attorneys is without support in the evidence. Conferences between de Bretteville and the attorneys were held during December 1952 and continued through July 1953. In January 1953, the attorneys were employed to collect a claim against Southern California Gas Company of $336,482.80 for wet gas delivered. They were to receive 20% of sums recovered. They were consulted, gave legal opinions and rendered other services at the request of de Bretteville through April 1953, for which they made charges. On February 26th, the firm billed the company for expenses in the sum of $50.14 and requested payment of $500 on account of expenses and attorney's fees. De Bretteville's reply did not admit or deny an indebtedness for legal services. However, the company paid nothing and the matter of attorney's fees was not discussed in the later correspondence.

In the light of the fact that the company sought the legal services of the Erskine firm and that the finding to the contrary is without support in the evidence, the crucial question was whether there was a mutual understanding, express or implied, that the attorneys would not be paid for the services.

It will be helpful to outline something more of the bankground of the dealings of the company with the lawyers. Herbert W. Erksine was a member of the firm at the time he was appointed as a judge of the United States District Court in 1949. For an undisclosed time prior thereto, and as a member of the firm, he had rendered legal services to the company. The services were not rendered gratuitously; payment of compensation for the services was deferred and 100 shares of the company's stock were issued to him in 1951 as partial compensation. He owned these shares at the time of his death in 1951. Morse Erskine was a brother of Herbert W. Erskine and Morse Erskine 2d was Herbert's son. So far as disclosed by the record, the services rendered by the firm after Herbert left it were, in general, a continuation of those which had been rendered in the past by Herbert. The company had a multitude of problems of long standing and was involved in much litigation. To say that its legal problems were numerous, complex and difficult, would be well within the facts. As the owner of a controlling interest in Treasure Oil Company, Trust was vitally interested in saving as much as possible of its property in the Del Rey oil field which had been condemned by the United States Government. Some features of Trust's difficulties were described in Wynn v. Treasure

Co., 146 Cal.App.2d 69, 303 P.2d 1067 and in United States v. Adamant Co., 9 Cir., 197 F.2d 1, and other matters were in controversy between Trust and Southern California Gas Company and Union Oil Company arising out of a contract that had been entered into May 31, 1949 between Trust, Reconstruction Finance Corporation, successor to Defense Plant Corporation, and the Gas Company. Although Trust was represented in litigation by attorneys employed after the services of the Erskine firm were terminated, many of the facets of the controversies were the subject of the services of the Erskine firm up to the time when they were superseded by other counsel. The company does not deny that the attorneys rendered substantial services. It only contends that they were rendered with an understanding that they were to be gratuitous. But the court did not so find.

The obvious question is—why did not the court make such a finding? Undoubtedly, the correct answer is that the court merely signed the findings as they were prepared by defendant's attorney, assuming they would support the judgment. The further question—why did not the attorney incorporate a finding that the services of the attorneys were rendered gratuitously? The answer to this question is not so clear.

Charges were made for services between December 1952 and April 1953. We find that as late as June 9 and 12, 1953, de Bretteville was seeking legal advice by letters addressed to Morse Erskine, to which Mr. Erskine replied, stating that one of the matters would involve considerable time and would only increase de Bretteville's obligation for attorney's fees. He suggested that another attorney who had been employed by the company might be prepared to answer the question. On June 16th, de Bretteville wrote in part: "Therefore, I want to make it clear to you that at no time have we ever authorized you to be our attorney, we don't need attorneys. We need finances. We need to find a way out of our difficulties." And following this unwarranted statement with respect to attorneys, the letter contained an offer to Mr. Erskine to pay him a brokerage fee for finding someone to assist the company financially. De Bretteville had previously written that the 100 shares of stock was a present to Herbert W. Erskine (which was contrary to the proven fact) and on August 24th, he requested of Erskine 2d the return of the stock. His letters also implied that the attorneys should cooperate to enhance the value of the stock. This appears to have been the inception of the theory that the attorneys had been working for themselves and not the company.

[3] It is evident that de Bretteville's theory of nonliability was carried into the findings. Finding No. V reads in part "but that the consideration for these legal services was the effort of said plaintiff's assignors to improve the value of the shares of stock standing in the name of Herbert W. Erskine." We have read and re-read this clause and are unable to construe it as a finding that the services were rendered gratuitously. Although we have consistently observed the rule that findings should be given the reasonable construction that tends most strongly to give support to the judgment, we are unable to construe the quoted clause as a finding that the services of the attorneys were rendered pursuant to a mutual understanding that they would impose upon the company no obligation to pay for them. It is not a finding that either the attorneys or the company had such an understanding. There was another finding that the 100 shares of stock "devolved to the legal and testamentary heir or heirs of the said Herbert W. Erskine, deceased. That certain of plaintiff's assignors, to wit, Morse Erskine, Morse Erskine 2d, are the brother and son, respectively, of Herbert W. Erskine, deceased." This finding is apparently an attempt to place the two Erskines in the position of having some ownership in the stock as a basis for an implication that they were rendering their services to themselves and not to the company. The unquestioned fact was that the stock was

owned by the widow of Herbert W. Erskine and, of course, there was a third partner, J. Benton Tulley, who had not even a remote interest in the stock, or its ownership. It was also found "Herbert W. Erskine * * * at the time the aforesaid one hundred shares of the defendant Trust Oil Company, a corporation, stock was transferred to him, [Erskine] was acting as attorney for the defendant Trust Oil Company, a corporation, and as a member of the partnership constituting plaintiff's assignors." The finding implies that the stock was issued to a member of the partnership for legal services rendered and became the property of the partnership. But this finding, like the one last discussed, was contrary to the facts. Herbert W. Erskine became a United States District Judge in 1949. The stock was issued to him in 1951 as partial consideration for legal services prior to his accession to the bench.

The court was not requested to find that the services were gratuitous. It was the theory of the attorney who prepared the findings that from the fact that the value of the Erskine stock would have been enhanced by the services of the attorneys, and upon the supposition that they would profit thereby in some manner, it would follow that the services were rendered gratuitously.

[4] If the attorneys had succeeded in extricating the company from some of its embarrassing legal problems to the material advantage of the company it would have improved the value of the Erskine shares. But these amounted to only 10% of the issued stock and the benefit to the holders of the Erskine shares would have been exceedingly small as compared with the total benefit derived by the company from the services. Certainly, the mere fact that an attorney may be a stockholder in a company for which he renders legal services, and will share to some extent in the successful results of his efforts, would not justify an inference that he was donating his services to the company. But the attorneys did not own the stock. Moreover, de Bretteville had a secret intention to deny that the Erskines owned it and to demand that it be surrendered.

In arriving at a proper construction of the findings, we have read the reporter's transcript and all the numerous exhibits. We have not found in the record any statement by any of the attorneys to any representative of the defendant or any statement by the latter to any of the attorneys declaring that the services of the attorneys were to be rendered gratuitously.

[5] It appears from the findings that it was the theory of the defendant that if it was shown that the attorneys would have benefited by their services it would follow that they were working for themselves rather than for defendant, and would not be entitled to compensation. It is an erroneous theory. The question was one of fact, not of law. We cannot see that the findings add up to a finding that the services were gratuitous. The court did not state in its conclusions that they were gratuitous.

We might add that we have not overlooked the contention that Morse Erskine 2d admitted that the services were free. On August 20, 1953, he wrote to de Bretteville in part as follows: "As you know, we no longer represent you and have had no dealings with you except gratuitously to render you legal advice which you have declined to follow, as evidenced by the filing of the recent action against the Southern California Gas Company on an account stated on June 13, 1953." We do not construe this as a statement that the services of the attorneys throughout had been rendered gratuitously. As we understand the statement, it refers to the legal advice given at the time of and after the preparation of a complaint against the Southern California Gas Company for declaratory relief relating to an alleged indebtedness of the gas company to Trust Oil for wet gas delivered, and after the employment of other attorneys. As early as January 1953, it was agreed by the Erskine firm and the company that the former would institute suit against the gas com-

pany to recover for wet gas delivered, the services of the attorneys to be on a contingency basis. A proposed complaint was submitted to de Bretteville January 27th with instructions that it should be verified and returned to the attorneys. De Bretteville decided not to file the complaint prepared by attorneys, but on June 13th caused an action to be filed against the gas company through other attorneys upon an alleged account stated. Whatever the significance of the August 20th letter it could not cure the inadequacy of the findings.

We are convinced that the judgment must be reversed for inadequacy of the findings to determine the issue of liability. We have discussed the evidence to a limited extent for the sole purpose of determining whether the findings as a whole can reasonably be construed to mean that the court determined that the services of the attorneys were gratuitous. It should not be inferred from our discussion of the evidence that we are undertaking to decide whether it was sufficient to support a finding either that the services were gratuitous or that they were rendered and accepted without any understanding of the parties that they were to be gratuitous.

We have experienced some difficulty in disposing of an appeal that would have presented no serious problem if the trial court had made adequate findings. However, it is not a case in which the judgment should be reversed merely with directions to the court to make additional findings. From reading the transcript of the evidence we have not learned that any witness was interrogated with respect to any conversation, statement, communication or special circumstance for the purpose of shedding light upon the mutual understanding of the parties or which might have been of assistance to the court in determining whether there was a mutual understanding with respect to the matter of compensation. Upon a retrial, additional evidence may or may not be adduced, but in either event it will be necessary for the court to determine from the direct or indirect evidence, or both, whether the services were rendered under circumstances that imposed a duty upon defendant to pay for them.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.



168 Cal.App.2d 220

COUNTY OF SAN MATEO, a political subdivision of the State of California, Petitioner,

v.

CITY COUNCIL OF CITY OF PALO ALTO, and Robert W. Byxbee, Mrs. Mildred S. Corcoran, Noel E. Porter, Lee W. Rodgers, Karl M. Ruppenthal, Dean R. Cresap, Dr. Burt L. Davis, Clifford Q. Giffin, Dr. J. P. Mitchell, Herbert A. Navis, Stanley Bishop, Stanley R. Evans, James G. Marshall, Carl S. Stephens, and Bertrum B. Woodward, Jr., as Members of said City Council, Respondents.

Civ. 18564.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1959.

Hearing Denied April 22, 1959.

Original mandamus proceeding by county against city council and its members to direct the counsel to terminate proceedings under the Annexation of Uninhabited Territory Act of 1939. The District Court of Appeal, Kaufman, P. J., held, inter alia, that a city has no jurisdiction to annex property located in another county.

Writ of mandate issued.

1. Mandamus ⇐78

Mandamus is a proper remedy to compel city council to terminate proceedings under the Annexation of Uninhabited Territory Act of 1939, prior to time when quo warranto becomes available. West's Ann. Gov.Code, §§ 35300–35326.

2. Municipal Corporations ⇐33(8)

Certiorari is a proper remedy to test validity of annexation proceedings under the Annexation of Uninhabited Territory Act of 1939. West's Ann.Gov.Code, §§ 35300–35326.

3. Municipal Corporations ⇐29

Annexation of territory to a municipality is governed by the general laws of the state and not by municipal law. West's Ann.Gov.Code, §§ 35300–35326; West's Ann.Const. art. 11, § 6.

4. Municipal Corporations ⇐23

Under statutes, a city must be wholly located in one county. West's Ann.Elections Code, § 9706; West's Ann.Gov.Code, §§ 34001, 34051, 34080, 34302, 35100–35158, 35116, 35130, 35145, 35201.5, 35256, 35305, 35317, 35803, 71002, 71040, 71040.1.

5. Municipal Corporations ⇐29(4)

The extension of a city across a county boundary is so unusual and so attended with manifest practical inconveniences growing out of relation of municipal and county governments that an intention to authorize such an act should not be lightly inferred from use of general language, but should be evidenced by express terms or by the clearest implication. West's Ann.Elections Code, § 9706; West's Ann.Gov.Code, §§ 34001, 34051, 34080, 34302, 35100–35158, 35116, 35130, 35145, 35201.5, 35256, 35305, 35317, 35803, 71002, 71040, 71040.1.

6. Municipal Corporations ⇐29(4)

A city has no jurisdiction to annex property located in another county. West's Ann.Gov.Code, §§ 35300–35326.

Keith C. Sorenson, Dist. Atty. of San Mateo County, Howard E. Gawthrop, Deputy Dist. Atty., Redwood City, for petitioner.

John R. Nimocks, City Atty., Palo Alto, for respondents.

KAUFMAN, Presiding Justice.

The City of Palo Alto, situated in the County of Santa Clara, is a municipal corporation and a charter city organized and existing under the laws of the State of California. On November 10, 1958, its City Council passed a motion pursuant to Govt. Code sections 35300–35326, "Annexation of Uninhabited Territory Act of 1939", directing their City Manager to commence proceedings for the annexation of 819 acres of land located within the boundaries of San Mateo County known as "Bayfront Annexation". A description of the above mentioned land was filed with the Boundary Commissions of the counties of San Mateo and Santa Clara.

The reply from the San Mateo County Boundary Commission stated that the legal description of the proposed boundary was definite and certain but that it could not approve and, in fact, specifically disapproved the proposed annexation on the ground that city annexations over county boundary lines are not authorized by law. The Santa Clara County Boundary Commission neither approved nor disapproved the proposed annexation since the property was not situated in their county.

The Palo Alto City Council on December 8, 1958, adopted a resolution giving notice of the proposed annexation and setting a date to hear any opposition.

The County of San Mateo, a political subdivision of this State, instituted these proceedings in mandamus and in certiorari, questioning the legality of the above resolution on the ground that a city has no jurisdiction to annex property located in another county.

[1, 2] Mandamus is a proper remedy to compel the City Council to terminate proceedings under the Annexation of Uninhabited Territory Act of 1939, prior to the time when quo warranto becomes available. Certiorari is a proper remedy to test the validity of annexation proceedings under that statute. See Jefferson Union School Dist. of Santa Clara County v. Sunnyvale City Council, 129 Cal.App.2d 264, 267–268, 277 P.2d 104, and cases cited therein. Although petitioner could have instituted these proceedings in a lower court, we have determined that the facts of this case make it a proper one for the exercise of our original jurisdiction.

[3] The basic question is whether a city may annex territory situated in another county. Annexation is governed by the general laws of the State and not by municipal law. Calif. Const. Art. XI, § 6; 34 Cal.Jur.2d 670.

[4] There is no code provision directly authorizing or prohibiting such annexation. Review of the code sections dealing with annexation and related matters reveals, however, the clear implication that a city must be wholly located in one county.

Section 34302 of the Government Code provides that "Any portion of a county * * * may become incorporated pursuant to this chapter * * *." (New Cities.) Government Code, section 35201.5 (Territory owned by a city or a contiguous school district) provides that, "* * * a city may annex non-contiguous territory * * * which lies in the same county as that in which the city is situated * * *." If the proceeding involves the annexation of land to one city and its detachment from another city, a certificate of the filing of the abstract of vote must be transmitted to "the board of supervisors of the county in which the cities are situated." Govt. Code, § 35256. The Municipal Consolidation Act of 1913 gives authority for the consolidation of "contiguous cities situated in the same county." Govt. Code, § 35803.

The Annexation Act of 1913 (Govt. Code, §§ 35100–35158) sets forth the procedure for the annexation of inhabited territory by a city. Section 35116 provides in part:

> "Upon receiving a petition signed by not less than one-fourth of the qualified electors residing within the territory, as shown by the county registration of voters, * * *. The city clerk and the county officer having charge of the registration of voters shall within two weeks check the petition and certify the sufficiency thereof * * *."

Section 35130 provides that annexation elections shall conform as nearly as possible with the Election Code provisions concerning general elections. Section 9706 of the Election Code states that voting precincts for a municipal election may consist of the regular election precinct established for state or county elections.

Section 35317 (Uninhabited Territory) provides that the Secretary of State shall, upon receipt of certified copy of the annexation ordinance, file it and transmit a certificate of the filing to "* * * the board of supervisors of the county in which the city is situated." Similar language may be found in section 35145, providing for the annexation of inhabited territory. Section 34001 of the Govt. Code (Cities Generally) states that the term "Board of supervisors" means the Board of Supervisors of the county within which the city or territory is situated. Section 34051 provides that no person is entitled to vote in a city election unless he is a qualified voter of the county. The clerk of the legislative body of a city must file an affidavit of completion of certain enumerated proceedings with "the recorder of the county in which the city is located * * *" (Govt. Code, § 34080).

Government Code, section 71040, states that "* * * the board of supervisors shall divide the county into judicial districts for the purpose of electing judges and other officers of municipal and justice courts * * *."

Section 71040.1 provides that upon annexation of territory, the boundaries of the judicial district, which includes the annexing city, shall automatically be changed to include the territory annexed. This would mean that territory situated in San Mateo County would be included in a judicial district situated in Santa Clara County. Section 71002 provides that the board of supervisors shall provide suitable quarters for both municipal and justice courts. If the territory automatically becomes part of the Santa Clara County judicial system, then the Santa Clara County board of supervisors would be exercising control over territory in another county. This, they may not do.

[5] Section 35305, Annexation of Uninhabited Territory Act might infer that

the annexation procedure in issue is permissible. That section provides:

> "Upon receiving a written petition requesting annexation, * * * and signed by the owners of not less than one-fourth of the land in the territory by area, and by assessed value as shown on the last equalized assessment roll of the county or counties in which the territory is situated, * * *"

Despite the possible inference that might be drawn from the above section, it is clearly evident from the remaining sections of the Uninhabited Territories Act and from the entire legislative scheme that a city must be confined to one county. The extension of a city across a county boundary is so unusual and so attended with manifest practical inconveniences growing out of the relation of the municipal and county governments that an intention to authorize such an act should not be lightly inferred from the use of general language, but should be evidenced by express terms or by the clearest implication. 43 C.J. 117; 62 C.J.S. Municipal Corporations § 46, p. 136.

Enumeration of only a few of the practical difficulties which would arise if Palo Alto were allowed to complete its proposed annexation further substantiates our conclusion.

Section 394 of the Code of Civil Procedure provides that an action against a city may be brought in the county in which such city is located. If a city were allowed to exist in two or more counties, in which county would a plaintiff bring his action, or would he be allowed to pick the county in which he believed the courts would be most favorable to him?

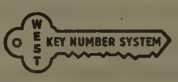
The appellate department of a superior court has jurisdiction on appeals from the municipal and justice courts within the county. If the proposed annexation were completed, which superior court would have jurisdiction over appeals from the Palo Alto Municipal Court?

[6] It would only be repetitious to cite further authority. Suffice it to say that the entire scheme of the organization and enlargement of cities in the State of California contemplates the organization and existence of each city within a single county.

In view of the foregoing, we conclude that a writ of mandate should issue directing the City Council of Palo Alto to terminate proceedings under the Annexation of Uninhabited Territory Act of 1939.

Writ of mandate to issue.

DOOLING and DRAPER, JJ., concur.



168 Cal.App.2d 490

In re Roger Joseph HARVILL, a Minor.

Civ. 5946.

District Court of Appeal, Fourth District, California.

March 6, 1959.

Minor charged with violation of statute prohibiting any person from engaging in motor vehicle speed contest was found by referee appointed by Juvenile Court to have committed offense. The Superior Court, sitting as a Juvenile Court, S. Thomas Buccirarelli, J., ordered the minor's operator's license suspended for period of three months and that he pay partial court costs, and minor appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that minor had violated statute.

Affirmed.

1. Automobiles ⇐355(5)

Evidence sustained finding that minor had violated statute prohibiting any person from engaging in motor vehicle speed contest. West's Ann.Vehicle Code, § 601.5(a).

2. Infants ⇐68

Point not raised by defendant in juvenile court hearing could not be raised for first time on appeal.

Brumer & Hopson, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., and John M. Huntington, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant Roger Joseph Harvill, a minor, was charged with a violation of section 601.5 of the Vehicle Code, which provides in part: "(a) No person shall engage in any motor vehicle speed contest or exhibition of speed on a highway and no person shall aid or abet in any such motor vehicle speed contest or exhibition on any highway."

A hearing was had before a referee appointed by the juvenile court who found that the charge was true and recommended to the Judge of the juvenile court that Harvill's operator's license be suspended for a period of three months and that he pay partial court costs amounting to the sum of $25. The findings and recommendation of the referee were approved by the Judge of the juvenile court and declared to be the order of said court. Harvill appeals from this order, claiming that the evidence is insufficient to warrant the findings and that there was no proof of corpus delicti at the hearing before the referee.

Four witnesses were sworn and testified in substance as follows:

Frank H. Bennett, a traffic officer with the Corona Police Department, testified that on the morning of January 26, 1958, while at Fuller and East 6th Street in the city of Corona, he heard a loud noise * * * muffler sound * * * "they revved up"; that he pulled out and saw appellant's car and a black Buick coming from the west "at what I would estimate between 50 and 55 miles an hour"; that the vehicles were running "neck and neck" and appellant's car was a little bit ahead; that the cars were traveling easterly and the speed limit was 35 miles per hour for cars traveling in this direction; that when these cars passed him, he took after them; that appellant turned into a parking lot and he (Bennett) followed the Buick; that when he returned to the parking lot appellant was gone; that later appellant "came in" and was given a ticket for a violation of section 601.5 of the Vehicle Code.

Harvill testified that he was 17 years old at the time the citation was issued to him; that on the morning of January 26 he was coming home from church and Ruben Hernandez (who was driving the Buick) was traveling east on 6th Street; that he pulled up beside Hernandez and "revved up" his engine and they continued "down the road and I went past Fuller and there saw officer Bennett and I pulled into the parking lot."

Hortensia Hernandez, who was riding in the Buick, testified that when they came to the intersection of Fuller and 6th Streets the appellant came up to them and "revved up"; that they were traveling at about 30 to 35 miles per hour.

Ruben Hernandez testified that he did not think that appellant made any motion or indication that he wished to engage in a speed contest or race because he (Hernandez) did not have a racing car; that appellant was traveling a little faster than the Buick.

Kenneth Taten, who was riding with appellant, testified they were coming home from church when they saw a car that "had some girls in it" and he mentioned something to appellant about seeing the girls in the car and said, "Look at the chicks"; that they pulled up and appellant "revved his engine up" and caught up with the Buick.

The jurisdiction of the juvenile court over the appellant and the authority of the court to make the order involved is found in section 826.5 of the Welfare and Institutions Code. In In re Schubert, 153 Cal. App.2d 138, 143, 313 P.2d 968, 971, the court said:

"Arguments * * * of the probative value of the evidence in the Juve-

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nile Court are subject to the same constitutional rule that applies to all cases on appeal; if there is any substantial evidence to support the finding of the Juvenile Court, a court of review is without power to weigh or to evaluate it. A reviewing court must indulge in all reasonable inferences to support the findings of the Juvenile Court, and such findings will not be disturbed on appeal when there is substantial evidence to support them. (Citations.)"

Appellant contends that there was a failure to prove the elements of a speed contest as denounced in said section 601.5 of the Vehicle Code. However, an exhibition of speed on the highway is also prohibited by said section and the referee found to be true both the allegation of a speed contest and the allegation of an exhibition of speed.

There is no case authority or statutory definition as to what is meant by "speed contest" or "exhibition of speed" in this particular section of the Vehicle Code. Webster's New International Dictionary, 2d Edition, defines contest as: "Earnest struggle for superiority, victory, defense, etc.; competition; * * *." The dictionary defines exhibition as "Act or instance of exhibiting for inspection, or of holding forth to view; manifestation; display." Thus it would appear that section 601.5 of the Vehicle Code could be violated by two or more persons competing in speed in vehicles on the highway or by one person displaying the speed of his vehicle on the highway to another person in the first person's car or in another car.

[1] While there is a conflict in the evidence as to the speed of the cars involved and as to whether there was a speed contest or exhibition of speed, there was sufficient substantial evidence presented by the traffic officer from which the court could reasonably infer that appellant by "revving up" his engine and by speeding at a rate of 55–60 miles per hour was exhibiting or displaying the speed of his car to the female occupants of the Buick. The testimony of the officer that he saw the cars running "neck and neck" at a speed of 50–55 miles per hour in a 35-mile zone and that appellant's car caught up with and passed the Buick, and other circumstances, are sufficient to support the "speed contest" charge.

[2] Appellant states that since Ruben Hernandez was acquitted of violation of section 601.5 in a justice court that appellant could not have violated said section of the Vehicle Code as it takes two to make a contest. However, there is nothing in the record before us indicating such acquittal. The point was not raised in the juvenile court hearing and cannot be raised for the first time on appeal. Estate of Thatcher, 120 Cal.App.2d 811, 815, 262 P.2d 337; People v. Hartridge, 134 Cal.App.2d 659, 667, 286 P.2d 72; People v. Martin, 128 Cal.App. 2d 361, 364, 275 P.2d 635.

The order appealed from is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.



168 Cal.App.2d 384

REVEREND MOTHER PAULINE, Sister Mary de Montfort, O.P., Sister Mary Francis and John P. Doran, Plaintiffs and Appellants,

v.

Justice A. F. BRAY, Defendant and Respondent.

Civ. 9570.

District Court of Appeal, Third District, California.

March 5, 1959.

Action against justice based on alleged rendering of decision against plaintiffs on ground of alleged personal malice and rancor. The Superior Court, Contra Costa

County, Hugh H. Donavan, J., entered judgment of dismissal and order after judgment denying plaintiffs' motion to vacate judgment and plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that complaint disclosing that justice's alleged actions were done while acting in judicial capacity failed to state a cause of action by reason of immunity protecting public officers acting within scope of their duties.

Affirmed.

1. Judges ⇐36

Complaint seeking damages against judge for action in confirming decree on alleged basis of rancor and personal malice toward plaintiffs was insufficient to state a cause of action, since complaint disclosed that any actions of judge were done within the scope of his official capacity for which he was immune from suit.

2. States ⇐200

Defense of sovereign immunity from suit presents a jurisdictional question.

3. Officers ⇐114

Sovereign immunity from suit protects public officers and employees acting within the scope of their duties even against charges of malicious personal torts.

John P. Doran, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., by Richard H. Perry, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal by plaintiffs from an order after judgment denying their motion under Section 473 of the Code of Civil Procedure to vacate the judgment. The judgment dismissed plaintiffs' action following an order sustaining defendant's demurrer without leave to amend.

[1–3] Plaintiffs' complaint alleged in substance as follows: That defendant is a Justice of the First District Court of Appeal, Division One; that in violation of law he arbitrarily dismissed plaintiffs' appeal from a judgment in a probate proceeding; that the dismissal was ordered by him without legal right or claim of right and wilfully and unlawfully and without color of law for the purpose of engaging in reprisals against plaintiffs' attorney because he, plaintiffs' attorney, had filed with the court of which defendant is a member, a claim that in entering a certain decree of that court defendant joined in an act of "judicial banditry" and gave away an estate through confirming a judgment to strangers to the probate record; that in doing said acts defendant was motivated by rancor toward plaintiffs and by malice and spleen; that his acts were designed solely to hurt and were not and could not be justified in law, but were done solely for the purpose of oppressing and threatening plaintiffs' said attorney. To this complaint defendant filed a general demurrer. It is apparent that the complaint stated no cause of action by reason of the immunity which protects public officers acting within the scope of their duties against charges such as are here made. It is settled law that the defense of sovereign immunity from suit presents a jurisdictional question. People v. Superior Court, 29 Cal.2d 754, 756–757, 178 P.2d 1, 40 A.L.R.2d 919. This immunity protects public officers and employees acting within the scope of their duties even against charges of malicious personal torts such as are charged here. White v. Towers, 37 Cal.2d 727, 235 P.2d 209, 28 A.L.R.2d 636; Hardy v. Vial, 48 Cal.2d 577, 311 P.2d 494. It is clear from the pleading that what was alleged to have been done by the defendant could only have been done by him within the scope of his duties as a member of the court. Allegations that defendant acted maliciously, in violation of law and arbitrarily, that he was motivated by rancor, malice, and spleen, and acted with the intention to

harm, to oppress and threaten, do not destroy the immunity. As said in Hardy v. Vial, supra, 48 Cal.2d at page 583, 311 P.2d at page 497: "* * * Plaintiff contends, however, that the school defendants are not entitled to the protection of the immunity rule because they assertedly acted beyond the scope of their employment when they conspired with the nonschool defendants and aided them in making and filing affidavits containing false charges. It should be noted in this connection that 'What is meant by saying that the officer must be acting within his power [to be entitled to immunity] cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.'" Since it appears from the face of the pleading that defendant was acting in a judicial capacity, that is, as a member of an appellate court and that the action taken was by the court, the plaintiffs' unrestrained allegations of misconduct add nothing to the pleading. Cross v. Tustin, 165 Cal.App.2d 146, 331 P. 2d 785. The trial court therefore properly sustained the general demurrer and, since it is obvious that in doing the things Justice Bray was alleged to have done he must necessarily have been acting as a Justice of his court, it was proper for the trial court to sustain the demurrer without leave to amend. For the same reason the trial court could not and did not abuse its discretion in denying plaintiffs' motion alleged to have been prosecuted under Section 473 of the Code of Civil Procedure. It would have been a futile act for the court to have granted plaintiffs' motion to vacate and annul the judgment of dismissal and the precedent order sustaining defendant's demurrer without leave to amend. That would merely have reinstated the complaint which, as we have said, did not state a cause of action and could not have been amended to state one.

For the reasons given, the order appealed from is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

168 Cal.App.2d 348

Doris Lucille BING, Plaintiff and Respondent,

v.

Dana Gerald BING, Defendant and Appellant.

Civ. 9456.

District Court of Appeal, Third District, California.

March 4, 1959.

Action by wife for divorce. The husband was granted a divorce on his cross complaint. He appealed from that portion of a judgment rendered by the Superior Court, Sacramento County, John Quincy Brown, J., dividing the community property. The District Court of Appeal, Van Dyke, P. J., held that conflicting evidence supported the trial court's ascertainment of value of community property.

Affirmed.

1. Divorce ⇐253

In wife's divorce action, wherein the husband, a contractor, was granted divorce on his cross complaint, conflicting evidence supported trial court's ascertainment of the value of the community property.

2. Appeal and Error ⇐717

The trial court's memorandum opinion cannot be used to destroy the trial court's findings of fact.

3. Appeal and Error ⇐931(1)

Every presumption must be indulged on appeal in support of factual findings of trial court.

Busick & Busick, Sacramento, for appellant.

Lewis, Lewis & Lewis, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from that portion of a judgment rendered in a divorce action which divided the community property be-

tween the parties. Defendant-appellant was granted a divorce on his cross-complaint. The ground was extreme cruelty.

[1] The trial court found that the community property of the parties was of the value of $62,021.87 and awarded respondent wife the sum of $21,707.35 as her share. That sum amounts to 35% of the whole. Appellant attacks the court's ascertainment of the value of the community property, but in doing so makes assumptions which, upon this record, cannot on appeal be permitted to stand against the court's findings. The court's findings do not fully show what valuations of the various items of community property it accepted. The issue as to the value of community property appears to have been sharply contested and the proof was materially in conflict. It appears that on one occasion the court, apparently on motion of appellant, reduced its figure for total value by something over $7,000.

Appellant was a contractor, who had for some time been in partnership with another and who thereafter for several years had operated his own business after the partnership had been dissolved. His fortunes showed the fluctuation that is not unusual in the history of any contracting business. For instance, there was received in evidence an accountant's report, which gave a comparative statement of assets and liabilities of appellant from December 31, 1949, three years before he married respondent, through 1956. The separation occurred in July of that year. This statement showed the following annual figures for net worth: $14,551.48, $6,544.30, $20,908.78, $32,114.76, $66,395.52, $148,962.16, $108,910.52, $110,145.76. With the exception of cash value of life insurance of a little over $7,000, appellant's assets when he married consisted mainly of his investment in the partnership. There is evidence that from this he obtained in the dissolution certain machinery for use in contracting work and he began to do business as an individual. He testified that from then on everything that came in was carried in a single account from which all expenditures were made; that there was continuous intermingling of community and separate assets and income with the single exception of the cash value of the life insurance. This asset, awarded to appellant, however, appears to have been classified by the court as separate property save for something less than $2,000 increase in value during the years of the marriage. During the marriage considerable property was placed in joint tenancy. Thus the record discloses no attempt on the part of appellant as the years of marriage passed to keep his separate property segregated or traceable from the accumulations of the community. Substantial diversions of these mingled assets occurred for the acquisition of joint property. These diversions were more than ample to absorb all of the separate property of appellant. It further appears that the great bulk of the total property, community and separate, was accumulated after the marriage. From the testimony of appellant it appears that the increase devolved largely from his own personal skill and industry in the guidance of his contracting business. On such a record the trial court's finding as to the value of the community property cannot be successfully assailed.

[2, 3] Appellant seeks to challenge the court's finding of value by making assumptions based upon statements made by the trial court in a memorandum opinion which has been brought up with the record here. He desires this court to follow him in his accounting computations, notwithstanding that if we did so we would be using the trial court's memorandum opinion to destroy its findings of fact. A memorandum opinion cannot be used for that purpose. Every presumption, of course, must be indulged on appeal in support of the factual findings of the trial court. A perusal of the record of oral proceedings discloses that there was evidence which would have justified the trial court in assigning a greater value to the community than the court actually found, and of course the court could have given respondent a greater share. Under all the circumstances presented by this rec-

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ord this court can do no other than to affirm the judgment of the trial court.

The portion of the judgment appealed from is affirmed.

PEEK, J., and WARNE, J. pro tem., concur.



168 Cal.App.2d 235

PEOPLE of the State of California, Plaintiff and Respondent,

v.

James H. MORRISON, Defendant and Appellant.

Cr. 6141.

District Court of Appeal, Second District, Division 3, California.

Feb. 26, 1959.

Rehearing Denied March 17, 1959.

Hearing Denied April 22, 1959.

Prosecution for selling corporate securities without having secured a license so to do, and for grand theft. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgment of conviction on six counts of violations of the Corporations Code, and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that mere fact that defendant might have owned stock in question for a brief period preceding delivery of items to various purchasers did not exempt defendant from statutory requirement that a seller of securities have a license to sell them, and in view of evidence that defendant was engaged in the business of buying and selling and of negotiating the sale of the stock, and that defendant was not licensed, a question was presented for the jury as to whether defendant was guilty of violation of statute prescribing sale of any security without a permit.

Judgment and order denying motion for a new trial affirmed.

1. Licenses ⇐18½(8)

A statutory exception to provision of Corporate Securities Law providing that it does not apply to sale of securities by a bona fide owner of the securities is that the Corporate Securities Law does apply to sales of securities by an owner of securities who is engaged in the business of selling or of negotiating for the sale of securities to the public. West's Ann.Corp.Code, §§ 25006, 25152, 25700, 26104(a).

2. Licenses ⇐18½(8)

Mere proof that a seller of securities was the owner of the securities at the time of the sale does not necessarily exempt the seller from statutory requirement that a person who engages in the business of selling or negotiating for the sale of securities to the public be licensed so to do. Wests' Ann. Corp.Code, § 26104(a).

3. Licenses ⇐18½(8), 42(5)

In prosecution for sale of corporate stock without having obtained a broker's license, mere fact that defendant might have owned stock in question for a brief period preceding delivery of items to various purchasers did not exempt defendant from statutory requirement that a seller of securities have a license to sell them, and in view of evidence that defendant was engaged in the business of buying and selling and of negotiating the sale of the stock and that defendant was not licensed, a question was presented for the jury as to whether defendant was guilty of violation of statute prescribing sale of any security without a permit. West's Ann.Corp.Code, §§ 25006, 25152, 25700, 26104(a).

4. Constitutional Law ⇐230(1), 287
Licenses ⇐18½(2)

Statutory requirement to the effect that a person who engages in the business of buying and selling or of negotiating for sale of securities should have a license so to do was not unconstitutional as a violation of due process or equal protection of the law provisions of the federal and state constitutions as applied to defendant charged with violation of such statute, even though he was an owner of the stock involved, where he engaged in the business of selling the

stock, or purchased the stock with the purpose of reselling or of offering it for sale to the public. West's Ann.Corp.Code, §§ 25006, 25152, 25700, 26104(a).

5. Constitutional Law ⇐90, 258
Licenses ⇐18½(2)

The Corporate Securities Law does not violate constitutional right of due process of law on theory that it is vague and uncertain, nor does it violate the constitutional right of free speech by conferring arbitrary powers on the commissioner of corporations. West's Ann.Corp.Code, § 26104 (a).

6. Indictment and Information ⇐71

An information is sufficient if it charges the offense in any words sufficient to give the accused notice of the offense of which he is accused. West's Ann.Pen.Code, § 952.

7. Licenses ⇐42(3)

Where, in substance, each count of information on which defendant was convicted charged him with selling stock, issued by a named corporation without having obtained a broker's license, in violation of the Corporations Code, information was sufficient. West's Ann.Corp.Code, § 26104(a).

8. Criminal Law ⇐406(4)
Judgment ⇐822(2)

In prosecution for selling stock without having obtained a broker's license, trial court did not err in sustaining an objection to receiving in evidence certified copies of the pleadings and judgment in a civil action commenced in another state by five of the complaining witnesses and others against defendant and others to rescind purchases of the stock involved and recover amounts paid for the stock, in view of fact that parties to the out-of-state action were not the same as the parties in the criminal case. West's Ann.Corp.Code, § 26104(a).

9. Criminal Law ⇐783(1)

In prosecution for selling stock without having obtained a broker's license, trial court did not err in refusing to instruct jury as requested by defendant to the effect that testimony by deposition was entitled to same consideration as testimony by a witness in court, in view of fact only witness whose testimony was given by deposition was a witness for the prosecution who testified regarding sales of stock in question to defendant by a brokerage company, and payment therefor by defendant, a fact not disputed by the prosecution. West's Ann.Corp. Code, § 26104(a).

10. Licenses ⇐40

Specific intent is not a necessary element of offense of violation of the Corporate Securities Law. West's Ann.Corp. Code, § 26104(a).

11. Criminal Law ⇐829(1)

In prosecution for sale of corporate securities without a license, trial court would not be deemed to have erred in refusing to give certain instructions where they were covered by instructions given. West's Ann.Corp.Code, § 26104(a).

12. Criminal Law ⇐833

In a criminal prosecution, a judge was not required to discuss instructions submitted by defendant's counsel, and he would not be deemed to have erred in refusing to discuss them.

13. Criminal Law ⇐814(16)

In prosecution for sale of corporate securities without a license, trial court would not be deemed to have erred in instructing the jury that it should view with caution any evidence that related to an oral admission of defendant, on theory that there was no evidence of an oral admission by defendant, in view of testimony of an investigator for the District Attorney as to the effect that defendant had stated that he was selling stock in question for $2 a share and buying for $1 a share. West's Ann. Corp.Code, § 26104(a).

14. Criminal Law ⇐823(4)

In prosecution for sale of corporate securities without a license, court would not be deemed to have erred in instructing that the law provided that no person act as a broker in the sale of any security until such person shall have secured a certificate authorizing him so to do, on theory that such instruction might have caused jury to believe that if a person sold his own stock without having obtained a permit, he would

be guilty of an offense, in view of fact a given instruction defined the word broker and included a statement to the effect that broker included a person who engages in the business of selling or negotiating for the sale of securities. West's Ann.Corp.Code, §§ 25006, 25152, 25700, 26104(a).

15. Criminal Law ⇐823(4)

In prosecution for sale of corporate securities without a license, trial court would not be deemed to have erred in instructing that every person who sells or causes to be sold any security, the sale of which has not been authorized by a permit, is guilty of a public offense, on theory that such instruction was incomplete in that it did not inform the jury that if they found that defendant sold his own stock to the complaining witnesses he was exempt from prosecution, in view of other instructions covering such point. West's Ann.Corp. Code, § 26104(a).

16. Criminal Law ⇐1172(1)

In prosecution for sale of corporate securities without a license, giving of instruction that any person who sold any security the sale of which had not been authorized by a permit was in effect guilty of a public offense would not be deemed prejudicial error due to use of the word permit in the instruction rather than the statutory word "license". West's Ann.Corp. Code, § 26104(a).

17. Criminal Law ⇐1171(1)

In prosecution for selling corporate securities without having a license so to do, and for grand theft, where defendant testified he accommodated various persons by selling stock to them, deputy district attorney would not be deemed guilty of prejudicial error in asking defendant on cross-examination as to whether reason he repurchased certain stock was because he knew he had swindled the buyer, whether he knew he had cheated another buyer, and as to whether as a matter of accommodation he cheated a third buyer, and as to whether accepting certain money from such buyers was like taking candy from a baby. West's Ann.Corp.Code, § 26104(a).

18. Criminal Law ⇐720(1)

In prosecution for sale of corporate securities without a license, deputy district attorney would not be deemed guilty of misconduct by stating in his argument that defense counsel had defendant make up a portion of a conversation that never happened in order to get before the jury result of an out-of-state trial in which certain of the prosecuting witnesses sought to recover their money, in view of fact defendant testified as to the result of such trial, and in view of fact that defendant prior to such testimony had on numerous occasions offered in evidence pleadings and judgment in the out-of-state action, and objections thereto had been sustained. West's Ann. Corp.Code, § 26104(a).

David H. Caplow, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was accused in seven counts with violating section 26104, subdivision (a), of the Corporations Code, and he was accused in four counts with grand theft. In a jury trial, he was convicted on six counts (counts 1, 3, 5, 7, 8, and 10), and acquitted on one count, of violating said section of the Corporations Code; and he was acquitted on the grand theft counts. He appeals from the judgment and the order denying his motion for a new trial.

In count 1, defendant was accused of violating "section 26104(a)" of the Corporations Code in that about July 11, 1955, he unlawfully engaged "in the business of buying and selling, offering for sale, and negotiating for the sale of securities and purchasing securities with the purpose of re-selling them to the public as defined in Section 25006 of the Corporations Code, in that the defendant did on or about said date sell and offer for sale and cause to be sold, for value, to wit, Five Hundred and 00/100 Dollars ($500.00), to George Neikrug, a security, to wit, shares of stock in

a company known as and called Stadia Oil and Uranium Corporation, a corporation, organized under the laws of the state of Nevada, for profit, without first having applied for and secured from the Commissioner of Corporations of the State of California, a license so to do."

The other five counts on which defendant was convicted were identical with count 1, except as to dates, names of purchasers, and amounts.[1] The dates alleged in those counts were July 14, 15, 23, and 25, 1955.

Stadia Oil & Uranium Corporation was organized under the laws of Nevada on August 4, 1954. It never applied for or received a permit to sell shares of its stock in California. In 1955 defendant was a tax consultant in Beverly Hills, California. He never applied for or received a broker's license to sell securities in California.

About the dates set forth in the information, the persons named therein as purchasers mailed or delivered, to defendant in Los Angeles County, checks in the respective amounts as set forth in the information (ranging from $500 to $4,200). Thereafter defendant delivered, to the respective purchasers, certificates representing shares of stock of Stadia Oil & Uranium Corporation, which shares he had sold to them at the price of $2 a share. The date on some of the certificates was July 20, 1955, and the date on the other certificates was July 29, 1955.[2]

Appellant states that he has never denied that he sold stock issued by Stadia. He asserts that the evidence shows that he was the owner of the stock which he sold; that as such owner he was exempt, under section 25152 of the Corporations Code, and under the due process and equal protection of the law provisions of the federal and state Constitutions, Const. art. 1, § 13; U.S. C.A.Const. Amend. 14, from a statutory requirement that a seller of securities should have a license in order to sell them.

George Neikrug, the purchaser referred to in count 1, testified that he is a musician; defendant had been his tax consultant since 1950, and they had had "dealings" in connection with uranium properties in Wyoming; about July 1, 1955, defendant said that, in the course of his work concerning the Wyoming properties, he performed services for persons who were making available to him some stock which was worth $5 a share and which was going on the market at $5 a share; he also said that, by reason of a mistake of a secretary, he could obtain the stock for $2 a share in return for the services he had performed, and that the stock would go to all the persons who were connected with the uranium deals in Wyoming; he also said that stock in the company would cost the witness $2 a share, and that the stock was going to open on several stock exchanges throughout the country in 30 days at $5 a share; a few

1.

Count	Date of Purchase	Name of Purchaser	Amount
3	July 15, 1955	Dr. W. John Pangman	$2,000
5	July 14, "	Stanley L. Marlowe	4,200
7	July 25, "	Ada Bell	1,000
8	July 25, "	Anne Pratt	3,000
10	July 23, "	Taylor Holmes	1,000

2. The dates of the certificates, names of owners, and number of shares were:

Date	Name	Number of Shares
July 20, 1955	George Neikrug	250
July 20, "	John Pangman	1,000
July 20, "	Stanley Marlowe	2,100
July 29, "	Ada E. Bell	500
July 29, "	Anne Pratt	1,500
July 29, "	Taylor Holmes	500

days after July 1 defendant told him that there was a limited amount of stock available.

Mr. Neikrug testified further that on July 11, 1955, he paid $500 to defendant for 250 shares of the Stadia stock, and several days later he received a certificate for those shares; on July 26, 1955, he paid $700 to defendant for 350 shares of the stock, and thereafter he received a certificate for those shares; on August 2, he paid $400 to defendant for 200 shares of the stock, and thereafter he received those shares; on August 26, he paid $800 to defendant for 400 shares of the stock, and thereafter he received those shares; about August 26, upon behalf of Samuel Neikrug, he paid $5,000 to defendant for 2,500 shares of the stock, and thereafter Samuel Neikrug received those shares; about August 26, upon behalf of Alexander Neiman, he paid $200 to defendant for 100 shares of the stock, and thereafter Neiman received those shares; about August 26, upon behalf of Israel Baker, he paid $2,000 to defendant for 1,000 shares of the stock, and thereafter he (witness) received those shares for Baker. The certificates of stock referred to in the above testimony of Neikrug were issued, in the names of said purchasers, by Stadia. Mr. Neikrug testified further that on October 4, 1955, he paid $2,400 to defendant for 1,200 shares of Stadia stock. A few weeks thereafter he asked the defendant why the certificates had not been delivered. Defendant said that the certificates were tied up in Salt Lake City and that he would get them. On several subsequent occasions Neikrug made similar inquiries of defendant, and defendant made similar replies. About February, 1956, he received three certificates representing 1,200 shares of the stock. Two of those certificates had been issued in the names of defendant and Zona Bell; and one of those certificates had been issued in the name of Zona Bell.[3] Those certificates were assigned to Neikrug.

Dr. John Pangman, the purchaser referred to in count 3, testified that he is a plastic surgeon; he met defendant in January, 1955, and soon thereafter he gave checks to defendant to purchase percentage interests in uranium claims in Wyoming; about July 15, 1955, defendant told him: that on account of favors he had done for the officers of Stadia, they had made available to him a block of 40,000 shares of Stadia stock, and he could sell the stock for $2.00 a share; there were 200,000 shares of founders' stock and approximately 100,000 shares were to be sold; the stock had been cleared by the Securities and Exchange Commission and would be sold in all of the states and Canada for $5 a share; the stock would go on the market in about two weeks. He also testified that on July 15 he paid $2,000 to defendant for 1,000 shares of Stadia, and several days later he received a certificate for those shares.

Stanley Marlowe, the purchaser referred to in count 5, testified that he is an actor; he met defendant in June, 1955; on June 14, 1955, defendant called him by telephone and said that the Stadia company was al-

3. The numbers and dates of certificates, and names of owners, and number of shares, referred to in the testimony of Neikrug were as follows:

Number	Date		Owner	Number of Shares
54	July 29,	1955	George Neikrug	350
72	August 19,	"	George Neikrug	200
103	September 3,	"	George Neikrug	400
99	September 3,	"	Samuel Neikrug	2,500
104	September 3,	"	Alexander Neiman	100
102	September 3,	"	Israel Baker	1,000
88	August 19,	"	James H. Morrison and Zona G. Bell	1,000
119	September 20,	"	Zona Gale Bell	100
121	September 20,	"	Zona Gale Bell and James H. Morrison	100

lowing him to sell some stock to his friends for $2 a share; the stock was a sure thing and would come on the market on August 25 or 27 at $5 a share; the stock had been approved by the Securities and Exchange Commission to be sold at Chicago, Los Angeles, and Toronto. He also testified that on July 14 he paid $4,200 to defendant for 2,100 shares of Stadia, and several days later he received a certificate for those shares.

Anne Pratt, the purchaser referred to in count 8, testified that she is a schoolteacher; in July, 1955, she called defendant by telephone and asked him if she could buy into a uranium business; defendant said that he had something much better, that he could get stock for her in the Stadia corporation for $2 a share, that the stock would go on the market in three weeks at $5 a share and all the stock had been "spoken for." She testified further that, about four days later, she and Mrs. Bell had a conversation with defendant wherein he repeated the statements he had made previously, and he also said that he would have to go to Utah to get the stock. She also testified that on July 25 she paid $1,000 to defendant for 500 shares of Stadia, and several days later she received a certificate for those shares.

Ada Bell, the purchaser referred to in count 7, testified that she is a schoolteacher; she met defendant in 1954, at which time he prepared an income tax return for her; in July, 1955, she and Mrs. Pratt had a conversation with defendant regarding Stadia; on July 25 she paid $3,000 to defendant for 1,500 shares of Stadia, and several days later she received a certificate for those shares. The testimony of Mrs. Bell, regarding the statements of defendant in said conversation, was substantially the same as the testimony of Mrs. Pratt regarding defendant's statements.

Taylor Holmes, the purchaser referred to in count 10, testified that he is an actor; defendant had prepared income tax returns for him; in July, 1955, defendant said that he knew a fine way to make money quickly and he wanted Holmes in on it, that Stadia stock would go on the market on August 23, and would go to $5 a share.

Mr. Holmes testified further that on July 23, 1955, he paid $1,000 to defendant for 500 shares of Stadia stock, and several days later he received a certificate for those shares; on August 2, 1955, he paid $3,000 to defendant for 1,500 shares of Stadia, and thereafter he received a certificate for those shares (certificate dated August 19); on September 7, 1955, he paid $600 to defendant for 300 shares of Stadia, and thereafter he received a certificate for those shares (certificate dated September 20). The certificates referred to in the above testimony of Holmes were issued, in Holmes' name, by Stadia.

Dr. Wheelis, a physician, testified that on June 14, 1955, while he and defendant and seven other persons were at a luncheon, defendant said: that Stadia stock was available only through him at that time; he had performed some service for Stadia and could get stock at $2 a share; the stock would be on the market about two weeks later at $5 a share; he would buy the stock at $2 a share and sell it to Dr. Wheelis and the others who were at the luncheon for $2 a share.

Dr. Wheelis testified further that on July 15, 1955, he paid $1,200 to defendant for 600 shares of Stadia stock, and thereafter he received a certificate for those shares; subsequently he purchased additional shares of Stadia stock, through the agency of another man, at $1 a share; thereafter he (witness) demanded that defendant return the money which he had paid to defendant for the 600 shares, and a few days later defendant paid him $1,200, and then Dr. Wheelis returned the certificate for the 600 shares to defendant.

The prosecution also introduced evidence, as follows: On July 29, 1955, defendant purchased 17,800 shares of Stadia from Austin B. Smith Brokerage Company in Salt Lake City, and in payment therefor he gave to that company a check for $17,800, which check was dated July 18, 1955 (a date which was 11 days before the purchase).

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Mr. Smith gave defendant a confirmation of the sale and told him that the stock could be issued in the names of any persons. Defendant gave the secretary the names of 11 persons to whom the stock was to be issued, and he designated the number of shares to be issued to each person. Some of those persons, and the number of shares designated for them, were: George Neikrug 350 shares; Ada Bell 500 shares; Anne Pratt 1,500 shares; Taylor Holmes 500 shares; and defendant 7,800 shares. On August 15, 1955, defendant purchased 4,700 shares of Stadia from said Smith company, and in payment therefor he gave to that company a check for $4,700, which check was dated July 31, 1955 (a date which was 15 days before the purchase). Defendant gave the secretary of Stadia the names of 13 persons to whom the stock was to be issued, and he designated the number of shares to be issued to each person. Some of those persons, and the number of shares designated for them, were: George Neikrug 200 shares; and defendant or Zona Bell 1,500 shares. On August 20, 1955, defendant purchased 4,000 shares of Stadia from the Smith company, and in payment therefor he gave to that company a check for $4,000, which check was dated August 20, 1955. (The record does not show the names of the persons to whom the stock was issued. Defendant testified that about 2,000 shares were issued in his name, and he believed that he told Smith's secretary the names of one or two persons to whom the stock was to be issued.) On September 3, 1955, defendant purchased 18,200 shares of Stadia from the Smith company, and in payment therefor he gave a check for $18,200, which check was dated August 20, 1955 (a date which was 14 days before the purchase). Defendant gave the secretary of Stadia the names of 14 persons to whom the stock was to be issued, and he designated the number of shares to be issued to each person. Some of those persons, and the number of shares designated for them, were: Samuel Neikrug 2,500 shares; Israel Baker 1,000 shares; George Neikrug 400 shares; Alexander Neiman 100 shares; and defendant 8,050 shares. On September 20, 1955, defendant purchased 1,100 shares of Stadia from the Smith company, and in payment therefor he gave a check for $1,100, which check was dated September 13, 1955 (a date which was 7 days before the purchase). (The record does not show the names of the persons to whom the stock was issued.)

With reference to the above-mentioned purchases from the Smith company, defendant testified in substance the same as is above set forth with reference to those purchases.

Defendant testified further that on July 3, 1955, he met John Collins (then secretary and treasurer of Stadia) in Wyoming, and they had a discussion regarding Stadia; in reply to defendant's inquiry, Collins said that no stock of Stadia was available at that time; about July 8, 1955, Collins (who was then in Reno, Nevada) called defendant by telephone and said that he had come across a block of stock (10,000 shares) in the hands of a Nevada resident, and that 9,850 shares of the stock were available; defendant told Collins that he wanted the stock, that Collins could consider it a closed deal, and that defendant would mail a check to Collins; Collins said, "You're the owner of the stock as of now"; on that same day, defendant mailed his check to Collins, which check was payable to Stadia; at that time he did not have $9,850 in the bank on which the check was drawn, but he had made arrangements to borrow the money from a friend; the following morning, in a telephone conversation, Collins confirmed receipt of the check and said that the stock was defendant's stock and that he (Collins) would transfer the certificate to defendant as soon as possible; on July 16, when defendant was in Reno, he gave another check for $9,850 to Collins, and Collins returned the other check (for $9,850) to defendant; the check he gave to Collins on July 16 (second check) was inadvertently dated July 14 (the check was payable to Collins); subsequently he received Stadia stock certificate Number 21

for 10,000 shares which had been issued in the name of C. A. Upson; and he also received an assignment of 9,850 shares represented by the certificate, which assignment was signed by C. A. Upson and dated July 20, 1955; a stock certificate for 9,850 shares was not issued in his name; before July 29, 1955 (the date of defendant's first purchase from the Smith company), he had sold about 7,850 shares of the stock represented by the Upson certificate.

Copies of certificate Number 21, and said assignment of 9,850 shares, and the second check for $9,850, which are referred to in defendant's testimony, were received in evidence. The spaces provided in the assignment for the name of the assignee are blank. The date on the second check, July 14, 1955, was a date which was 2 days before the date defendant allegedly gave that check to Collins. The first endorsement stamp of a bank on that check (a bank in Reno) was dated July 21, 1955, which was 5 days after defendant allegedly gave the check to Collins.

There was evidence, on behalf of defendant, that about July 20, 1955, defendant delivered certificate 21 to Stadia, and requested that the shares represented thereby be transferred to certain persons; that pursuant thereto Stadia issued 13 certificates, in the names of various persons, for a total of 9,850 shares; that about July 23 Stadia delivered those certificates to defendant. Included in those certificates there were certificates as follows: one issued in the name of George Neikrug for 250 shares; one issued in the name of John Pangman for 1,000 shares; and one issued in the name of Stanley Marlowe for 2,100 shares.

[1, 2] A contention of appellant, as above stated, is that he was the owner of the stock which he sold, and as such owner he was exempt from any statutory requirement that a seller of securities should have a license to sell them. He argues that, under the provisions of section 25152 of the Corporations Code, the Corporate Securities Law does not apply to a sale of stock by a bona fide owner of the stock. Said section 25152 provides, in part: "Except as expressly provided in this division," the Corporate Securities Law does not apply to the sale of securities by a bona fide owner of the securities. Section 25700 which is in the same code division provides: "No person or company shall act as an agent or broker until it has * * * secured from the commissioner a certificate * * authorizing it so to do." Section 25006 which is in the same code division provides: "'Broker' includes every person * * * other than an agent, who * * * engages either wholly or in part *in the business of selling,* offering for sale, negotiating for the sale of * * * any security issued by others * * * *or of purchasing such securities with the purpose of reselling them,* or of offering them for sale *to the public.*" (Italics added.) It thus appears that other code provisions, in the same code division where said section 25152 appears, contain an exception to the provision (in section 25152) that the Corporate Securities Law does not apply to a sale by a bona fide owner. Those other provisions were to the effect that no person shall act as a broker until he has secured a license; and a broker is a person who engages *in the business* of selling, or of negotiating for the sale of, securities to the public. It is apparent, therefore, that a statutory exception to said provision in section 25152 is that the Corporate Securities Law does apply to sales of securities by an owner of securities who is engaged *in the business* of selling, or of negotiating for the sale of, the securities to the public. The charges herein against the defendant were in substance, as above shown, that he unlawfully engaged in the business of buying and selling and of negotiating for the sale of securities, as defined in said section 25006 of the Corporations Code, without having secured a license so to do. The issue herein, therefore, was whether or not defendant was unlawfully engaged in the business of buying and selling, or of negotiating for the sale of, securities without having a license so to do. Mere proof that a seller

of securities was the owner of the securities at the time of the sale does not necessarily exempt the seller from said statutory requirement that a person who engages in the business of selling, or of negotiating for the sale of, securities to the public should be licensed so to do.

[3] The jury could have reasonably found from the evidence that at the time defendant agreed to sell Stadia stock to the various persons, mentioned in the counts on which he was convicted, he was not the owner of the stock he subsequently delivered to them; that after he had agreed to sell stock to those persons, he purchased stock from Collins and the Smith company in order that he might make delivery of the stock he had agreed to sell; and that he was engaged in the business of buying and selling, and of negotiating for the sale of, the stock. It was established that he did not have a license. With respect to the sales to Neikrug, Pangman, and Marlowe (counts 1, 3, and 5) on July 11, 15, and 14, respectively, the jury was not required to believe defendant's explanation to the effect: that about July 8 he told Collins that he would then buy from Collins 9,850 shares of stock; that on that day he mailed a check for $9,850 to Collins; and that Collins then said that defendant was then, at the time of the alleged conversation, owner of those shares. It was conceded by defendant that he did not have sufficient money in the bank to pay the check for $9,850 which he allegedly mailed to Collins on July 8. That check, which he asserted was returned by Collins on July 16, was not produced in evidence. The jury could have found that his first agreement to buy the 9,850 shares from Collins was on July 16, when he gave Collins a check for $9,850, and predated it July 14; and could have found that the purchase from Collins was completed on July 20, when defendant received the assignment of 9,850 shares from Upson. In other words, the jury could have found that it was on July 20, several days after the defendant agreed to sell stock to Neikrug, Pangman, and Marlowe (on July 11, 15, and 14, respectively) that defendant became owner of the stock which Stadia, at his request, delivered to him on July 23.

With respect to the sales to Bell and Pratt (counts 7 and 8) on July 25, and to the sale to Holmes (count 10) on July 23, there was evidence that on July 29 defendant purchased 17,800 shares of Stadia from the Smith company, at $1 a share, and on that day he gave his predated check (dated July 18) in payment therefor. It was from those shares that Stadia, on July 29, at the request of defendant, issued certificates of stock to Bell, Pratt, and Holmes for the shares they had purchased from defendant on July 25 and 23. It appears that on July 29, several days after defendant agreed to sell stock to those purchasers (on July 25 and 23), he purchased stock in order that he might make delivery of the stock he had agreed to sell. The jury could have found he was not the owner of the stock when he agreed to sell it to those purchasers; and could have found that he predated his check (July 18) in order to make it appear that he purchased the stock before he agreed to sell it. Even if it be assumed that defendant owned the stock for a brief period preceding the delivery of it to the various purchasers, the jury could reasonably have found that he was engaged in the business of buying and selling, and of negotiating for the sale of, the stock.

[4] As above stated, a further contention of appellant is to the effect that he, as owner of the securities involved herein, was exempt, under the due process and equal protection of the law provisions of the federal and state Constitutions, from a statutory requirement that a seller of securities should have a license in order to sell them. In People v. Woolsey, 13 Cal. App.2d 54, 56 P.2d 557, the defendant contended that the Corporate Securities Act was unconstitutional insofar as it purported to regulate the sale of securities by him, as owner of the securities. It was held therein that his contention was not sustainable. In that case it was said, 13 Cal.App.2d at page 57, 56 P.2d at page 559: "We see no reason to exempt one such as appellant, engaged in the buying and selling of securities as a

'business,' from the necessity of securing a broker's license and submitting to the reasonable regulations of the act. The public welfare is directly involved, the provision complained of is not discriminatory or unreasonable, and the fact that appellant is the owner of the securities bought and sold for the brief interval that they are in his possession presents no cogent reason why the act is inapplicable in his case. To hold otherwise would be to defeat the enforcement of the act and to prevent the safeguarding of the public designed by this legislation." The statutory requirement, involved herein, to the effect that a person who engages in the business of buying and selling, or of negotiating for the sale of, securities should have a license so to do, is not unconstitutional as applied to appellant in the matter of his said transactions involving Stadia stock.

[5] Appellant also contends (1) that the Corporate Securities Law violates the constitutional right of due process of law in that it is vague and uncertain; and (2) that it violates the constitutional right of free speech in that it confers arbitrary powers on the Commissioner of Corporations. This contention is not sustainable. Similar contentions were made in People v. Sears, 138 Cal.App.2d 773, 292 P.2d 663. In that case it was said, 138 Cal.App.2d at page 793, 292 P.2d at page 675: "Appellant's claim that the statute is vague and indefinite and for that reason does not state a public offense is untenable. The language of the Corporate Securities Law provides an adequate warning as to what conduct comes within its prohibition." It was said further in that case, 138 Cal.App.2d at pages 791–792, 292 P.2d at page 674: "In answer to appellant's challenge that the act restrains the right of free speech in violation of the First Amendment to the Constitution of the United States, which is protected by the Fourteenth Amendment against state action, in that it confers plenary and arbitrary powers upon the Commissioner of Corporations, and forbids a person to deal with his property as he chooses, we might quote the following observation of the Supreme Court of the United States relative to the purposes of legislation of this character and of the evils it is designed to correct: * * *". (The quotation there referred to is in Hall v. Geiger-Jones Co., 242 U.S. 539, 550, 37 S.Ct. 217, 61 L.Ed. 480.)

[6, 7] Appellant contends that the information was insufficient in that it did not apprise him of the charges against him in such a manner as to enable him to prepare his defense and to protect him against another prosecution for the same offense. An information is sufficient if it charges the offense "in any words sufficient to give the accused notice of the offense of which he is accused." Pen.Code, § 952. "Notice of the particular circumstances of the offense is given not by detailed pleading but by the transcript of the evidence before the committing magistrate (or the grand jury); defendant is entitled to such transcript under section 870 (or section 925) of the Penal Code." People v. Roberts, 40 Cal.2d 483, 486, 254 P.2d 501, 503. In substance, each count of the information on which defendant was convicted charged him with selling stock, issued by Stadia, without having obtained a broker's license. This contention is not sustainable.

[8] Appellant contends that the court erred in not receiving in evidence certified copies of the pleadings and judgment in a civil action commenced in Utah by five of the complaining witnesses, and others, against Stadia, appellant, John T. Collins, and others, to rescind the purchases of Stadia stock and to recover the amounts paid for the stock. When defendant offered the pleadings in evidence, the prosecution objected to the offer on the ground that the copies were immaterial and that the parties and issues were not the same. The objection was sustained. Appellant argues that the pleadings were admissible to show: interest, bias and motive on the part of some of the prosecution witnesses herein; that allegations of that complaint were inconsistent with the testimony of prosecution witnesses in the present case;

and that the issues of ownership of the stock and misrepresentation in the sales of the stock had been adjudicated in that action. During cross-examination of some of the complaining witnesses, defendant's counsel elicited information that the complaining witnesses herein had commenced the Utah action, and elicited information as to the nature of that action. Appellant has not specified the allegations, of that complaint, which he claims are inconsistent with the testimony of prosecution witnesses. The parties to the Utah action, i. e., the prosecution witnesses herein and others, as plaintiffs therein, and appellant and others, as defendants therein, were not the same as the parties to the present case, i. e., the People of the State of California and the appellant. The court did not err in sustaining the objection.

[9] Appellant contends that the court erred in refusing to instruct the jury, as requested by him to the effect that testimony by deposition is entitled to the same consideration as testimony by a witness in court. The only witness whose testimony was given by deposition was Austin B. Smith, a witness for the prosecution, who testified regarding the sales of Stadia shares by the Smith company. Appellant argues that the failure to give the requested instruction minimized the value of Smith's testimony that appellant bought and paid for the stock which appellant sold to the complaining witnesses. The prosecution did not contend that appellant did not pay for the stock he bought from the Smith company. The prosecution introduced in evidence: (1) copies of the documents in which the Smith company confirmed the sales of the stock to appellant; and (2) copies of appellant's checks to the Smith company. The court did not err in refusing to give said instruction.

Appellant asserts that the court erred in refusing to give 11 other instructions which were requested by him. In his opening brief he does not set forth those instructions or cite the pages where such instructions are in the record. In that brief he states that each of the instructions touched on the issues raised by the People, and that the instructions "had to do" with "the following facts and law" developed by the prosecution evidence. The "facts and law," so referred to, were briefly set forth by a general reference to the subject matter of the proposed instructions. Those references were as follows: Legality of a "short sale." Presumptions—that private transactions have been fair; the law has been obeyed; ordinary course of business is followed; and a person is owner by exercising acts of ownership. A valid contract may be made by telephone. An owner of stock may make sales without a permit or without having actual possession of a certificate of ownership. Specific intent, when an element of an offense, must be proved. One's right to dispose of his property is guaranteed by the state Constitution.

[10, 11] Appellant's argument with reference to such refused instructions is that by reason of the court's refusal to give those instructions he was denied due process of law. In view of such general references and general argument as to those instructions, it is not necessary to discuss the instructions in detail. As to the presumptions referred to, it appears that the given instruction on the subject of reasonable doubt was adequate. Furthermore, appellant testified with reference to his actions and statements in connection with the transactions. Specific intent is not a necessary element of the offense, charged herein, of violating the Corporate Securities Act. See People v. Murphy, 17 Cal. App.2d 575, 62 P.2d 592. As to the other refused instructions, so referred to, it is sufficient to say that they are covered by instructions which were given. The court did not err in refusing to give said instructions.

[12] Appellant contends that the judge erred in refusing to discuss with appellant's counsel the instructions submitted by him. The judge was not required to discuss the instructions, and he did not err in refusing to discuss them.

[13] Appellant contends further that the court erred in instructing the jury, as requested by the prosecution, that the jury should view with caution any evidence that purports to relate an oral admission of the defendant. Appellant argues that there was no evidence of an oral admission by him. Officer Gibbons, an investigator for the district attorney, testified that appellant said that he was selling the stock for $2 a share and buying it in Salt Lake City for $1 a share; the checks to the Smith company were in payment for Stadia stock; the confirmation slips from the Smith company were receipts showing that the sales had been made; he wrote the names of persons, and the numbers of shares to be issued, on the lists which he gave to the secretary of Stadia. The court did not err in giving the instruction.

[14] Appellant also contends that it was error to give the following instruction: "The Corporate Securities Law of this state provides that no person shall act as an agent or broker in the sale of, offering for sale, or negotiating for the sale of, or in taking subscriptions for, any security until such person shall have secured from the Commissioner of Corporations of the State of California a certificate authorizing him so to do, and unless that certificate then is in force. A violation of that law is a criminal offense." Appellant argues that this instruction might cause the jury to believe that if a person sells his own stock, without having obtained a permit, he has committed an offense; and it told the jury that the defendant was acting as a broker or agent in selling the Stadia stock. The instruction included some of the provisions of sections 25700, 25006, and 26104, subdivision (a), of the Corporations Code. As stated in other given instructions, no instruction was to be considered as a single instruction, but all instructions were to be considered together, and each instruction was to be considered in the light of all the other instructions. A given instruction defined the word "Broker," and such definition included a statement to the effect "Broker" included a person who engages *in the business* of selling or of negotiating for the sale of securities. The court did not err in giving said above quoted instruction.

[15, 16] Appellant also contends that it was error to give the following instruction: "Every officer, agent, or employee of any company, and every other person who knowingly authorizes, directs, or aids in the issue or sale of, or who issues or executes or sells or causes or assists in causing to be issued, executed, or sold, any security the issuance, execution, or sale of which has not been authorized by a permit from the Commissioner of Corporations of the State of California then, in effect, is guilty of a public offense. The law which defines this offense is known as the Corporate Securities Law." Appellant argues that this instruction told the jury that he directed or aided in the issue or sale of a security, or that he sold a security, without first obtaining a permit; that the instruction deprived the jury of its right to determine questions of fact; that the instruction was incomplete in that it did not include a provision that if the jury found from the evidence that defendant sold his own stock to the complaining witnesses, he was exempt from prosecution; that the instruction was incomplete in that it did not incorporate the language of section 25152 of the Corporations Code; and that the instruction was prejudicial for the reason that it pertains to section 26104 of the Corporations Code, whereas appellant was charged with violation of section 26104, subdivision (a), of that code. That instruction included provisions of section 26104 of the Corporations Code, including provisions of subdivision (a) of that section. It is to be noted that the word "permit" (rather than the word "license") was used in the instruction. An instruction, given at the request of appellant, stated circumstances under which the Corporate Securities Law was not applicable to an owner. That instruction included the words of said section 25152, except the beginning words of that section which are: "Except as expressly provided in this division."

Said instruction was as follows: "The Corporate Security Law does not apply to the sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of the securities, disposes of his own property for his own account, and the sale is not made directly or indirectly for the benefit of the issuer or an underwriter of the security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of the Corporate Securities Law." As hereinabove indicated, the jury was also instructed to the effect a person who engages in the business of selling securities is required to have a broker's license. Also as above stated, there was an instruction to the effect that all the instructions were to be considered together. The defendant was charged with engaging in the business of selling securities without having a license so to do. The use of the word "permit" in the instruction, instead of the word "license," was not prejudicial. The court did not err prejudicially in giving said above quoted instruction.

[17] Appellant contends that the deputy district attorney was guilty of prejudicial misconduct in asking appellant, on cross-examination, the following questions: (1) "And the reason you did that, sir, [repurchased the stock appellant sold to Dr. Wheelis] is because you knew that you had swindled Dr. Wheelis, isn't that right?" (2) "You knew you had cheated Dr. Wheelis, is that right?" (3) "As a matter of accommodation you cheated Mr. Neikrug out of $2,400; is that right?" (4) "It [accepting $2,400 from Mr. Neikrug] was like taking candy from a baby, wasn't it?" Apparently, appellant's objection to those questions related principally to the words "swindled" and "cheated." Appellant was charged with the theft of $1,200 from Dr. Wheelis; and with theft of $2,400 from Mr. Neikrug. Those charges were based on alleged fraudulent representations. Preceding the question in which the word "accommodation" was used, appellant had said that he accommodated various persons by selling stock to them. The asking of those questions did not constitute misconduct.

[18] Appellant also contends that the deputy district attorney was guilty of misconduct by reason of statements made in his argument to the jury. Some of those statements are as follows:

"Are you going to believe Mr. Morrison who would lie to you to save himself in any respect or would you believe Mr. Gibbons. Now, when you look at that evidence in its proper perspective, you will see, ladies and gentlemen, that this was completely a figment of the defendant's imagination, this conversation. You see all throughout the trial, Counsel had been asking all of these witnesses as to the result of that trial up in Salt Lake City; and throughout the trial the Judge has been excluding that evidence as being immaterial. So now he has his last witness on the stand. This is his last chance to get it in before you as to what that verdict was up there. So he has Mr. Morrison make a portion of the conversation that never happened, because that's the only way you people—

"Mr. Caplow: If the Court please, I object to that slur against Defendant's counsel, your Honor.

"The Court: It's argument, Mr. Caplow. Counsel is entitled to discuss the credibility of the witnesses. The objection is overruled.

"Mr. Stovitz: I am sorry if I intimated that it was Counsel that did it; because you see sometimes when you do have an advocate working with a particular side, that advocate does join forces and becomes an ally of the defendant or the plaintiff as the case may be. For instance in this case Mr. Morrison made believe that he is being persecuted, and he made believe that all of these actions that these people have taken, trying to recover their just money, as persecution. And so

his attorney, his advocate, comes out and tells you those things that are written in the defendant's mind."

The statements of the deputy were made in commenting on the credibility of appellant and Mr. Gibbons (investigator for the district attorney) with respect to a telephone conversation between them. Appellant had testified that he told Mr. Gibbons that in an action brought in Utah, by the complaining witnesses in the present case, it had been adjudged that he was the owner of the stock, he had not violated the Corporate Securities Act, and he was "free" from fraud. Mr. Gibbons had testified that they did not discuss the outcome of the Utah action, and appellant did not say that he had recovered judgment in that action. Prior to that testimony, appellant had on numerous occasions offered in evidence the pleadings and judgment in the Utah action, and objections thereto had been sustained. The deputy in referring to appellant's counsel, in connection with appellant's testimony about the Utah case, was referring to questions, which apparently afforded appellant an opportunity to tell about the Utah case. The statements of the deputy did not constitute misconduct.

Appellant asserts further that the deputy district attorney was guilty of misconduct by reason of a statement made by him during cross-examination of appellant. That statement is the last two sentences of the following quotation:

"Q. [By deputy district attorney] Where is the record to show that that stock was in your name, Mr. Morrison?

"Mr. Caplow [attorney for defendant]: That's objected to. Counsel knows where the records are. They're up in Salt Lake City.

"Mr. Stovitz [deputy]: I know that not to be a fact, Mr. Caplow. I know that there are no records to show that 17,800 shares of stock was in this witness' name."

It thus appears that the exchange of comments between the attorneys, regarding the location of the records, was initiated by counsel for appellant. He charged that the deputy knew where the records were, and then he declared that they were in Salt Lake City. Thereupon, the deputy denied the charge, and then asserted his view regarding the records. Under such circumstances, the statements of the deputy did not constitute misconduct.

Other contentions of appellant that the deputy was guilty of misconduct do not merit discussion. The deputy was not guilty of misconduct.

Appellant contends that the trial judge was guilty of misconduct in that (1) he overruled several objections of appellant to evidence offered by the prosecution; (2) he erred in instructing the jury; and (3) he made statements in the presence of the jury which prevented appellant from having a fair trial. He has not referred specifically to any such alleged statement of the judge. This contention is wholly without merit.

The judgment and the order denying the motion for a new trial are affirmed.

VALLÉE, J., concurs.

SHINN, P. J., concurs in the judgment.



168 Cal.App.2d 391

Maximilian ROVEN, Plaintiff and Appellant,

v.

Willis L. MILLER and Dorothy M. Miller, Defendants and Respondents.

Civ. 5936.

District Court of Appeal, Fourth District, California.

March 5, 1959.

Rehearing Denied March 30, 1959.

Hearing Denied April 29, 1959.

Action for specific performance of contract for sale of realty. The Superior Court of Orange County, Ronald W. Crookshank, J., rendered judgment denying specific performance, and the plaintiff

appealed therefrom and also sought to appeal from an order denying motion for new trial. The District Court of Appeal, Mussell, J., held that where subordination clause in purchase option contract did not state amount of construction loan which would be placed on the property or any of its terms or when the construction loan would become due or rate of interest that it would bear or the terms or conditions of first deed of trust to secure the construction loan, specific performance of the contract would be denied, since such provisions were material and essential to contract providing for deed of trust as security for an obligation.

Judgment affirmed and appeal from order dismissed.

1. Appeal and Error ⇐110

An order denying motion for new trial in civil case is not an "appealable order", and purported appeal from such an order will be dismissed and only the appeal from the judgment will be considered.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

2. Specific Performance ⇐31

Where subordination clause in purchase option contract did not state amount of construction loan which would be placed on the property or any of its terms or when the construction loan would become due or rate of interest that it would bear or the terms or conditions of first deed of trust to secure the construction loan, specific performance of the contract would be denied, since such provisions were material and essential to contract providing for deed of trust as security for an obligation.

3. Vendor and Purchaser ⇐18(1)

Where purchase option agreement required an agreement in the future as to what improvements would be required in the development of the property retained by the vendors and as to their cost and its apportionment, the purchase option agreement would not be enforceable until the parties had entered into such future agreement.

4. Vendor and Purchaser ⇐18(1)

An option agreement which leaves an essential term to future agreement is not enforceable.

5. Vendor and Purchaser ⇐18(3)

Where purchase option agreement by its terms had expired when purchaser gave vendors notice that purchaser would waive the subordination provisions of the agreement, the notice was ineffectual.

6. Appeal and Error ⇐991, 1010(1)

In action for specific performance of alleged oral contract for sale of realty, the question of whether vendors were estopped to deny the oral agreement was question of fact for court trying case without jury, and where the evidence was sufficient to support an inference by the trial court and no estoppel existed, the trial court's findings to that effect would not be disturbed on appeal.

John W. Preston, John W. Preston, Jr., Los Angeles, Adelman & Schwartz, Beverly Hills, for appellant.

Powell & Banyard, Santa Ana, for respondents.

MUSSELL, Justice.

[1] This is an action for specific performance of a contract for the sale by defendants to plaintiff of approximately 99.66 acres of land in Orange county. In the first count of the complaint plaintiff sought specific performance of an alleged written contract and in the third count sought specific performance of an alleged oral contract, claiming that the defendants were estopped to deny said oral agreement. Counts two and four of the complaint, in which plaintiff sought damages for breach of contract, were dismissed and the issue of plaintiff's right to specific performance was tried by the court without a jury. Judgment was rendered denying specific performance of the contract and plaintiff appeals from the judgment and also seeks

to appeal from an order denying motion for a new trial. Since an order denying motion for a new trial in a civil case is not appealable, plaintiff's purported appeal from that order must be dismissed and only the appeal from the judgment need be considered. Pipoly v. Benson, 20 Cal.2d 366, 368, 125 P.2d 482, 147 A.L.R. 515.

On August 14, 1954, plaintiff and defendants entered into a contract in writing, entitled "Purchase Option Contract", which is quoted in footnote 1.

1. "Willis L. Miller and Dorothy M. Miller, as Sellers, do hereby agree to sell:

"Approximately 99.66 acres out of a 124.09 acre (more or less) parcel of real property, generally located as immediately adjoining the Joe Soares property on the east and north lines between Garden Grove Boulevard and Westminster Boulevard, excepting therefrom all oil and mineral rights below 500 feet of the surface of the subject real property (exact legal description to be supplied later), with the subject real property to be used for the construction and maintenance of dwellings only. A rough sketch of the property to be retained by Sellers for commercial development is attached hereto marked "Sketch A" and made a part hereof. The property to be retained by Sellers fronts on Garden Grove Boulevard and hereafter to be referred to as Parcels No. 1, No. 2 and No. 3, the legal description of each parcel being as follows: (Legal description.)

"This Purchase Option Contract made to Maxmilian Roven only, hereinafter called Buyer, upon the following terms and conditions:

"That Buyer shall have sixty (60) days from the date he signs this Agreement to determine whether or not the subject real property will be suitable for subdivision. That the following contingencies, and no others, shall be determined by Buyer during said sixty (60) day period.

"a. Approval of preliminary title report within ten (10) days after receipt thereof and approval of conditions of right of way as of record and as of use.

"b. Reasonable availability of sewage disposal facilities.

"c. A drainage system for the subject real property acceptable to the Board of Supervisors of Orange County.

"d. Satisfactory zoning for housing.

"e. F. H. A. or V. A. approval.

"f. Suitability of real property for subdivision purposes from an engineering standpoint as determined by engineering study and report.

"That in determining the scheme of proposed development the Buyer shall give the Sellers first preference in the right to supply domestic water for the proposed subdivision development. That if Sellers are unable or unwilling to supply said water in the manner desired and acceptable by Buyer, Buyer may secure water from some other source on the same terms and conditions that said preferential right was offered to Sellers.

"That Buyer shall use diligence in resolving the above contingenies and will report in writing as to his progress in the determination thereof upon written request of Sellers.

"This Contract shall be held by Jas. H. Kindel, Jr., 705 North Main Street, Santa Ana, California, and all writings and information concerning this contract shall be directed to him at the above address.

"That Buyer as evidence of good faith shall deposit with Jas. H. Kindel, Jr., upon the signing of this agreement, the sum of $10,000.00.

"That if upon the expiration of the sixty (60) day period Buyer has been unable to resolve any of the contingencies hereinabove specified, through no fault of his own and solely by reason of County, State or Federal governmental agencies, Sellers agree to allow Buyer a reasonable additional period of time; however, time is of the essence in respect to said contingencies.

"That at the end of said sixty (60) day period or a reasonable extension thereof, as hereinabove provided, Buyer must advise Sellers in writing whether or not he will, or will not, purchase the subject real property. No notice received from Buyer will be deemed a rejection by Buyer of Sellers' offer, and this agreement will be terminated as though Buyer declined in writing to purchase said real property. In the event Buyer shall refuse to complete the purchase, Jas. H. Kindel, Jr. upon receipt of all engineering data and other studies that Buyer has caused to be made in relationship to the subject real property, shall rereturn the sum of $10,000.00 to Buyer after deducting any expenses incurred by reason of and pursuant to this agreement, which shall be limited to the following: Costs of preliminary title report, long distance phone calls, and mailing charges.

"That if Buyer elects to proceed with the purchase of said real property, Sellers shall have ten (10) months from the re-

During the sixty day period in which plaintiff was to "determine the contingencies" defendants requested in writing that he report on his progress. Roven reported that the preliminary title report was acceptable; that some preliminary field work had been done; that a preliminary "V. A." approval had been received; and that he had requested the Boyle Engineering Company to furnish defendants certain progress reports. From the time the agreement was signed by defendants and until November 4, 1954, they had not been supplied with information regarding their supplying domestic water to plaintiff's proposed subdivision and at no time were they offered first preference in the right to supply water. At Roven's request the sixty day option period was extended to November 5, 1954. On November 4, 1954, Roven informed defendants in writing that he had determined that the subject property was

ceipt of notice to purchase to determine whether or not they will accept said real property which may be offered Sellers in lieu of a part of or all of the cash or other property to be paid for the purchase price of the subject real property.

"That at any time after Buyer gives Sellers notice of his intention to purchase, Sellers may, and must within a period of 307 days from the date of delivery of said notice, enter into a sixty (60) day escrow agreement to sell the subject real property to Buyer, upon the following terms and conditions:

"1. The escrow and all related matters of sale, including pay-off of the Deed of Trust, shall be at the First National Bank of Garden Grove.

"2. That Sellers will provide a standard Joint Protection Title and Insurance Policy from the Orange County Title Company, Santa Ana, California.

"3. That the purchase price of the real property is to be calculated on the value of $3,500.00 per acre, acreage subject to survey.

"4. All taxes and special assessments to be pro-rated to close of escrow.

"5. Buyer to stand all expenses of flood control and drainage program.

"6. Buyer's downpayment, including the $10,000.00 theretofore deposited with Jas. H. Kindel, Jr., to be a total of $180,000.00 or equivalent property, valuation of which is mutually agreed upon in writing by the parties hereto to be not less than $180,000.00. The balance due on the purchase price shall bear interest at the rate of 6% per annum and said balance shall be secured by a First Deed of Trust which will contain the following provision:

" 'This Deed of Trust will be subordinate to a First Deed of Trust to secure a construction loan which will be placed upon the property by the Trustor, or his successors and assigns, given to a recognized Savings and Loan Association or bank for the purpose of securing a loan to be used for the construction of residences and improvements on said property. Beneficiary will issue a partial reconveyance for any specific lot number covered by this Deed of Trust upon the payment to the beneficiary of a sum equal in proportion to the number of lots secured by the Deed of Trust to the original amount of the note secured hereby plus 20% for each lot reconveyed. When the balance of the note secured by this Deed of Trust has been paid in full, beneficiary will issue a full reconveyance for the property still covered by the lien of this Deed of Trust.'

"7. The balance of the purchase price due secured by said Deed of Trust shall be payable within eighteen (18) months from the date of start of escrow.

"8. That out of the last $11,000.00 to be paid by Buyer to Sellers pursuant to the promissory note secured by the deed of trust securing the balance due, Sellers agree to pay $11,000.00 to Don Christenson and Harry Barancik, 212 Beverly Drive, Beverly Hills, California.

"Sellers' Remaining Property

"That with respect to the remaining 24.46 acres (more or less) retained by Sellers, the Sellers agree to do the following things in connection with and as a part of Buyer's proposed subdivision development:

"a. Sellers will pay their proportionate share of all improvements required in the overall scheme of development which is constructed on the property to be retained by Sellers.

"b. That in case Sellers do not use all of Parcel No. 2 for commercial development, Buyers are to have first refusal of same.

"This Agreement made and to be performed in the City of Santa Ana, California.

"This offer good until noon, August 16, 1954.

"Witness our signatures this 14 day of August, 1954.

"(Signatures)"

suitable for subdivision and gave defendants notice that he would purchase the property in accordance with the purchase option agreement.

On December 16, 1954, defendants filed an application with the Orange County Planning Commission to have their Garden Grove Boulevard frontage rezoned for commercial use and the area applied for was the same as shown on the sketch attached to the agreement involved.

On December 10, 1954, the Boyle Engineering Company reserved tract numbers, including the Millers' property, at the county surveyor's office and in the latter part of 1954 plaintiff instructed engineer Fickes to contact various water companies to furnish water to the entire development. In January, 1955, the planning commission advised the defendants that the tentative map filed by Boyle Engineering Company was for the entire area and that the area excluded for commercial use was not the same as defendants had described in their application for commercial zoning and, that in order to forestall any action on the Boyle map, they should hire an engineer to prepare another map for filing on their behalf. This conflict with respect to maps resulted in numerous meetings and discussions between the parties.

Mr. Fickes testified that one of his problems from the beginning of the project was to determine what property was being reserved for commercial area and at no time did Fickes or Roven have any discussion regarding the site for the church which was referred to in the purchase agreement.

On April 13, 1955, plaintiff filed a tentative map with the planning commission and this map contained no church site, no overall scheme of development, reduced the commercial area of the Miller property and was filed without the consent of the defendants.

At various meetings and in correspondence with Roven the Millers and their attorney advised Roven that he was in default and that the option agreement had terminated. On September 7, 1955, defendants, with their attorney and plaintiff's attorney, met at an escrow office and attempted to come to some agreement and to open an escrow "if all the conflicts had been resolved". The parties were unable to agree on the terms of the sale and Miller then stated that he would prefer that plaintiff be personally present. On the following day, September 8, 1955, the parties and their attorneys met at the same escrow office and a further attempt was made to agree upon the terms and conditions of the sale. No agreement was reached and thereafter plaintiff and his attorney prepared escrow instructions and submitted them to defendants, who refused to sign them. On September 19, at another meeting, Miller stated to Roven that it was apparent that they could not get together. On November 4, 1954, Roven notified defendants by letter that he had determined that the property involved was suitable for subdivision and he would purchase said property in accordance with the terms of the option agreement. On November 14, 1955, Roven advised defendants by letter that he would appear at a bank in Garden Grove on November 28, 1955 "with the full cash portion of the purchase price and a note for the balance of the purchase price to be secured by first trust deed on the property, without subordination provisions or other contingencies, ready, able and willing to deposit same in escrow and fully carry out all the terms and provisions of the purchase option agreement to be performed on my part. Demand is hereby made on you that you be present at said time and place ready to deposit in escrow your deed to said property and otherwise fully carry out and perform the terms and provisions of the purchase option contract on your part." The defendants did not appear at said bank on November 28, 1955, and on December 12, 1955, Roven filed the instant action for specific performance.

The trial court found, inter alia, that

"It is true: That defendants granted an extension of the option period set

forth in said agreement to November 5, 1954; that on November 4, 1954, plaintiff notified defendants, in writing, that he was exercising the option; that at the time of said notice plaintiff and defendants had not reached an agreement concerning defendants' supplying domestic water for the proposed subdivision development; that at the time of said notice, plaintiff had not given defendants first or any preference in the right to supply domestic water for the proposed subdivision development; that at the time of said notice, plaintiff had not resolved all the contingencies contained in the agreement and had not used diligence to resolve said contingencies; that at the time of said notice plaintiff had been requested in writing by defendants to report as to his progress in determining said contingencies and that plaintiff, at the time of said notice, had not reported his progress to defendants as requested by defendants.

"It is true: That the said agreement entered into between plaintiff and defendants on August 16, 1954 is incomplete, indefinite and uncertain.

"That said provision for subordination does not state the amount of the construction loan which will be placed on said property, nor any of its terms, nor when said construction loan will become due, nor the rate of interest that it will bear nor the terms of the first Deed of Trust nor the conditions of the first Deed of Trust; that the provisions of said subordination clause hereinabove referred to are incomplete, vague, indefinite and uncertain; that in order for the parties to complete the transaction, it was necessary for them to agree in the future upon the terms and conditions of said construction loan and of the first Deed of Trust to secure it; that no agreement was ever had between the parties concerning the terms and conditions of said subordination agreement nor the terms and conditions of said Deed of Trust which was to secure said construction loan."

In Gould v. Callan, 127 Cal.App.2d 1, 273 P.2d 93, it was held that the failure of a subordination clause to state the amount of interest and the terms and conditions of payment of an obligation to be secured by a first deed of trust made the contract uncertain and indefinite and justified the court in denying specific performance; that a contract will not be enforced unless it is complete and certain; that a contract for the sale of realty will not be specifically enforced unless it not only contains all the material terms, but also expresses each in a reasonably definite manner; that this general principle has been applied in denying specific performance of contracts which were incomplete, indefinite and uncertain with respect to the terms of payment of deferred balances or the terms of the encumbrances representing such deferred balances and that uncertainty as to the terms and conditions of deferred payments is fatal to a claim for specific performance.

In Bruggeman v. Sokol, 122 Cal.App.2d 876, 265 P.2d 575, the escrow instructions were indefinite and uncertain as to the time, place and conditions of the payment of the purchase price and the terms and conditions of the interim finance were not set forth and were to be determined at some future time. It was there held that the trial court properly refused to decree specific performance of a contract for the sale of the real property involved.

[2] In the instant case the subordination clause contained in the purchase option contract does not state the amount of the construction loan which would be placed on the property, nor any of its terms, nor when said construction loan would become due, nor the rate of interest that it would bear, nor the terms or conditions of the first deed of trust to secure said construction loan. These provisions are material and essential to a contract providing for a deed of trust as security for an obligation and their absence

justified the trial court in denying specific performance of the contract.

[3, 4] The purchase option agreement provided "That with respect to the remaining 24.46 acres (more or less) retained by the Sellers, the Sellers agree to do the following things in connection with and as a part of Buyer's proposed subdivision development: a. Sellers will pay their proportionate share of all improvements required in the overall scheme of development which is constructed on the property to be retained by Sellers"; and "b. That in case Sellers do not use all of Parcel No. 2 for commercial development, Buyers are to have first refusal of same." These provisions require an agreement in the future as to what improvements would be required in the development of the property retained by the Sellers and as to their cost and its apportionment.

In Ablett v. Clauson, 43 Cal.2d 280, 284, 272 P.2d 753, 756, the court stated that the general rule regarding contracts to agree in the future is stated to be as follows:

> "Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise."

And that the rule is well established in this state and it has been held that an option agreement which leaves an essential term to future agreement is not enforceable.

[5] Appellant argues that the trial court erred in finding and decreeing that the purchase option contract had been terminated on or before November 14, 1955, the date of plaintiff's letter to defendants waiving the subordination provisions of the contract is not supported by the evidence. However, the contract provided that "At any time after Buyer gives Sellers notice of his intention to purchase, Sellers may and must within the period of 307 days from the date of delivery of said notice enter into a 60 day escrow agreement to sell the subject property to the Buyer." The notice was dated November 4, 1955, and the option by its terms expired on September 8, 1955.

In Klein v. Markarian, 175 Cal. 37, 41, 165 P. 3, 4, the court said:

> "The appellant concedes, virtually, that the writing is, on its face, so uncertain as to preclude specific enforcement. He claims, however, that all uncertainty was removed by his act of tendering four notes, together with a mortgage to secure them. The defendant having then failed to specify any objections to the terms of the instruments tendered, he was, it is argued, precluded from objecting thereafter. Section 2076 of the Code of Civil Procedure, providing that objections not made by a person to whom a tender is made are deemed waived, is cited in support of this claim. This section is qualified by section 1501 of the Civil Code, which provides, in effect, that the failure to object does not waive a defect which could not, if specified, have been obviated by the person making the offer. Allen v. Chatfield, 172 Cal. 60, 69, 156 Pac. 47. No matter what the defendant might have said in response to the offer, the plaintiff could not, of course, have remedied the defects in the written option. The writing was so indefinite that the plaintiff could not, within its terms, lay the foundation for a decree of specific performance. To hold the defendant bound by a tender outside of the provisions of the option would be to make a new contract for him. His mere silence, when the unauthorized offer was made to him, did not constitute an assent to such new contract."

[6] Appellant contends that the trial court erred in not finding for him on his

plea of estoppel contained in the third cause of action in the complaint. However, the question of whether estoppel existed was one of fact for the trial court and where, as here, the evidence is sufficient to support an inference by the trial court that no estoppel existed, its finding to that effect will not be disturbed on appeal. Hagenbuch v. Kosky, 142 Cal.App. 2d 296, 301, 298 P.2d 875.

There is sufficient substantial evidence in the record before us to support the trial court's refusal to decree specific performance of the contract involved.

Judgment affirmed. Appeal from order dismissed.

GRIFFIN, P. J., and SHEPARD, J., concur.



168 Cal.App.2d 224

CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff,

v.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation, Defendant and Appellant,

County of Los Angeles, Defendant and Respondent.

Civ. 23493.

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1959.

Hearing Denied April 22, 1959.

Action involving contest over right to receive award in eminent domain. The Superior Court of Los Angeles County, Joseph G. Gorman, J. pro tem., rendered a judgment which was appealed. The District Court of Appeal, Ashburn, J., held that in view of statutes relating to land taken or accepted for public roads, a deed which stated that a strip of land of given width was conveyed for road purposes and which plainly inferred that grantor owned land on each side of the strip, properly construed, conveyed only an easement and not an estate in fee.

Reversed with directions.

1. Dedication ⇐53

In statute providing that by taking or accepting land for county highway, public acquires only the "right of way", the quoted phrase means easement. West's Ann.Streets & High.Code, § 905.

See publication Words and Phrases, for other judicial constructions and definitions of "Right of Way".

2. Dedication ⇐53

With respect to construction of deed of land for road purposes, general provisions of Civil Code regarding construction of grants yielded to specific statutory provisions dealing with public roads. West's Ann.Civ.Code, §§ 831, 1066, 1069, 1070, 1105, 1636, 1639, 1641; West's Ann.Streets & High.Code, § 905.

3. Dedication ⇐53

Statute providing that by taking or accepting lands for county highway public acquires only a right of way operates to create a presumptive easement in public rather than an estate in fee. West's Ann. Streets & High.Code, § 905.

4. Dedication ⇐53

In view of statutes relating to land taken or accepted for public roads, a deed which stated that a strip of land of given width was conveyed for road purposes and which plainly inferred that grantor owned land on each side of the strip, properly construed, conveyed only an easement and not an estate in fee. West's Ann.Civ.Code, §§ 831, 1105; West's Ann.Streets & High. Code, § 905.

5. Dedication ⇐53

Statute providing that by taking or accepting land for highway public acquires only right of way applies both to land which public acquires through condemnation or prescription and that which it acquires by

deed of grant. West's Ann.Streets & High.Code, § 905.

6. Dedication ⇐53

Statutes relating to conveyances of land for public roads were to be read into and became implied terms of a deed of land for such use. West's Ann.Civ.Code, §§ 831, 1066; West's Ann.Streets & High. Code, § 905.

7. Statutes ⇐220

Legislative interpretation of existing statute is entitled to respect by the courts but it does not bind the courts.

8. Dedication ⇐53

Statute passed many years after execution of deed conveying land for road purposes could not change quantity of estate conveyed by deed.

E. D. Yeomans and James W. O'Brien, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, A. R. Early, Deputy County Counsel, Los Angeles, for respondent.

ASHBURN, Justice.

This is a contest over the right to receive an award in eminent domain. The City of Los Angeles has condemned the fee of the subject parcel of land (known in this cause as Parcel 15–18) and defendants County of Los Angeles and Pacific Electric Railway Company each claim the award of $5,600.

By deed executed and recorded on September 6, 1886, Erastus H. Johnson and George W. Lang conveyed a 50-foot strip of land (the parcel now under consideration) to the Board of Supervisors of Los Angeles County "for road purposes," and it was so used until formal vacation of the highway through proceedings begun on January 9, 1905 and concluded on March 11, 1908. On January 30, 1905, Huntington Land and Improvement Company and Pacific Electric Land Company conveyed to defendant Pacific Electric Railway Company a parcel of land which included the said strip then devoted to road uses by the county.

This controversy was submitted below upon a stipulation of facts which says: "That defendant Pacific Electric Railway Company has been in exclusive possession of the property within Parcel 15–18 and has paid taxes thereon from and after said vacation proceedings in 1908, to and including the order of possession which was obtained in the above entitled action on June 13, 1956." But counsel placed no reliance upon that phase of the case and concluded the stipulation as follows: "That if Exhibit A [1] granted to the County of Los Angeles title in fee simple, it is the owner of Parcel 15–18. That if Exhibit A granted the County of Los Angeles an easement for road purposes, Pacific Electric Railway Company is the owner of Parcel 15–18." There was thus presented to the trial court, and here, the sole question of the proper construction of the 1886 deed to the county, —whether it conveyed a fee or an easement.

The pertinent portions of that deed are: "We Erastus H. Johnson and George W. Lang do hereby grant to the Board of Supervisors of Los Angeles County and their successors in office all that real property situate in the County of Los Angeles, State of California described as follows being a strip of land fifty (50) feet wide extending across the land theretofore conveyed to said Johnson by Jessee Yarnell beginning at the east line of the land so conveyed and running west and then northwest following the general line of the telephone poles as they now stand and taking the said line of poles for the north and northeast lines of the strip hereby conveyed to the west line of said lot conveyed by Yarnell said strip is near to and partly within the lines of the upper road to San Gabriel to Los Angeles and it connects at its east end with a strip recently conveyed to the grantees by J. C. Newton and wife. The premises are hereby conveyed for road purposes."

1. Exhibit A is the deed under consideration.

The trial court held that a fee thereby vested in the county and hence it is entitled to the condemnation award. The Railway Company appeals. The case is governed by § 2631 Political Code and the case of People, By and Through Department of Public Works v. Thompson, 43 Cal. 2d 13, 271 P.2d 507.

[1] Section 2631 was enacted as part of the original Political Code of 1872. It then read: "By taking or accepting land for a highway the public acquire only the right of way and the incidents necessary to enjoying and maintaining it, subject to the regulations in this and The Civil Code provided. All trees within the highway, except only such as are requisite to make or repair the road or bridges on the same land, are for the use of the owner or occupant of the land."[2] The statutory phrase "right of way" spells an easement (Parks v. Gates, 186 Cal. 151, 154, 199 P. 40; People, By and Through Department of Public Works v. Thompson, supra, 43 Cal. 2d 13, 21, 271 P.2d 507).

It is said in Wright v. Austin, 143 Cal. 236, 239, 76 P. 1023, 1024, 65 L.R.A. 949, that § 2631 "is but the formulation of the general rule laid down in the books and decided cases when treating of highways as easements, which they are." To the same effect, see, Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 705, 117 P. 906, 36 L. R.A.,N.S., 185; Wood v. Truckee Turnpike Co., 24 Cal. 474, 487–488; Harding v. Jasper, 14 Cal. 643, 650; Porter v. City of Los Angeles, 182 Cal. 515, 518, 189 P. 105; Elliott, Roads and Streets (4th Ed.), § 164, p. 188; § 255, p. 307; 25 Cal.Jur.2d, § 166, p. 21; 39 C.J.S. Highways § 136, p. 1072; 25 Am.Jur., § 132, p. 426, § 134, p. 430; 16 Am.Jur. § 56, p. 402. A county road owned in fee is the exception; an easement is the general rule. Section 831, Civil Code, was also enacted in 1872, then and now reading: "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown." In other words, the presumptive result of a conveyance for road purposes is a grant to the county of an easement, not a fee.

[2] Stress is laid by respondent and by the court below upon certain general rules for construction of grants, such as Civil Code §§ 1066 (grants to be interpreted in like manner as contracts), 1636 (so interpreted as to give effect to the mutual intention of the parties so far as ascertainable), 1639 (intention of a written contract to be ascertained from the writing alone), 1641 (so interpreted as to give effect to every part), 1069 (a grant to be interpreted in favor of the grantee), 1070 (if several parts of a grant are absolutely irreconcilable the former part to prevail), 1105 (a fee simple title is presumed to be intended to pass by a grant of real property, unless a contrary intent appears). But these sections are general in their nature and must yield to the sections (2631 Pol.Code and 831 Civ.Code) which deal with the specific subject of public roads. See, People v. Moroney, 24 Cal.2d 638, 644, 150 P.2d 888; Neuwald v. Brock, 12 Cal.2d 662, 669, 86 P.2d 1047; Division of Labor Law Enforcement v. Moroney, 28 Cal.2d 344, 346, 170 P.2d 3; In re Williamson, 43 Cal.2d 651, 654, 276 P.2d 593. "It is well settled * * * that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision re-

2. The last sentence was eliminated by amendments of 1873–1874 (Amendments to Codes, 1873–1874, p. 116). The section was codified in 1935 as § 905 of Streets and Highways Code, reading as follows: "By taking or accepting land for a county highway, the public acquires only the right of way and the incidents necessary to enjoy and maintain the same, subject to the regulations provided in this and the Civil Code." Stats.1935, Ch. 29, p. 303. It will be noted that this limited the application of the section to county highways.

lates." Rose v. State of California, 19 Cal.2d 713, 723–724, 123 P.2d 505, 512.

[3] That said § 2631 operates to create a presumptive easement is clear from its terms as well as those of § 831, Civil Code. The Code Commissioners' note to the 1872 Political Code cites Adams v. Rivers, 11 Barb., N.Y., 390 as explanatory of § 2631. That case says, at page 393: "The plaintiff proved, *prima facie*, that he owned and possessed both the lots mentioned in the complaint. These lots being bounded by public streets, extended to the centre of the street. This is undoubtedly the legal presumption."

[4] The deed at bar evidences such an intention. It shows that the grantors are conveying a strip of land 50 feet wide "extending across the land heretofore conveyed to said Johnson by Jessee Yarnell," which "strip is near to and partly within the lines of the upper road to San Gabriel to Los Angeles * * *. The premises are hereby conveyed for road purposes." This language raises the plain inference that the grantor owns the land on each side of the 50-foot strip (and thus comes within § 831 Civil Code) and that that strip is partly within the lines of an existing roadway which upon settled principles is presumptively an easement. Finally, the limitation of the conveyance "for road purposes" points directly to § 2631 and its declaration of an implied easement.

Respondent's reliance upon Las Posas Water Co. v. County of Ventura, 97 Cal. App. 296, 275 P. 817, does not advance its cause, for that case was practically overruled by People, By and Through Department of Public Works v. Thompson, supra, 43 Cal.2d 13, 20–21, 271 P.2d 507. In the Las Posas instance it was held that the deed to a county for road purposes conveyed a fee, but there are certain features which differentiate it from the case at bar. The granting clause carried a strip of land 60 feet wide and stated that the "total length of the road described" was in excess of 19 miles. Then followed this: "'Together with all and singular the tenements, hereditaments, and appurtenances, thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances.'" The habendum clause: "'To have and to hold * * * forever as a public highway.'" The deed at bar makes no mention of reversions or all estates at law or in equity; nor does it have a habendum clause.

The court held in Las Posas, 97 Cal.App., at pages 299–300, 275 P. at page 818: "Appellant contends that some effect must be given to the words 'as a public highway.' These words indicate the use to which the land should be put, and they are not at all inconsistent with a conveyance of the title in fee. The land could be used 'as a public highway' equally as well, whether a fee or a mere easement was conveyed. As we view it, the words in the *habendum* clause are not a restriction or limitation upon the clause which quitclaims the fee title. The granting clause could hardly have been clearer in expressing an intent to remise, release, and quitclaim the whole fee title, rather than a mere easement. In fact, an inspection of the clause as quoted above will disclose that words are used which are inconsistent with an intention to convey a mere right of way over the land described." Concerning § 2631, Political Code, the opinion says: "It has been said that this section is only the formulation of the general rule laid down in the books and decided cases, when treating of highways as easements. Wright v. Austin, 143 Cal. 236, 76 P. 1023, 65 L.R.A. 949, 101 Am.St.Rep. 97. It is not new law, but simply means that, by taking or accepting an easement over land for a highway, the public (the people of the state) acquire only the right of way, etc. It should be borne in mind that this section has no reference to the fee title to the land which is servient to the easement. The fee title may belong to the owner of the adjacent property, or it may belong to one

who owns only the property which is subject to the easement itself. It may be owned by a private individual or corporation, or by the county, or by the state." 97 Cal. App. at page 300, 275 P. at page 818. There was no petition for hearing in the Supreme Court.

In People, By and Through Department of Public Works v. Thompson, supra, 43 Cal.2d 13, at page 20, 271 P.2d 507, at page 511, that tribunal discussed Las Posas, saying: "That case, however, as appears from the numerous authorities hereinabove cited, is out of line with both earlier and later decisions of this court." The Supreme Court quoted the language concerning § 2631 which is hereinabove set forth and said, 43 Cal.2d at page 21, 271 P.2d at page 511: "To apply the quoted language of the Las Posas case to the present situation would require us to refuse to give effect to the plain provision of former section 2631 of the Political Code that 'By taking or accepting land for a highway, the public acquire *only the right of way*, and the incidents necessary to enjoying and maintaining the same * * *.' [Italics by the court.] Obviously, if that section is applicable at all it is applicable here; it was, indeed, an idle enactment if it meant merely that the public acquired only a right of way for a highway when the deed expressly conveyed only a right of way for a highway. * * * In the present case we hold that the court * * * correctly determined that the deed in question conveyed only an easement, and that any contrary implications in the Las Posas case * * * must be disapproved."

In the Thompson case, supra, the question was one of the right to severance damage in a condemnation, which turned in part upon a determination of whether the highway that crossed the premises was owned by the State in fee or only as an easement. In arriving at the conclusion that the estate conveyed by the deed under consideration was an easement, the court said, 43 Cal.2d at page 19, 271 P.2d at page 510: "The document of conveyance is entitled 'Grant Deed.' It provides that the grantors, in consideration of $10, 'hereby *grant* to The State of California *the real property* * * * described as follows: * * * It is hereby agreed that as a further consideration for the *granting of said right of way*, the State * * * [will abandon] the *old highway right of way* which is * * * not included within the 80′ strip of land described herein'; grantors 'hereby waive all claim for damage or compensation for and on account of the establishment of *said State highway*.' [Italics by the court.]

"At the time of the execution of the 1924 deed section 2631 of the Political Code provided, 'By taking or accepting land for a highway, the public acquire only the right of way, and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this and the Civil Code provided.'

"It is clear that, as ruled by the trial court, the deed, read as a whole and in the light of former section 2631 and the decisions construing and applying that section, was intended to and did convey only an easement. Numerous cases have recognized that while that section was in effect the public by acquiring land for a highway acquired only the rights described in such section. See Wright v. Austin (1904), 143 Cal. 236, 238–240, 76 P. 1023, 65 L.R.A. 949, [101 Am.St.Rep. 97]; Gurnsey v. Northern Cal. Power Co. (1911), 160 Cal. 699, 705, 117 P. 906, 36 L.R.A.,N.S., 185; Olaine v. McGraw (1913), 164 Cal. 424, 428, 129 P. 460; Porter v. City of Los Angeles (1920), 182 Cal. 515, 519, 189 P. 105; City of Oakland v. Schenck (1925), 197 Cal. 456, 461, 241 P. 545; City of Burlingame v. Norberg (1930), 210 Cal. 105, 108, 290 P. 587; People v. Olsen (1930), 109 Cal.App. 523, 532, 293 P. 645; People v. Church (1943), 57 Cal.App.2d Supp. 1032, 1055, 136 P.2d 139."

[5] The expressed view of the dissent (which respondent now embraces) that § 2631 applies only to a "taking" by condemnation or prescription, or "accepting" a dedication, and does not apply to ac-

quisition through grant, reflects an inaccurate notion of dedication.[3] That a grant deed is one of the recognized vehicles for dedication to public use seems well settled. See, 15 Cal.Jur.2d, § 25, p. 290; City of San Francisco v. Scott, 4 Cal. 114, 115, 117; Harding v. Jasper, supra, 14 Cal. 643, 650; Wheeler v. City of Oakland, 35 Cal.App. 671, 674, 170 P. 864; 26 C.J.S. Dedication § 14, p. 424; 16 Am.Jur. § 21, p. 364.

[6] The actual holding of the Thompson case, supra, is that the subject deed "was intended to and did convey only an easement." [43 Cal.2d 13, 271 P.2d 510.] We deem that case controlling here. The statutes (§ 2631, Political Code, and § 831, Civil Code) are read into the deed and become implied terms of the same. Civ. Code, § 1066; 12 Cal.Jur.2d § 135, p. 348; 26 C.J.S. Deeds § 81, p. 806. The presumption of an easement is not refuted by anything found within the four corners of the instrument and there is no parol evidence upon the intent of the parties.

Cases relied upon by respondent are readily distinguishable from the one before us. The opinions in People v. County of Marin, 103 Cal. 223, 37 P. 203, 26 L.R.A. 659; Elliott v. McCombs, 17 Cal. 2d 23, 109 P.2d 329; Cooper v. Selig, 48 Cal.App. 228, 191 P. 983; San Francisco-Oakland Terminal Rys. v. County of Alameda, 66 Cal.App. 77, 225 P. 304; Marshall v. Standard Oil Co., 17 Cal.App.2d 19, 61 P.2d 520, and Basin Oil Co. of California v. City of Inglewood, 125 Cal.App. 2d 661, 271 P.2d 73, do not consider § 2631 or § 831.

Wright v. Austin, supra, 143 Cal. 236, 239, 76 P. 1023, says that § 2631 is declaratory of a long established principle and holds that owners of abutting land may enjoin the sinking of a water well within a highway.

Parks v. Gates, supra, 186 Cal. 151, 199 P. 40, 41, dealt with the grant of a "right of way" for a drainage ditch from the grantors' premises to the county road. It was held that that phrase connotes an easement and that the judgment properly enjoined obstruction thereof. The case did not involve ownership of a public road.

In 1955 section 905, Streets and Highways Code (the successor of § 2631) was amended by adding this concluding sentence: "This section shall not be construed or applied so as to prevent a county, city and county, or city from acquiring fee title to land for highway purposes." This seems to be intended as a legislative interpretation of the preexisting statute and also appears to have been prompted by the dissent in the Thompson case, supra. It was approved on June 22, 1955, approximately one year after the Thompson decision. The dissent therein says, 43 Cal.2d at page 31, 271 P.2d at page 517: "Neither the language of the opinions in those cases nor the factual bases upon which they were decided justifies the conclusion that the State could not by purchase acquire the fee with respect to land to be used as a highway. * * * This is the plain meaning of the statute and I find no basis for holding that it prohibited the state from acquiring a fee by the deed which it obtained from Thompson's predecessors in interest." We do not so interpret the majority opinion, which held that the deed under consideration "was intended to and did convey only an easement." True, that opinion in distinguishing Palmer v. Los Angeles, etc., Ry. Co., 55 Cal.App. 519, 521, 203 P. 1012, and Midstate Oil Co. v. Ocean Shore R. R. Co., 93 Cal.App. 704, 708, 270 P. 216, used this language: "The cases are not controlling here, for there was no limitation similar to former section 2631 as to the interest which the railroads could accept; they could acquire a fee by purchase, al-

3. Section 2618, Political Code, lent no support to this view: "Highways are roads, streets, or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public." (See, also, West's Ann.Street & High.Code, § 25).

though if they did resort to eminent domain they could have acquired only an easement." 43 Cal.2d at page 20, 271 P.2d at page 511. That is at best an intimation, rather than a holding, that the State had no capacity to take a fee for road purposes. Respondent's brief herein says, at page 5: "People [By and Through Department of Public Works] v. Thompson (1954), 43 Cal.2d 13 [271 P.2d 507], does not explicitly hold that Section 2631 of the Political Code prevented the State or the County from ever acquiring fee title to land to be used for road purposes; nor does it have the effect of converting the grant of a fee into the grant of a mere easement. Although some of the expressions in the opinion are undoubtedly susceptible to such a construction, such a result cannot reasonably be inferred from the opinion. Such a result would conflict with the entire legislative history of Section 2631. It would require overruling a long line of cases, including cases which the opinion expressly approves." But if the contrary be assumed the 1955 amendment to § 905 cannot affect the instant case.

[7,8] It is well established that a legislative interpretation of an existing statute, though entitled to respect, does not bind the courts; if it is an erroneous construction it goes for naught; if a correct one it is surplusage. "The subsequent legislation interpreting the statute construed, does not change the meaning; it merely supplies an indication of the legislative intent which may be considered together with others factors in arriving at the true intent existing at the time the legislation was enacted." Stockton Savings & Loan Bank v. Massanet, 18 Cal.2d 200, 204, 114 P.2d 592, 595. See, also, Lawrence v. City of Concord, 156 Cal.App. 2d 531, 534, 320 P.2d 215; 45 Cal.Jur.2d § 178, p. 678. Especially is this true in the instant case for the title, whatever its quality, vested in 1886. The law then existing fixed it as a fee or an easement. Any statute passed in 1955 could not change the quality of that estate. To permit it to do so would sanction retroactive legislation impairing vested rights, and that cannot be done. In re Estate of Thramm, 80 Cal. App.2d 756, 765, 183 P.2d 97; 45 Cal.Jur. 2d, § 26, p. 552, § 28, p. 556.

The judgment is reversed with instructions to make and enter a judgment declaring that the deed of 1886 from Johnson and Lang to the Board of Supervisors of Los Angeles County conveyed to the county only an easement for road purposes, and that defendant Pacific Electric Railway Company is entitled to receive the amount awarded herein for the taking of the subject premises.

FOX, P. J., and HERNDON, J., concur.

Hearing denied; TRAYNOR and PETERS, JJ., dissenting.



168 Cal.App.2d 785

Angie D. CIANCETTI, doing business under the firm name and style of S. P. Furniture Stores, Plaintiff and Respondent,

v.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation, Defendant and Appellant.

No. 63.

Appellate Department, Superior Court, Fresno County, California.

Feb. 10, 1959.

Action against surety brought by proprietor of store on fidelity bond to recover amount of misappropriation by bookkeeper. From adverse judgment of the Municipal Court, Fresno Judicial District, George W. Huffman, J., the surety appealed. The Superior Court, Appellate Department, DeWolf, J., held that under fidelity bond obligating surety to reimburse proprietor of store for any losses due to misappropriation by any employees except as to an employee who with employer's knowledge had previously committed any fraudulent or dishonest act in service of proprietor,

bookkeeper, who prior to issuance of bond, had taken $20 from petty cash drawer to which he had access against instructions and who had replaced it with duplicate freight bill to cover shortage and who paid money back to proprietor when questioned about it, was guilty of fraudulently appropriating to his own use money which belonged to proprietor, and proprietor was not entitled to recover for a misappropriation by such bookkeeper during effective period of fidelity bond.

Judgment reversed.

Insurance ⇐430

Under fidelity bond obligating surety to reimburse proprietor of store for any losses due to misappropriation by any employees except as to an employee who with employer's knowledge had previously committed any fraudulent or dishonest act in service of insured, bookkeeper, who prior to issuance of bond had taken $20 from petty cash drawer to which he had access contrary to instructions and who replaced it with duplicate freight bill to cover shortage and paid money back to proprietor when questioned about it, was guilty of fraudulently appropriating to his own use money which belonged to proprietor and proprietor was not entitled to recover for a misappropriation by such bookkeeper during effective period of fidelity bond. West's Ann.Pen.Code, §§ 508, 513.

John D. Chinello, Fresno, for plaintiff and respondent.

Harold A. Parichan, Fresno, for defendant and appellant.

DE WOLF, Judge.

Plaintiff owned and operated a furniture store. On the 19th of April, 1954, plaintiff had issued to her a fidelity bond by the defendant company. In the bond the defendant agreed to reimburse to plaintiff any money losses which were due to misappropriation by any of her employees after the effective date of the bond.

In the month of June, 1954, plaintiff discovered that one Charles Tobin, an employee of hers, had misappropriated $769.26 between the dates of April 19, 1954, and June 12, 1954. Plaintiff thereupon filed her claim for this sum with defendant and demanded that defendant reimburse her in accordance with the terms of the bond. When defendant refused to pay this sum, plaintiff filed an action in the lower court, and, from a judgment in her favor, the defendant prosecutes this appeal.

The defendant does not deny that Charles Tobin misappropriated the money claimed, but bases its refusal to pay on the ground that the bond states that it is subject to the following condition and limitation:

"Prior Fraud or Dishonesty.

"Section 14. No Employee, to the best of the knowledge of the insured, or of any partner or officer thereof not in collusion with such Employee, has committed any fraudulent or dishonest act in the service of the insured or otherwise."

It is defendant's contention that plaintiff, at the time the bond was issued to her, on April 19, 1954, had knowledge of the fact that Charles Tobin, while in her employment, had committed a dishonest act in the month of February, 1954. Defendant urges that the evidence is susceptible of no other interpretation, and, consequently, the judgment of the lower court should be reversed.

The salient facts adduced before the trial court are as follows: that Charles Tobin was employed by plaintiff as a salesman and bookkeeper in plaintiff's furniture store business; that Charles Tobin in the ordinary course of his duties as plaintiff's employee had access to the petty cash in the petty cash drawer; that the money in the petty cash drawer belonged to plaintiff; that plaintiff instructed Tobin that he was not to borrow money from the petty cash drawer; that in February, 1954, at a time subsequent to her instruction to

Tobin not to borrow from the petty cash drawer, plaintiff noticed a duplicate freight bill for the sum of twenty dollars in the petty cash drawer; that she checked the records and discovered the freight bill had been paid; that she then questioned Tobin about the duplicate freight bill; that Tobin at first denied taking any money from the petty cash drawer, but later admitted he had taken twenty dollars from the petty cash drawer and had replaced it with the duplicate freight bill to cover the shortage; that Tobin then paid back the twenty dollars to the plaintiff.

Plaintiff further testified that she did not consider what Tobin had done amounted to a dishonest act, but that she thought defendant had just borrowed the money.

This court is unable to agree with plaintiff's conclusion that Tobin's conduct was not dishonest. Tobin, while in the course of his employment, fraudulently appropriated to his own use twenty dollars which belonged to plaintiff and which had come into his care by virtue of his employment as a servant of plaintiff. This is a description of the crime of embezzlement as defined in Section 508 of the Penal Code. Nor is the criminal character of the act changed by the fact that Tobin returned the twenty dollars to plaintiff (Penal Code, § 513).

Section 14 of the bond gives to the defendant a good defense if, according to the best knowledge of the plaintiff, she knew of prior dishonest acts on the part of Tobin. Plaintiff knew of Tobin's prior embezzlement. Her statement that she did not consider his acts to be dishonest can in no way change an act of embezzlement into an act of borrowing. It also might be well to note that before Tobin could borrow plaintiff had to be lending. That Tobin was not borrowing and plaintiff was not lending is conclusively shown by plaintiff's own testimony at the trial that she had specifically forbade Tobin from borrowing money from the petty cash drawer. It follows then that when Tobin took the money contrary to plaintiff's instructions, he was not borrowing—he was embezzling.

We conclude, therefore, that there is no evidence in the record before us which will support the trial court's judgment.

The judgment appealed from is ordered reversed.

CONLEY, P. J., and POPOVICH, J., concur.

CALIFORNIA REPORTER

336 PACIFIC REPORTER
SECOND SERIES

CALIFORNIA REPORTER

336 PACIFIC REPORTER
SECOND SERIES



168 Cal.App.2d 549

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Darrell BROWN, Defendant and Appellant.

Cr. 1398.

District Court of Appeal, Fourth District, California.

March 9, 1959.

Defendant was convicted of theft of lobsters. The Superior Court, San Diego County, Joe L. Shell, J., entered judgment, and defendant appealed. The District Court of Appeal, Stone, J. pro tem., held that the trial court did not err in permitting impeachment of defense witness by cross-examination concerning crimes with which the defendant and the witness had been charged but of which they had not been convicted, where such evidence was relevant and material to the crime for which the defendant was being tried.

Affirmed.

1. Witnesses ⇐350

In prosecution for theft of lobsters from receiving tanks which were attached to buoy floating on the surface of the water, where the defense was the purchase of lobsters from another person and defense witness testified on direct examination that the day before the defendant took the lobsters the witness had seen a boat deposit lobster receivers in the same area, the State could impeach witness by cross-examining witness concerning his previous arrest jointly with defendant for illegal possession of lobsters, notwithstanding that up to time of trial neither the witness nor the defendant had been convicted of such offense, since the cross-examination was pertinent to show possible bias on part of witness and to explain a motive for his testimony which gave substance to the other person, of whom no record had been found after an exhaustive police search.

2. Criminal Law ⇐369(2)

The evidence of another offense is admissible even though the defendant has not been convicted of it, providing such evidence is relevant and material to the crime for which the defendant is being tried.

3. Criminal Law ⇐1170½(2)

In prosecution for theft of lobsters, overruling objection to cross-examination of defendant's codefendant concerning defendant's pending prosecution for another crime was not error prejudicial to defendant where codefendant gave answers favorable to the defendant.

4. Criminal Law ⇐824(8)

In prosecution for theft of lobsters, where witness was cross-examined as to his previous arrest jointly with defendant for illegal possession of lobsters and codefendant was cross-examined concerning defendant's pending prosecution for another crime, an instruction advising jury of limited purpose of cross-examination would have been advisable but trial court was not required to give such an instruction sua sponte, and consequently there was no reversible error in not giving such

instruction in absence of request that such instruction be given.

5. Criminal Law ⇐670

In prosecution for theft of lobsters, refusal of defendant's offer of proof that defendant had been willing at all times to furnish exemplars of defendant's handwriting to district attorney or to any person designated by district attorney and that defendant was still willing to supply the exemplars was not error as to defendant where State's handwriting expert had not testified regarding defendant's handwriting but had merely testified concerning handwriting of codefendant and the district attorney's remarks which inspired the offer of proof had been answered by counsel for defendant who in open court and before the jury made the statement that the defendant would furnish exemplars of his handwriting and that he had always been willing to do so and the offer did not include an offer of proof of testimony or other evidence concerning the effect of the exemplars.

6. Criminal Law ⇐824(7)

In prosecution for theft of lobsters, if witnesses were accomplices, failure of trial court sua sponte to give the accomplice instructions was not reversible error where there was no vital conflict between the testimony of such witnesses and the testimony of the defendant and most of the testimony of the witnesses was corroborated and the evidence essential to conviction did not come from the lips of such witnesses. West's Ann.Pen.Code, § 1111.

Barton C. Sheela, Jr., San Diego, for appellant.

Edmund G. Brown, Atty. Gen., S. Clark Moore, Deputy Atty. Gen., for respondent.

STONE, Justice pro tem.

An information was filed against defendant Darrell Brown, charging him and a codefendant Richard H. Wessilink with grand theft. The jury found both defendants guilty and the defendant Brown appeals from the judgment of conviction. The defendants were charged with the theft of approximately 600 pounds of lobsters of the value of $424. The lobsters were taken from four receiving tanks belonging to Stanley J. Lewis and Gene Mierlot who, as partners, operated a commercial fishing business. The tanks were located in the kelp beds offshore near Cardiff, California, and were attached to a red or orange buoy which floated on the surface. Sometime prior to January 2, 1958, Brown and his codefendant Wessilink, while they were at sea on a fishing boat, met one Charles Whitney, a San Diego State College student and part-time fisherman. Whitney suggested to Brown and Wessilink that they sell their lobsters to a Mr. Busalacchi of the Union Fish Company in San Diego. On January 2, 1958, appellant and Wessilink arranged through Mr. Busalacchi to have Mr. Whitney meet with them. At the meeting they hired Mr. Whitney and his boat to take them to a position off Cardiff to collect lobsters for a consideration of $50. They met at Mission Bay around 7 p. m. and at that time Mr. Whitney was told that appellant was not going in the boat but would go to Cardiff by automobile. Mr. Whitney, Mr. John Pringle and Wessilink went in Whitney's skiff to an area off Cardiff. They located four receivers attached to red or orange buoys and unloaded two of the receivers into the boat. Mr. Wessilink said he believed there was some trouble on shore so they cut the tie lines to the remaining two receivers and loaded them aboard. Subsequently they unloaded the last two receivers and then threw them overboard. There were a number of undersized lobsters some of which were thrown overboard, although others were placed in sacks and handled in the same manner as the legal sized lobsters. They returned to Mission Bay and removed the sacked lobsters to a vacant lot. Mr. Whitney then called Joseph Busalacchi, owner of the Union Fish Market, and he and his son met defendant Wessilink and Whitney. The lobsters were sold to the

Busalacchis and appellant signed a receipt using the name Joe Hogan. On January 3, 1958, Lewis and Mierlot discovered that their lobster receivers were gone and that the rope which had been attached to the receivers had been severed with a knife. Later that month Sergeant King of the Sheriff's office of San Diego County had a conversation with Wessilink and appellant concerning the stolen lobsters and Wessilink stated that a Mr. Cromer had told him that the lobsters had come from Mexico in Mr. Cromer's boat. Wessilink stated that Cromer's boat was in San Pedro so that Cromer was unable to handle the transportation of the lobsters and he sold them to him. Wessilink gave Sergeant King a receipt for the lobsters signed by Bob Cromer. Later examination disclosed that there were indentations on the receipt which showed that on two occasions other writings had been prepared over this receipt and that many of the words in these other writings were the same as those on the receipt, including the signature of Bob Cromer. The defendants did not produce Bob Cromer and an exhaustive search by an investigator for the District Attorney's office failed to show any record of a Robert or Bob Cromer or Cramer.

[1] Appellant specifies four grounds of error, the first being that the court erred in permitting impeachment of a defense witness by cross-examination concerning crimes with which the defendant and the witness had been charged but of which they had not been convicted. The questions asked defense witness Pangle concerned his previous arrest jointly with appellant for the illegal possession of lobsters. The witness admitted the arrest but up to the time of the trial, neither the witness nor the appellant had been convicted of the offense. Conviction of the offense is not always a prerequisite to the introduction of evidence concerning other wrongful acts. In People v. Raleigh, 83 Cal.App.2d 435, 442, 189 P.2d 70, 74, the court said:

"It is clear that under the rule of the foregoing authorities, evidence of defendant's prior possession of the gun, and the circumstances thereof, was admissible even though such evidence tended to show independent wrongful acts. It is contended, however, that even though such rule might apply under ordinary circumstances, it cannot apply where, as here, there was a court dismissal of the independent crimes shown. However, the rule is well settled in England as well as in this country that an acquittal (and of course a dismissal at the preliminary examination is not even as strong in effect as an acquittal) does not prevent the admissibility of the evidence."

[2] The ultimate fact to be proved is the defendant's guilt of the crime with which he is charged and not the other offense. The evidence of the other offense is admissible even though the defendant was not convicted of it, provided such evidence is relevant. Therefore, the rule concerning the admissibility of other offenses expressed in the Raleigh case must be limited to those circumstances where the proof is relevant and material to the crime for which the defendant is being tried. The general rule of the admissibility of other criminal acts is stated in People v. Sanders, 114 Cal. 216, at page 230, 46 P. 153, at page 157:

"If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime. People v. Tucker, 104 Cal. 440, 38 P. 195. The general tests of the admissibility of evidence in a criminal case are: First. Is is a part of the *res gestae?* Second. If not, does it tend logically, naturallly, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other

crime be similar in kind or not, whether it be part of a single design or not."

See also People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. McMonigle, 29 Cal.2d 730, 742, 177 P.2d 745; People v. Sykes, 44 Cal.2d 166, 170, 280 P.2d 769.

The questions asked the witness Pangle concerning other offenses were material to the issues before the court. Appellant and his codefendant Wessilink set up as a defense the purchase of the lobsters from a Bob Cromer or Cramer contending they had no intent to steal the lobsters of Lewis or Mierlot. The defendants failed to produce Cromer and the evidence disclosed that a thorough search by the investigating staff of the District Attorney failed to locate any such person. The witness Pangle on his direct examination gave credence to this defense by testifying that the day before defendants took the lobsters Pangle had seen a boat depositing lobster receivers in the same area. This gave some support to the defense theory that this other person was Bob Cromer and that he had deposited lobster receivers in the same area from which defendants had taken lobsters. No one else had seen receivers other than those of Lewis and Mierlot in the vicinity prior to the theft.

The prosecution by cross-examination was thus inquiring about the witness's association with the defendant Brown to show that they had been in the lobster business together and had been arrested and charged with violating the law regarding lobsters. The evidence was pertinent to show possible bias on the part of the witness and to explain a motive for his testimony which gave substance to the mythical Mr. Cromer. The evidence also tended to refute defendant Brown's inference that he was a novice at the lobster business. People v. Thomson, 92 Cal. 506, 509, 28 P. 589.

[3, 4] The second error charged is that, over objection, the court permitted the District Attorney to cross-examine appellant's codefendant concerning appellant's pending prosecution for another crime. All of the authorities cited hereinbefore in the discussion of appellant's first ground of appeal are applicable to this, appellant's second specification of error. See People v. Raleigh, supra; People v. Sanders, supra; People v. Peete, supra; People v. Sykes, supra. Additionally, the codefendant Wessilink gave a negative answer to each question concerning any connection of defendant Brown with another crime. There was no prejudicial error in overruling the objection or denying the motion to strike because the answer was favorable to the appellant. People v. Sorrentino, 146 Cal.App.2d 149, 163, 303 P.2d 859; People v. Bigelow, 104 Cal.App. 2d 380, 386, 231 P.2d 881; People v. Deacon, 117 Cal.App.2d 206, 211, 255 P.2d 98. Certainly, an instruction such as CALJIC No. 33, advising the jury of the limited purposes of such questions would have been advisable as to both the witness Pangle and the codefendant Wessilink. According to the record before us, no such instruction was requested by the defendants and as this is not an instruction which the court is required to give *sua sponte*, there was no reversible error in not giving it.

[5] Appellant's third specification of error reads: "Was it error for the court to exclude evidence that the appellant Brown and his codefendant Wessilink were ready, willing and able to provide the State handwriting expert witness with samples of their handwriting?" The people called a handwriting expert as a witness who testified that he could not tell whether the handwriting on the receipt signed "Bob Cromer" or "Bob Cramer" was the same as the handwriting of defendant Wessilink. On direct examination he was asked no questions concerning the handwriting of appellant Brown nor was appellant Brown mentioned in connection with the receipt. On cross-examination counsel for appellant asked: "Q. And were you asked to make a comparison between the questioned document, I believe it is People's 9, and any handwriting of Mr. Brown? A. No I was not." Some additional questions were asked which are

not pertinent to the point involved, whereupon the following occurred:

"Q. But you think that you would have a better chance of saying whether or not, for example, the defendants wrote the questioned document, if you had ample exemplars of their handwriting? A. Of course.

"Q. And you wouldn't be adverse to making such an examination? A. No.

"Q. If the District Attorney were to request you to make it? A. It doesn't matter who requested me.

"Q. I didn't mean it that way—

"Mr. Kimball: Your Honor, I would like to make one point clear in view of this last question. I cannot request the defendants give exemplars and it is not ethical for me to even talk with them, so I think Mr. Sheela might make such a request, but I would like to make it clear I can't do it ethically.

"Mr. Sheela: There was a request made for exemplars of handwriting.

"The Court: This is not the place to argue.

"Mr. Sheela: No, but, well, on behalf of the defendant Brown I will furnish any records that the District Attorney wants or any handwriting of his, if they wish to make such an examination.

"The Court: This is in the nature of argument, Mr. Sheela.

"Mr. Sheela: I made a statement, I am telling him we are ready, willing and able to comply, Your Honor."

Counsel for appellant then made an offer of proof which was heard in chambers out of the presence of the jury. Counsel asked permission to recall Brown to the stand and to prove that he had been willing at all times to furnish exemplars of his handwriting to the District Attorney or to any person designated by the District Attorney, and further that defendant was still willing to supply the exemplars. The court refused the offer of proof. There was no error committed as the witness had not testified regarding the defendant Brown's handwriting, hence an offer to furnish exemplars would have added nothing material to the case. The District Attorney's remarks had been answered by counsel for the defendant who in open court and before the jury made the statement that the defendant would furnish exemplars of his handwriting and that he had always been willing to do so. It should also be noted that the offer made in chambers to furnish exemplars did not include an offer of proof of testimony or other evidence concerning the effect of the exemplars. Therefore it was, in our opinion, an incomplete offer of proof. Under the circumstances the court's ruling was not error.

[6] Appellant's fourth specification of error is entitled: "Was it error for the court to fail *sui sponte* to give the accomplice instructions?" Penal Code section 1111 defines an accomplice in the following language:

> "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Viewing the record in the light of Penal Code section 1111, and viewing the evidence most favorably to defendant, we do not believe it could be said that as a matter of law the witnesses Whitney and Pringle were accomplices of defendant Brown.

However, conceding for the sake of argument that the witnesses Whitney and Pringle were accomplices and that the court erred by not giving an instruction on accomplices, it was not reversible error. In the first place there was no vital conflict between their testimony and that of the appellant. Secondly, most of the testimony of these two witnesses was corroborated. Third, the evidence essential to conviction did not come from the lips of the

witnesses alleged to be accomplices. People v. Carswell, 51 Cal.2d 602, 335 P.2d 99.

Judgment of conviction affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.



J. KATZEV, Herbert H. Katzev, Sophia Katzev, and Arthur J. Kates, co-partners doing business under the firm name and style of Sunset News Company, Henry A. Epstein, doing business as Independent Magazine Company, Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES, a body politic and corporate, S. Ernest Roll, District Attorney of the County of Los Angeles, and Eugene W. Biscailuz, Sheriff of Los Angeles County, Defendants and Respondents.*

Civ. 23174.

District Court of Appeal, Second District, Division 2, California.
Feb. 25, 1959.
Hearing Granted April 22, 1959.

News dealers brought action against the County of Los Angeles and others for a declaratory judgment that county ordinance prohibiting the sale or circulation of crime comic books to children under the age of 18 years, and declaring a violation of its proscriptions to be a misdemeanor, is unconstitutional. The Superior Court of Los Angeles County, John K. Otis, J. pro tem., entered judgment adverse to the news dealers, and they appealed. The District Court of Appeal, Ashburn, J., held that crime comic books are not per se beyond the protection of constitutional guarantees of freedom of the press, but that evidence established crime comic books gave rise to a clear and present danger of substantive evils, so that the ordinance did not violate constitutional guarantees of freedom of the press, and that ordinance was not invalid on ground that it was too broad in its sweep, or because it allegedly denied equal protection of the laws, or on ground that it was too vague to establish a clearly defined standard of guilt.

Judgment affirmed.

* Opinion vacated 341 P.2d 310.

1. Constitutional Law ⇐90

Certain forms of speech, oral or written, such as obscenity, profanity, and libelous or fighting words tending to cause a breach of the peace, are not protected by constitutional guarantees of freedom of the press. U.S.C.A.Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

2. Constitutional Law ⇐90

Crime comic books are not per se beyond the protection of constitutional guarantees of freedom of the press. U.S.C.A. Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

3. Constitutional Law ⇐90

Magazines, which have no possible value to society, are as much entitled to the protection of constitutional guarantees of freedom of the press as the best of literature. U.S.C.A.Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

4. Appeal and Error ⇐893(1), 895(2)
Constitutional Law ⇐48

A reviewing court, when dealing with alleged infringement on constitutional guarantees of freedom of the press, will make an independent appraisal of the facts, untrammeled by the ordinary presumption of validity of legislation, and unembarrassed by findings of lower courts, based on uncontroverted facts. U.S.C.A.Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

5. Constitutional Law ⇐90

Evidence established that crime comic books give rise to a clear and present danger of substantive evils so that restrictions on such books under county ordinance do not violate constitutional guarantees of freedom of the press. U.S.C.A.Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

6. Infants ⇐13

County ordinance prohibiting the sale or circulation of crime comic books to any child under the age of 18 years, and declaring violation of the proscriptions to be a misdemeanor is not too broad in its sweep, on ground that it includes good crime comics as well as bad ones, where ordinance includes only the depiction of commission or attempted commission of arson, burglary, and other specified crimes, and also acts by animals or any nonhuman, part-human, or imaginary beings, which, if performed by a human, would constitute one of enumerated crimes.

7. Constitutional Law ⇐81

The legislative authority may strike an evil where it is felt most.

8. Constitutional Law ⇐81

It is the function of the legislative body to draw the line between the permitted and the proscribed.

9. Infants ⇐13

Alleged fact that some innocuous comic books may fall within terms of county ordinance prohibiting the sale or circulation of crime comic books to any child under the age of 18 years and declaring a violation of the proscriptions to be a misdemeanor, does not condemn the ordinance.

10. Constitutional Law ⇐81

The police power is not static, but is elastic and, in keeping with growth of knowledge and belief in popular mind of the need for its application, is capable of expansion to meet existing conditions of modern life, and thereby keep pace with social, economic, moral, and intellectual evolution of the human race.

11. Infants ⇐13

County ordinance prohibiting the sale or circulation of crime comic books to any child under the age of 18 years and declaring a violation of its proscriptions to be a misdemeanor is not invalid on ground that it embraces and proscribes publications outside the scope of the evil sought to be corrected, because news dealers are allegedly precluded from displaying crime comics to adults, where exhibition of crime comics to adults is not forbidden by the ordinance but is limited to such place and manner as will keep the crime material away from the eyes of impressionable children.

12. Infants ⇐13

County ordinance prohibiting the sale or circulation of crime comic books to children under the age of 18 years, and declaring a violation of its proscriptions to be a misdemeanor, is not invalid because it does not expressly or impliedly make knowledge or intention an element of the offense.

13. Constitutional Law ⇐211

The Legislature may select one phase of a problem for appropriate action without necessity of including all others, which might be affected in same field of legislation, thus striking at the evil where it is felt, and reaching the class of cases where it most frequently occurs without denying equal protection of the laws.

14. Constitutional Law ⇐250

County ordinance prohibiting the sale or circulation of crime comic books to any child under the age of 18 years, and declaring a violation of its proscriptions to be a misdemeanor, is not invalid, on ground that it denies equal protection of the laws because it excepts accounts of crime appearing in newspapers, and newspaper comic strips, and actual historical events or occurrences set forth in sacred scriptures of any religion.

15. Counties ⇐21½

County ordinance prohibiting the sale or circulation of crime comic books to any child under the age of 18 years, and declaring a violation of the proscriptions to be a misdemeanor, is not invalid, on ground that it is too vague to establish a clearly defined standard of guilt.

Gang, Kopp & Tyre, Milton A. Rudin, Los Angeles, Payson Wolff, Hollywood, for appellants.

Harold W. Kennedy, County Counsel, David D. Mix, Deputy County Counsel, Los Angeles, for respondents.

ASHBURN, Justice.

This declaratory relief action attacks as unconstitutional a county ordinance prohibiting the sale or circulation of any "crime comic book" to any child under the age of 18 years, and declaring a violation of its proscriptions to be a misdemeanor. From an adverse judgment plaintiffs appeal.

The sections of the ordinance involved in the ensuing discussion are set forth in the margin.[1]

1. Ord. No. 6633.

"An ordinance prohibiting the sale and circulation of crime 'comic' books to children under the age of eighteen (18) years.

"The Board of Supervisors of the County of Los Angeles do ordain as follows:

"Section 1. The Board of Supervisors finds that in the unincorporated area of Los Angeles County:

"a. There is a great volume in the number and variety of crime 'comic' books available to children under the age of eighteen (18) years.

"b. These crime 'comic' books resemble closely other publications devoted in substance to humor.

"c. These crime 'comic' books are placed for sale side by side with numerous publications.

"d. These crime 'comic' books have been sold or circulated to children under eighteen (18) years of age.

"e. Many children have been incited to commit crimes as a consequence of looking at crime 'comic' books.

"f. Many children have been incited to attempt the commitment of a crime as a consequence of looking at crime 'comic' books.

"g. There is a clear and present danger which the Board of Supervisors finds is great and imminent that the continued sale and circulation in the unincorporated area of Los Angeles County of crime 'comic' books to children will incite said children to commit crimes or attempt to commit crimes and inculcate a preference in the minds of many of the children to participate in crime.

"h. The Board of Supervisors specifically finds that the prohibition against the sale to or circulation of crime 'comic' books to children is a reasonable measure to meet the clear and present danger hereinabove found.

"Section 2. Every person is guilty of a misdemeanor who sells or circulates any crime 'comic' book to any child under the age of eighteen (18) years.

"Section 3. This ordinance shall not apply:

"a. To those accounts of crime which are part of the general dissemination of news.

"b. To those accounts of crime which appear in a newspaper of general circulation.

"c. To those accounts of crime which delineate actual historical events.

"d. To those accounts which delineate occurrences actually set forth in the sacred scriptures of any religion.

"Section 4. As used in this ordinance, the following terms shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number.

"a. *Crime 'comic' book:* Any book, magazine, or pamphlet in which an account of crime is set forth by means of a series of five (5) or more drawings or photographs, in sequence, which are accompanied by either narrative writing or words represented as being spoken by a picture character, whether such narrative or words appear in 'balloons,' captions or on or immediately adjacent to the photograph or drawing.

"* * * * * *

"c. *Crime:* The commission or attempted commission of an act of arson, burglary, kidnapping, mayhem, murder, rape, robbery, theft, train-wrecking, or voluntary manslaughter; or the commission of an act of assault with caustic chemicals or assault with a deadly weapon. As the term 'crime' is used in paragraph 'a.' of this section, it includes but is not limited to, acts by human beings and further includes acts by animals or any non-human, part human, or imaginary beings, which if performed by a human would constitute any of the crimes named.

"* * * * * *

"f. *Sells or circulates:* To sell, offer for sale, attempt to sell, exhibit, give away, keep in possession with intent to sell or give away, or in any way furnish or attempt to furnish.

"g. *Sacred scriptures:* The Bible, including any version thereof, or any writing of similar statute in any established religion.

"* * * * * *

"Section 7. Crime 'comic' books are now being sold and circulated to children under the age of eighteen (18) years in

Plaintiffs are dealers in magazines, books and other printed materials, including crime comic books, and their distribution of the latter would be impaired through enforcement of the ordinance. Appellants' contentions may be summarized as follows.

1. The ordinance is an unjustifiable abridgement of freedom of the press because distribution of such crime comic books is protected by state and federal constitutions;

2. Only a clear and present danger of an evil subject to regulation by the legislative body will justify restrictions upon freedom of the press and no such danger is shown with respect to crime comic books because no causal relationship exists between their distribution and juvenile delinquency, the evil act at which the ordinance is aimed;

3. The ordinance is too broad in its sweep because it prohibits circulation to minors of all crime comic books, the good ones as well as the bad;

4. The ordinance denies equal protection of the laws because it makes arbitrary and unreasonable exemptions of accounts of crime appearing in newspapers, also those which delineate actual historical events or occurrences set forth in sacred scriptures of any religion;

5. The ordinance is too vague to establish a clearly defined standard of guilt.

[1] First, as to whether crime comics described in the statute—those depicting commission or attempted commission of arson, burglary, kidnapping, mayhem, murder, rape, robbery, theft, train-wrecking, voluntary manslaughter, assault with caustic chemicals or with a deadly weapon,—are protected by the freedom of press sanction of the First Amendment to the Federal Constitution (now absorbed into the Fourteenth Amendment).[2] Certain forms of speech, oral or written, do not fall within the aegis of the fundamental guaranty. Among them are obscenity, profanity, libelous or fighting words tending to cause a breach of the peace. Beauharnais v. People of State of Illinois, 343 U.S. 250, 256, 72 S.Ct. 725, 96 L.Ed. 919; Dennis v. United States, 341 U.S. 494, 544, 71 S.Ct. 857, 95 L.Ed. 1137 (Mr. Justice Frankfurter concurring); Kingsley Books v. Brown, 354 U.S. 436, 440, 77 S.Ct. 1325, 1 L.Ed.2d 1469; Roth v. United States, 354 U.S. 476, 500, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (Mr. Justice Harlan concurring). This concept flows from the immediate and indisputably obnoxious effect of such conduct. The Beauharnais case, supra, dealing with a libel upon the colored race of people says, 343 U.S. at page 255, 72 S.Ct. at page 730: "'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"

[2] There seems to be no case in the reported decisions that deals with the specific question whether crime comic books are

the unincorporated territory of Los Angeles County, destroying their moral fiber and inciting them to crime and juvenile delinquency. Such damage, once accomplished, is irreparable. By reason of the foregoing, this ordinance is immediately needed for the preservation of the public health, safety, and welfare and shall take effect upon the passage hereof.
"* * * * *"

2. The corresponding section of the California Constitution expressly withholds its protection from any publication which is an abuse of the basic freedom: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; * * *" (Calif.Const., art. I, Sec. 9.)

within the constitutional protection or, like the last cited cases, are automatically exempt from its operation. The question of whether they are harmful to children and whether their distribution to juveniles should be prohibited on that ground is one which has caused much debate among laymen, sociologists, psychologists, psychiatrists, and other experts and pseudo-experts, with resulting disagreement as to causation and appropriate remedy. See, 7 Stanford Law Review, pp. 237, 249–251, "Crime Comics and the Constitution"; Interim Report of the Subcommittee to Investigate Juvenile Delinquency to the Senate Committee on the Judiciary, 84th Cong., 1st Sess. 14 (1955), p. 12 (Kefauver Committee.) There being no general agreement upon the perniciousness of "crime comics" it is our opinion that the time has not yet arrived to declare them per se beyond the protection of the First and Fourteenth Amendments.

[3] Speaking of publications principally made up of criminal news, police reports or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime (not limited to minors), the Supreme Court said, in Winters v. People of State of New York, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840: "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." That language appears to be applicable here.

The Board of Supervisors found and declared, in passing ordinance 6633, that there are within the county of Los Angeles a great volume and variety of crime comic books available to children under the age of 18 years; that they are sold or circulated (exhibited) to children, many of whom are thereby incited to commit or attempt to commit crime; that such books destroy the moral fiber of children and incite them to crime and juvenile delinquency. The county counsel—recognizing the established rule that the legislative finding incorporated in a statute or ordinance which restricts freedom of speech or the press is not conclusive, and that the courts have the duty of determining independently whether the new law has reasonable basis in fact and with respect to remedy,—introduced oral and documentary evidence in the trial court upon the subject. He called as an expert witness, Dr. Hilde L. Mosse, an experienced psychiatrist attached to the Bureau of Child Guidance in the city of New York, who has made careful and prolonged study of the subject of crime comics. Considerable documentary evidence was also introduced.

Dr. Mosse testified that crime comics are a new phenomenon, printed and circulated primarily for the juvenile trade and carrying advertisements of guns, hatchets, ropes and other instruments of crime which make special appeal to children. There are 60 million to 70 million comic books printed each month in this country, most of which are devoted to crime, its technique and its horror situations. The publishers have a proclivity for gore and gruesomeness. Various forms of cruelty are depicted in such publications. Children are attracted to books containing criminal acts such as described in § 4c of the ordinance. They make their own purchases from the newsstands, read daily one or two or more such books, having about 36 pages each, trade them with one another and repeat the process many times and for years. These books glamorize crime and depict its details. Coming to the child during his fantasy or daydream phase he identifies himself with the criminal or the victim, relives the episode and fails to distinguish between fact and fiction. Often he tries to re-enact the crime or horror of the story with disastrous consequences to himself or other people. All children like to read crime comics and a great majority are doing so. These books have a detrimental effect upon children who are basically healthy as well as those who are already mentally or emotionally disturbed. While there are some good *comic* books, the witness never saw a good *crime* comic book. Younger children do not actually read them but study the pictures and glean the story of horror from them. They become

picture-gazers. The words often are in the balloons and the format makes it difficult for the children to learn to read, causing "linear dyslexia," difficulty in learning to read a straight line; inability to read is "connected with" juvenile delinquency, though probably not a cause of it. The witness further said that parental supervision is not adequate protection against the harm of crime comics, which are purchased with the child's own money and passed so persistently from small owner to small owner; the mother does not have the capacity to read them in advance. "The more important point is that comic books are a social phenomenon which one parent alone cannot cope with. It is quite out of the question. So you protect your child, your child goes to the other children, goes to other people's houses, the kids trade them. Most of the time the mothers don't even know what their children look at and they cannot be present with the children day in and day out. That is why I think society has to take this in hand to protect children. It is not a question of the family protecting their children alone. * * * This is a totally new social factor. Your family is not the isolated pioneer family any more. Comic books and especially television bring society in your home and into your family whether you want it or not. There is nothing you can do about it. Organized society has to take action for the protection of children. That is one thing that our studies over the many years have shown very clearly."

The county counsel also introduced numerous examples of crime comics; exhibit A consists of 19 such books. From the lurid covers we cite as exemplars these titles: The Crypt Keeper; The Old Witch; The Vault Keeper; Weird Yarns of Unseen Terrors; Servants of the Tomb; Mother Ghoul's Nursery Tales; Bloodthirsty; Shoot to Kill; A Web of Evil; Beast of Crime; Bloodstained Bullets; Justice Traps the Guilty; Body Snatchers; Terrifying Mystery from Weird Worlds; The Forbidden Tomb; The Horrible Entity; Haunted; The Raving Maniac; By the Light of the Moon; Bird of Prey; Death Deals a Hand; Heart of the Corpse; Tomb for a Were-Wolf; Call from the Grave; Crime Never Pays; Horror in the Clock; Grim Revenge; Curse of the Castle; Pay Off.

Opposed to the views of Dr. Mosse is the testimony of Dr. Rocco L. Motto, called as plaintiffs' expert. These two witnesses gave the only oral evidence in the case. Dr. Motto is described in the opening brief as "a psychiatrist who served with the Los Angeles County Juvenile Hall from 1949–1951, for several years thereafter was on the staff of the Marion Davies Clinic and for the last 5 years has been director of the Reiss-Davis Clinic for Child Guidance." His thesis was that there is no scientific evidence that crime comics have operated as incitement to children's crimes, that other factors are always present; juvenile delinquency is an exceedingly complex problem and no single element of causation is identifiable; the crime depicted in a crime comic does not incite to crime except to the extent that it may "trigger" some episode in a disturbed child; exposure of the child to crime should not be forbidden within the limit of his ability to tolerate, for it is part of his educational process. The witness also testified:

> "Q. * * * in your opinion would the complete enforcement of that ordinance, say, by eliminating such comic books from even coming across the borders of Los Angeles County for a period of two or three years have any effect whatsoever upon the juvenile delinquency problem in this County? A. In my opinion I would doubt it seriously. I would doubt that our statistics *in two or three years* after the enforcement of an ordinance like this would show any change at all in our delinquency population." (Emphasis added.)

He further said he had never been the principal investigator in any research that was directed to the effects of mass media

upon children. Also, that the delinquent child reads the greater volume of crime comics, which have a greater influence than television, motion pictures or any other trigger mechanism. Much reading of crime comic books may have some effect upon the disturbed child's willingness or desire to commit crime or to imitate an act of crime read by him. The comic book is accepted by the child as his own and its ads are directed at him. The witness estimated that two million children are in the impressionable stage and identify themselves with the criminal and the victim; they copy details of crime shown in comic books to an extent depending upon the amount of exposure to the same. The picture of a man with a bloody ax, holding up a woman's head by the hair while she drools from the mouth, with her torso shown in the background (found in exhibit A) is designed to have a great deal of impact on a child.

"Q. By Mr. Mix: I show you a reference of a picture of the only comic book in this group, that is Defendants' Exhibit A, which is entitled 'Crimes by Women.' On this front cover it depicts two women fighting. One has torn the other's skirt and one has torn the other one's blouse, so that her brassiere is quite clearly evident, and one says to the other, 'He is mine, I tell you. Keep away from him.' The second says to the first, 'Why, you cheap frill, who helped him pull that bank job? From now on I am the favorite around here.' In the background is a picture of a man. I think perhaps it is obvious he is a criminal. Maybe it isn't to you. He has a holster with a gun in it hanging from his shoulder, leaning against the wall, smoking, blowing smoke in the air, with a smile on his face, saying, 'Tsk, tsk. Now, girls.' Do you think that that sort of drawing, not only the actual drawing itself but the implications from it, would have an impact upon a child, a strong impact? A. It would have an impact and in some children a strong impact." Finally the witness testified: "Q. Now, have you made such an investigation in your work that you know that many comic books are solely devoted to violence, that have maybe * * * 30 pages * * * but they have several crimes per page maybe in 30 pages? A. I do know of such comic books and this is precisely a point I am trying to make, around the phrase 'dosage, proper dosage.' * * *

"The Witness: Because I would object to these—I do object to them, and I want to be on record objecting to them, because of my point of dosage, because of my point of content and the structuring of content. In other words, I am not here to defend those particular kinds of presentation at all. * * *

"Q. What I am trying to find out from you is whether or not this reading of the comic book might be one of that number of things that result in the act. A. I think I have so stated."

Concerning Dr. Motto's theory that normal children are not harmed by addiction to crime comics, Dr. Fredric Werthan says, in "The Curse of the Comic Books" (exhibit M): "Perhaps the most insidious of these arguments, and one deserving to be fought at every step, is the claim that only unstable children who are insecure, or otherwise predestined or preconditioned, are adversely affected by comic books. That gives adults complete leeway to corrupt children wholesale for commercial reasons. Obviously, one cannot make any hard and fast rule according to which children can be divided into *stable* or *unstable*. Every normal child is immature, growing, and to that extent unstable and vulnerable. And even if he does nothing wrong, temptation exposes him to emotional conflict and that coupled with other factors may do him subtle harm, immediately or later on. The first modern psychologist, Saint Augustine, was well aware of this. He pointed out the effect of mass seduction

by public spectacles on an immature mind, especially in the direction of unconscious fascination by sadism and violence." Manifestly, it is not the strong, normal child that most needs the protection of the state; it is the mentally retarded or unstable or the emotionally disturbed one that should be the special concern of public authority.

Appellants introduced into evidence certain children's books of fairy tales, e. g., The Three Bears, The Three Little Pigs, Little Red Riding Hood, The Gingerbread Man; also other stories such as Rin Tin Tin, Bugs Bunny, Roy Rogers and the New Cowboy, Annie Oakley and the Rustlers,—all in an effort to show that there are good crime comics as well as harmful ones,—a consideration which bears upon the matter of classification, later discussed herein.

Senator Kefauver's Interim Report, supra, contains the following passages: "In the years between 1945 and 1954, two striking changes took place in the comic-book industry. The first was the great increase in the number of comic books published and the number of firms engaged in their publication. The second was the increased number of comic books dealing with crime and horror and featuring sexually suggestive and sadistic illustrations. This increase of materials featuring brutality and violence is being offered to any child who has the 10-cent purchase price. That these examples of crime and horror are aimed at children is clearly evident from the advertisements with which each issue is replete" (p. 4); "It has been pointed out that the so-called crime and horror comic books of concern to the subcommittee offer short courses in murder, mayhem, robbery, rape, cannibalism, carnage, necrophilia, sex, sadism, masochism, and virtually every other form of crime, degeneracy, bestiality, and horror. These depraved acts are presented and explained in illustrated detail in an array of comic books being bought and read daily by thousands of children. These books evidence a common penchant for violent death in every form imaginable. Many of the books dwell in detail on various forms of insanity and stress sadistic degeneracy. Others are devoted to cannibalism with monsters in human form feasting on human bodies, usually the bodies of scantily clad women" (p. 7); "The subcommittee believes that this Nation cannot afford the calculated risk involved in the continued mass dissemination of crime and horror comic books to children" (p. 23); "While not attempting to review the several findings included in this report, the subcommittee wishes to reiterate its belief that this country cannot afford the calculated risk involved in feeding its children, through comic books, a concentrated diet of crime, horror, and violence. There was substantial, although not unanimous, agreement among the experts that there may be detrimental and delinquency-producing effects upon both the emotionally disturbed child and the emotionally normal delinquent. Children of either type may gain suggestion, support, and sanction from reading crime and horror comics" (p. 32); "Standards for such products, whether in the form of a code or by the policies of individual producers, should not be aimed to eliminate only that which can be proved beyond doubt to demoralize youth. Rather the aim should be to eliminate all materials that potentially exert detrimental effects" (p. 33); "The interest of our young citizens would not be served by postponing all precautionary measures until the exact kind and degree of influence exerted by comic books upon children's behavior is fully determined through careful research. Sole responsibility for stimulating, formulating and carrying out such research cannot be assumed by parents' or citizens' groups. Rather it must also be assumed by the educational and social welfare agencies and organizations concerned. * * *" (p. 33.)

The California Legislature in 1955 passed Assembly Bill 183,[3] containing this finding: "The Legislature * * * finds that children below the age of 18 years are of a susceptible and impressionable character

3. This Bill was vetoed by the Governor. (7 Stan.Law Rev. 241.)

and are often stimulated by collections of pictures and stories of criminal acts, and do in fact often commit such crimes partly because incited to do so by such publications. * * *" (7 Stan.Law Rev. p. 251.) The National Association of County and Prosecuting Attorneys found that crime comics contribute to juvenile delinquency and violent crimes (7 Stan.Law Rev. p. 250). "One psychiatrist reports that 'researches have proved that there is a significant correlation between crime-comics reading and the more serious forms of juvenile delinquency.' The National Council of Juvenile Court Judges and investigating committees of both the Senate and the New York legislature have made similar findings." 68 Harv.Law Rev. 489.

The trial court held the ordinance to be valid and made factual findings as set forth in the margin.[4]

[4] It seems to be established law that the Supreme Court of the United States when dealing with an alleged infringement upon rights guaranteed by the First Amendment will make an independent appraisal of the facts, untrammeled by the ordinary presumption of validity of legislation (Pennekamp v. State of Florida, 328 U.S. 331, 335, 66 S.Ct. 1029, 90 L.Ed. 1295; In re Porterfield, 28 Cal.2d 91, 112, 168 P.2d 706, 167 A.L.R. 675; City of Corona v. Corona Daily Independent, 115 Cal.App.2d 382, 384, 252 P.2d 56), and unembarrassed by the findings of the lower courts,—subject only to the limitation expressed in Feiner v. People of State of New York, 340 U.S. 315, 316, 71 S.Ct. 303, 304, 95 L.Ed. 267, from which we quote: "In the review of state decisions where First Amendment rights are drawn in question, we of course make an examination of the evidence to ascertain independently whether the right has been violated. Here, the trial judge, who heard the case without a jury, rendered an oral decision at the end of the trial, setting forth his determination of the facts upon which he found the petitioner guilty. His decision indicated generally that he be-

4. "That persons under the age of eighteen years are especially attracted to the reading of comic books in preference to other forms of reading material; that persons under the age of eighteen years are so attracted to reading comic books containing accounts of crime."

"That crime comic books contain accounts of brutal and seriously aggravated crimes. That such accounts include, among others, acts of cannibalism, decapitation of persons, arson committed by children, torture of and acts of mayhem upon persons, and murder for profit and revenge. That such accounts are illustrated in a lurid manner, and in a manner creating great visual impact upon the reader."

"That crime comic books contain episodes of crime in which the criminal does not suffer a penalty for his crimes. That crime comic books contain episodes in which homicide is depicted as an enjoyable emotional experience for the murderer. * * *"

"That persons under the age of eighteen years are in a period of their development during which their character is being formed. That such persons are prone to fantasies and undergo stages of development in which they are unable to differentiate between fact and fantasy. That such persons are affected by stories which they read in crime comic books and imitate the accounts which they read therein. That many persons under the age of eighteen years believe that the characters and events portrayed in such accounts of crime are real persons and actual events."

"That the reading of crime comic books by normal persons under the age of eighteen years is deleterious to the moral character and development of such persons. That there are within the County of Los Angeles many thousands of children who because of their individual emotional development are especially susceptible to injury to their moral character and are especially susceptible to being influenced to commit crimes by and as a result of reading by them of crime comic books."

"That the reading of crime comic books by persons under the age of eighteen years inculcates into the minds of such persons a preference to participate in crime. That persons under the age of eighteen years have been influenced to commit crimes and to attempt to commit crimes as a consequence of their having read accounts of crime in crime comic books."

lieved the state's witnesses, and his summation of the testimony was used by the two New York courts on review in stating the facts. Our appraisal of the facts is, therefore, based upon the uncontroverted facts and, *where controversy exists, upon that testimony which the trial judge did reasonably conclude to be true.*" (Emphasis added.) See, also, Local Union No. 10 United Ass'n of Journeymen, Plumbers and Steamfitters of U. S. and Canada of A. F. of L. v. Graham, 345 U.S. 192, 197, 73 S.Ct. 585, 97 L.Ed. 946; Hoag v. State of New Jersey, 356 U.S. 464, 471, 78 S.Ct. 829, 2 L.Ed.2d 913; Norton Co. v. Dept. of Revenue of State of Ill., 340 U.S. 534, 538, 71 S.Ct. 377, 95 L.Ed. 517; South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 191, 58 S.Ct. 510, 82 L.Ed. 734; Norris v. State of Alabama, 294 U.S. 587, 589–590, 55 S.Ct. 579, 79 L.Ed. 1074. We apprehend that the same rule of review prevails in the state courts of California. See, Lockard v. City of Los Angeles, 33 Cal.2d 453, 461–462, 202 P.2d 38, 7 A.L.R.2d 990; Johnston v. City of Claremont, 49 Cal.2d 826, 839, 323 P.2d 71; Kissinger v. City of Los Angeles, 161 Cal.App.2d 454, 327 P.2d 10; People v. Berve, 51 Cal.2d 286, 332 P.2d 97.

[5] This court has made an independent appraisal of the evidence, oral and written, and has arrived at the same findings as the trial judge, some of which are quoted in footnote 4. They spell the existence of "a clear and present danger" of "substantive evils that [the State] has a right to prevent" (quoting Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470),—the specific danger of permitting youth to be led along paths of crime or other forms of delinquency. That this is an evil which the legislative authority is competent to prevent is clear as a matter of fundamental principle and has been recognized by the United States Supreme Court.

In Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 165, 64 S.Ct. 438, 441, 88 L.Ed. 645, the court, speaking of freedom of religion and its relation to a statute forbidding the selling of newspapers, magazines and periodicals by children in any street or public place, said: "Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. * * * It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." At page 168 of 321 U.S., at page 443 of 64 S.Ct., concerning the "clear and present danger" argument: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection." At page 170 of 321 U.S. at page 444 of 64 S.Ct.: "Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case." Winters v. People of State of New York, supra, 333 U.S. 507, 510, 68 S.Ct. 665, 667: "We recognize the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency." Mr. Justice Frankfurter,

dissenting, 333 U.S. at pages 526–527, 68 S.Ct. at page 675: "No one would deny, I assume, that New York may punish crimes of lust and violence. Presumably also, it may take appropriate measures to lower the crime rate. But he must be a bold man indeed who is confident that he knows what causes crimes. Those whose lives are devoted to an understanding of the problem are certain only that they are uncertain regarding the role of the various alleged 'causes' of crime. * * * Is it to be seriously questioned, however, that the State of New York, or the Congress of the United States, may make incitement to crime itself an offense? He too would indeed be a bold man who denied that incitement may be caused by the written word no less than by the spoken." Competency of the Board of Supervisors to deal with the subject in hand cannot be gainsaid.

Nor can prevailing differences of opinion as to appropriate and effective remedies stay legislative action. "The people have a right of experimentation, of evolution through trial and error." In re Porterfield, supra, 28 Cal.2d 91, 102, 168 P.2d 706, 714, 167 A.L.R. 675. "It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues. 'The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.' * * * Certainly the Due Process Clause does not require the legislature to be in the vanguard of science—especially sciences as young as human ecology and cultural anthropology." Beauharnais v. People of State of Illinios, supra, 343 U.S. 250, 261–262, 72 S.Ct. 725, 733, 96 L.Ed. 919. "We, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional. Judicially we must tolerate what personally we may regard as a legislative mistake." Harisiades v. Shaughnessy, 342 U.S. 580, 590, 72 S.Ct. 512, 519, 96 L.Ed. 586. Mr. Justice Harlan, concurring in Roth v. United States, supra, 354 U.S. 476, 501, 77 S.Ct. 1304, 1317, 1 L.Ed.2d 1498: "We do not decide whether the policy of the State is wise, or whether it is based on assumptions scientifically substantiated. We can inquire only whether the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power. * * * The States' power to make printed words criminal is, of course, confined by the Fourteenth Amendment, but only insofar as such power is inconsistent with our concepts of 'ordered liberty.' * * * The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct. It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. There is a large school of though, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime, or delinquency. Others disagree. Clearly it is not our function to decide this question. That function belongs to the state legislature. Nothing in the Constitution requires Cal-

ifornia to accept as truth the most advanced and sophisticated psychiatric opinion." At page 502, of 354 U.S., at page 1318 of 77 S.Ct.: "Above all stands the realization that we deal here with an area where knowledge is small, data are insufficient, and experts are divided. Since the domain of sexual morality is pre-eminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality. It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to 'deprave or corrupt' a reader." To the same effect see, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 550–551, 69 S.Ct. 1221, 93 L.Ed. 1528; Bess v. Park, 144 Cal.App.2d 798, 802, 301 P.2d 978; Fourcade v. City and County of San Francisco, 196 Cal. 655, 664–665, 238 P. 934; Werner v. Southern Cal. Associated Newspapers, 35 Cal.2d 121, 125, 216 P.2d 825, 13 A.L.R.2d 252.

What then is the relation of the "clear and present danger" doctrine to this case? The rugged words of Bridges v. State of California, 314 U.S. 252, 263, 62 S.Ct. 190, 86 L.Ed. 192, served well in the solution of the problem then under consideration, contempt of court. It is there said that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." But this proved to be an unworkable formula and the erosive processes of time and events worked upon it until the phrase "clear and present danger" is recognized as "not a slogan or a shibboleth to be applied as though it carried its own meaning" (United States v. Dennis, 2 Cir., 183 F.2d 201, 212); nor is it a mathematical formula (American Communications Ass'n, C. I. O. v. Douds, 339 U.S. 382, 394, 70 S.Ct. 674, 94 L.Ed. 925). In the Dennis case, supra, Chief Justice Vinson, speaking for four members of the Supreme Court, said at pages 508 and 510, of 341 U.S. at page 866, of 71 S.Ct.: "[N]either Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case. Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. * * * Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F.2d at [page] 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words." Mr. Justice Frankfurter, concurring: "This conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict." At page 519 of 341 U.S., at page 872 of 71 S.Ct. "The phrase 'clear and present danger', in its origin, 'served to indicate the importance of freedom of speech to a free society but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution.' * * It were far better that the phrase be abandoned than that it be sounded once more to hide from the believers in an absolute right of free speech the plain fact that the interest in speech, profoundly important as it is, is no more conclusive in judicial review than other attributes of democracy * * *." At page 544, of 341 U.S., at page 885 of 71 S.Ct.

Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233, upheld an ordinance declaring door to door solicitation of subscriptions to magazines etc. to be a misdemeanor. The liberties of the First Amendment were declared not to have been violated. At pages 625-626, of 341 U.S., at page 923 of 71 S.Ct., the court said: "There is equal unanimity that opportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose. This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place. Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all." At page 633, of 341 U.S., at page 927 of 71 S.Ct.: "The problem is legislative where there are reasonable bases for legislative action. We hold that this ordinance is not invalid under the Due Process Clause of the Fourteenth Amendment." At page 645, of 341 U.S., at page 934 of 71 S.Ct.: "We think those communities that have found these methods of sale obnoxious may control them by ordinance. It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents. We see no abridgment of the principles of the First Amendment in this ordinance."

Poulos v. State of New Hampshire, 345 U.S. 395, 405, 73 S.Ct. 760, 766, 97 L.Ed. 1105: "It is a non sequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary. It has indicated approval of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion."

Kovacs v. Cooper, 336 U.S. 77, 83, 69 S. Ct. 448, 451, 93 L.Ed. 513: "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people." To the same effect, see Haggerty v. Associated Farmers of Cal., 44 Cal.2d 60, 64-70, 279 P.2d 734.

The evolution of the doctrine under discussion is interestingly traced in "Bowing Out 'Clear and Present Danger'" by Professor Edward S. Corwin, in 27 Notre Dame Lawyer, p. 325.

The vogue of "clear and present danger" reached its zenith in Bridges v. State of California, supra, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, but the pendulum has swung back to the concept originally expressed by Mr. Justice Holmes in the Schenck case, supra, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; the evil need be only a substantive one which the legislative branch has a right to prevent—exemplified by any problem which no longer needs to be pounded out on the anvil of debate. Juvenile delinquency and the need for a remedy lie indisputably in that area.

Appellants' counsel draw a distinction between regulation of the place and manner of speech and the regulation or suppression of its content. We deem this distinction a factual rather than a constitutional one. "At the opposite pole is the belief of many agitators that the First Amendment renders unconstitutional any Act of Congress without exception 'abridging the freedom of speech, or of the press,' that all speech is free, and only action can be restrained and punished. This view is equally untenable." Chafee on Free Speech in the United States, p. 8. Cases such as Beauharnais, supra, 343 U.S. 250, 72 S.Ct. 725, show that the quality of speech may be such as to with-

draw entirely the normal constitutional protection. Prince v. Commonwealth of Massachusetts, supra, 321 U.S. 158, 64 S.Ct. 438, holds that although religious literature may not be suppressed or its distribution substantially curtailed, a law prohibiting its sale or distribution by a child on a public street is unobjectionable. The ordinance under consideration does not prohibit sale or distribution or display of crime comic books so long as they are kept away from children. There is little, if any, difference of substance between the Prince situation and that created by the county ordinance. Both properly protect young people from deleterious influences and there is no substantial constitutional objection to that sort of regulation of speech or press.

What we have here is a situation wherein the effect of an ordinance upon the exercise of freedom of the press is relatively small in contrast with the public interest to be protected, one of great magnitude. Application of the rationale of the cases above quoted solves this case and shows that the clear and present danger concept has no real and substantial application at bar. Certainly that philosophy has not been violated by the ordinance in question.

[6] Appellants' argument that the ordinance is too broad in its sweep because it includes good crime comics as well as bad ones cannot prevail. The ordinance is carefully and narrowly drawn and includes only the depiction of commission or attempted commission of arson, burglary, and other specified crimes; also acts by animals or any nonhuman, part-human or imaginary beings which if performed by a human would constitute one of the enumerated crimes. This latter provision covers personification of animals or mythical characters and the commission by them upon a human being of any of the specific crimes named. It is clear that there are no good crime comics when that term is confined to the ordinance definition. Dr. Mosse testified that there are some good *comic* books, but no good *crime* comic books; also that the fairy tales upon which appellants rely have nothing whatsoever in common with crime comic books.

[7–9] Moreover, it is the law that the legislative authority may strike an evil where it is felt most (Werner v. Southern Cal. Associated Newspapers, supra, 35 Cal. 2d 121, 132–133, 216 P.2d 825); that some one must draw the line between the permitted and the proscribed, and that is the function of the legislative body. The fact that some fairy tales, or Bugs Bunny or Roy Rogers comics, or Disney stories or others thought to be innocuous, may fall within the terms of the ordinance (if they do) does not condemn the law but merely prohibits in the light of modern conditions stories which, considered alone or as ancient and standard pabulum for children, must now take their place as parts of an evil tide and be stemmed with it. The suggested line of innocuous stories is not sacrosanct. Dr. Wertham, in "The Curse of the Comic Books" at page 9: "Even in many 'good' animal comic books the animals glorify violence and delinquency. In a recent Disney comic book, published by Dell, two fires are set, one involving a schoolhouse, and we learn—believe it or not, five times that little Pinocchio suffers from chronic gonorrhea! When the child is a little older he gets the full course, of crime, love, sex, horror, jungle, Superman comic books."

[10] The police power is not static. Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co., 11 Cal.2d 634, 644, 82 P.2d 3, 9, 118 A.L.R. 486: "The police power has not expanded. Its proper exercise has always been and still is confined to regulation in the public welfare, and has always been and still is subject to the standard of reasonableness in its relation to that interest. However, changed social, political and economic conditions have enlarged the field of conduct which may properly be subjected to regulation in order that the general welfare may be adequately pro-

tected. The proper application of the power cannot be measured by past precedents—the test is, of course, present day conditions. * * * 'Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. * * *'"

[11] Counsel also contend that news dealers are precluded from displaying crime comics to adults and therefore the ordinance embraces and proscribes publications which are outside the scope of the evil sought to be corrected. Reliance is placed on Butler v. Michigan, 352 U.S. 380, 77 S. Ct. 524, 1 L.Ed.2d 412, in which the court invalidated a statute forbidding the sale to anyone of magazines tending to incite minors to violent, depraved or immoral acts, manifestly tending to the corruption of the morals of youth. Sale of an obscene book was made to a police officer, conviction was reversed, and the court said at page 383, of 352 U.S., at page 526 of 77 S. Ct.: "Surely, this is to burn the house to roast the pig. * * * We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." That presents no analogy to the facts at bar. The sale or circulation to minors under 18 years is the thing that is prohibited. The phrase "sells or circulates" is defined by the ordinance to include an offer for sale, exhibition, or in any way furnishing or attempting to furnish a crime comic to a minor. Of course this precludes the dealer from keeping crime comics in a rack readily available to minors or so positioned as to be read by them. That is necessary to effect the main purpose of the ordinance and cannot be said to be within the philosophy of the Butler case. Exhibition to adults is not forbidden but it is limited to such place and manner as will keep the crime material away from the eyes of impressionable children.

[12] The fact that the dealer must know what he is selling raises no bar to legislation prohibiting sale or display of obnoxious literature. The ordinance does not expressly or impliedly make knowledge or intention an element of the crime, but there is no constitutional objection to such a statute operating within the area of public welfare which deals with juvenile delinquency. See, Shevlin-Carpenter Co. v. State of Minnesota, 218 U.S. 57, 67, 30 S. Ct. 663, 54 L.Ed. 930; Williams v. State of North Carolina, 325 U.S. 226, 238, 65 S.Ct. 1092, 89 L.Ed. 1577; United States v. Balint, 258 U.S. 250, 252, 42 S.Ct. 301, 66 L. Ed. 604; People v. Darby, 114 Cal.App.2d 412, 427, 250 P.2d 743 (appeal dismissed for want of substantial federal question in 97 L.Ed. 1364).

People v. Daniels, 118 Cal.App.2d 340, 343, 257 P.2d 1038, 1039: "It is the universal rule that it is within the power of the Legislature to declare an act criminal, irrespective of the knowledge of the doer that the facts exist which make the act unlawful. People v. McClennegen, 195 Cal. 445, 468, 234 P. 91; 22 C.J.S. Criminal Law § 30, p. 85; 14 Am.Jur. 768, § 16." To the same effect see, In re Marley, 29 Cal.2d 525, 528, 175 P.2d 832; People v. Stuart, 47 Cal.2d 167, 172, 302 P.2d 5, 55 A.L.R.2d 705; People v. Reznick, 75 Cal.App.2d 832, 838, 171 P.2d 952; Wharton's Criminal Law and Procedure, § 783, p. 624; 14 Cal. Jur.2d § 79, p. 265; 22 C.J.S. Criminal Law § 30, p. 86. The dealer's convenience in remaining ignorant of his violation of the law cannot override the welfare of the community or that segment whose protection the statute is legitimately designed to serve. Cf. Crooks v. Harrelson, 282 U.S. 55, 60, 51 S.Ct. 49, 75 L.Ed. 156; Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 333, 59 S.Ct. 191, 83 L.Ed. 195;

People v. Malley, 49 Cal.App. 597, 603, 194 P. 48; People v. Pay Less Drug Store, 25 Cal.2d 108, 116, 153 P.2d 9.

Unreasonable and arbitrary classification is claimed because of the exemption (§ 3) of accounts of crime which are part of the general dissemination of news or which appear in newspapers of general circulation or delineate actual historical events or occurrences set forth in the sacred scriptures of any religion. The thrust of the argument is directed primarily at the exemption of newspaper comic strips, it having been stipulated that newspapers contain in their comic pages, daily and Sunday, accounts of crime the sale of which would constitute a violation of the ordinance but for the exemption granted by § 3.

[13] The legislature may select one phase of a problem for appropriate action without the necessity of including all others which might be affected in the same field of legislation (First Unitarian Church of Los Angeles v. County of Los Angeles, 48 Cal.2d 419, 433, 311 P.2d 508; Williamson v. Lee Optical of Okl., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563), thus striking "at the evil where it is felt, and [reaching] the class of cases where it most frequently occurs" (Silver v. Silver, 280 U. S. 117, 123–124, 50 S.Ct. 57, 74 L.Ed. 221; Werner v. Southern Cal. Associated Newspapers, supra, 35 Cal.2d 121, 133, 216 P.2d 825). The Williamson case, supra, says at page 489, of 348 U.S., at page 465, of 75 S.Ct.: "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation.] Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [Citation.] The legislature may select one phase of one field and apply a remedy there, neglecting the others. [Citation.] The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

The criteria for determining permissible statutory classification are stated in Lelande v. Lowery, 26 Cal.2d 224, 232, 157 P.2d 639, 645, 175 A.L.R. 1109, wherein the court quotes the United States Supreme Court as follows: " 'The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise, there could be no legislative power to classify. * * * [T]he legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. [Citation.] It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' (Miller v. Wilson (1915), 236 U. S. 373, 382–384, 35 S.Ct. 342, 344, 59 L.Ed. 628, L.R.A.1915F 829, affirming In re Miller (1912), 162 Cal. 687, 124 P. 427; [see, also,] Patsone v. [Commonwealth of] Pennsylvania (1914), 232 U.S. 138, 144, 34 S. Ct. 281, 58 L.Ed. 539, and cases there cited.) When the classification made by the Legislature is questioned, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts is presumed, and one who assails the classification must carry the burden of showing that it is arbitrary. [Citations.]"

Mr. Justice Frankfurter, concurring in Dennis v. United States, supra, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137: "Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment. * * * But in no case has a majority of this Court held that a legislative judgment, even as to freedom of utterance, may be overturned merely because the Court would have made a different choice between the competing interests had the initial legis-

lative judgment been for it to make." 341 U.S. at pages 539–540, 71 S.Ct. at page 883.

Keokee Consol. Coke Co. v. Taylor, 234 U.S. 224, 227, 34 S.Ct. 856, 857, 58 L.Ed. 1288: "But while there are differences of opinion as to the degree and kind of discrimination permitted by the 14th Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear." To same effect, see People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 73, 49 S.Ct. 61, 73 L.Ed. 190; United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 102, 67 S.Ct. 556, 91 L.Ed. 754, 774.

[14] There is ample justification for the exemption of newspaper comic strips in the present instance. "Crime Comics and the Constitution," 7 Stanford Law Review, page 237 says: "Recently, criticism of certain types of comic books has become widespread. It has been directed neither at comic strips in newspapers nor at animal or humor comic books, but at 'crime and horror' comics. It has been said that these constitute one-fourth of all comics." Dr. Mosse testified that newspaper comic strips are mostly written for adults, although they are also read by children; their volume is not so great as that of crime comic books; and "comic strips are very carefully edited by many newspaper editors and you could not possibly print in strips of newspapers what goes completely unaltered in comic books. There are scenes of violence which no newspaper editor would let you portray which can be portrayed in the comic books for children." Apparently quoting from Dr. Wertham's "Seduction of the Innocent" she further said: " 'The easiest way to study abnormal psychology these days is to read the unfunny crime comic books. Don't mistake them for the comic strips your paper prints. Papers wouldn't dream of printing the stuff.' " Also, that there are many more pictures of crime in one comic book than a person would find in any newspaper comic strip; sometimes there are more in one page of a comic book.

> "Q. Now, if we had the type of pictures as appears in Mysterious Adventures showing five corpses operating on an individual, if they had that type— A. She was awake and not anesthetized.
>
> "Q. That's right. A person awake, and five corpses operating on the person. If it appeared in a newspaper would it be disturbing to a child? A. It cannot appear in a newspaper. No newspaper editor would permit it. I have an example. There is a comic strip, Brenda Starr * * * a picture of an operation. She is shown as the cover picture. You see, sometimes they make comic books out of comic strips. I have to specify that. In Brenda Starr they made a comic book and the cover showed a sadistic scene of a woman about to be operated. This picture could never and did never appear in a newspaper comic strip because there are editors who see to it that it doesn't."

In short, the newspaper does not present the problem which requires legislative remedy. That is not the place where the evil is felt substantially, and the legislature need not cover the entire field. Some one must draw the line in every classification and that is the business of the legislative body when definition of crime is involved. Plaintiffs' witness, Dr. Motto, seemed to take a gloomier view of comic strips than did Dr. Mosse, but it is for the legislature, not the witnesses, to decide between different schools of thought. See quotation, supra, from Mr. Justice Harlan's concurring opinion in Roth v. United States, 354 U.S. 476, 501, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

The trial court's findings on this phase of the case are set forth below.[5]

Our Supreme Court, in Werner v. Southern Cal. Associated Newspapers, supra, 35 Cal.2d 121, 216 P.2d 825, 13 A.L.R.2d 252, upheld as reasonable classification an amendment to § 48a of the Civil Code providing that recovery for libel published in a newspaper or slander by radio broadcast be limited to special damages unless a correction be demanded and be not published or broadcast. The claim was that this discriminated without cause against defendants in all other instances of libel or slander. At page 132 of 35 Cal.2d, at page 832 of 216 P.2d the court said: "The Legislature could reasonably conclude that defamation suits against newspapers and radio stations constituted the most conspicuous example of the danger it sought to preclude. It is not prohibited by the equal protection clause from striking the evil where it is felt most."

Appellants rely upon Adams v. Hinkle, 51 Wash.2d 763, 322 P.2d 844, which struck down a comic book statute requiring a previous license for publication (322 P.2d at page 850), thus presenting quite a different constitutional problem from a statute providing for punishment for abuse of speech or press administered after the event. See, Near v. State of Minnesota, 283 U.S. 697, 715, 51 S.Ct. 625, 75 L.Ed. 1357, et seq.; Kingsley Books v. Brown, supra, 354 U.S. 436, 441, 77 S.Ct. 1325, 1 L.Ed.2d 1469; Staub v. City of Baxley, 355 U.S. 313, 322, 78 S.Ct. 277, 2 L.Ed.2d 302. The Adams decision, supra—five to four—rested principally upon the license theory, but it also dealt with other questions such as the exemption from its operation of comic sections of newspapers. The majority opinion held this to be invalid because, so it asserted, the reasonable classification principle has no application to laws dealing with fundamental liberties such as freedom of speech or press as guaranteed by the First Amendment, now absorbed into the Fourteenth (322 P.2d at page 857). West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639, 63 S.Ct. 1178, 87 L.Ed. 1628, is relied on

5. "That accounts of crime which appear in comic book form (as defined in Ordinance No. 6633) are factually distinguished in their effect upon persons under the age of eighteen years, from accounts of crime appearing in the comic section or elsewhere in newspapers of general circulation. That the factual difference between the said two types of accounts include the following:

"A. Many more accounts of crimes appear in comic book form than in newspapers of general circulation.

"B. Many comic books are devoted exclusively to accounts of crime, whereas no newspaper of general circulation is so devoted, nor is the comic section of any newspaper of general circulation so devoted.

"C. Children under the age of eighteen years customarily purchase comic books for their own use, whereas this practice is infrequent relative to the purchase by said persons of newspapers of general circulation.

"D. Accounts of crime which appear in comic book form are frequently sanguinary, lurid and of a seriously aggravated and revolting character, whereas the same is seldom if ever found in newspapers of general circulation.

"E. Parents of persons under the age of eighteen years customarily are aware of the content of newspapers of general circulation available to their children. Said parents are frequently unaware of the content of comic books read by their children.

"F. Comic books are often secreted from adults by persons under eighteen years of age. Persons under eighteen years of age collect comic books, read and re-read them many times, trade them with other such persons, and hoard and collect them. Said persons do not perform the said acts upon newspapers of general circulation nor upon the comic sections thereof.

"G. The massed presentation of comic strips found in the comic book form of publication encourages persons under the age of eighteen years to read comic books in preference to comic strips appearing in newspapers of general circulation.

"H. The massed presentation of comic strips found in the comic book form of publication has a greater impact upon the mind of a person under the age of eighteen years than does the comic strip presentation found in newspapers of general circulation."

and quoted but it actually is not in point, does not discuss the present problem and the language quoted therefrom does not support the majority view. The dissenting justices quoted from Tigner v. State of Texas, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124: "'The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'" 322 P.2d of page 860. They stated that the classification was reasonable, and said further: "It is clear to me that even without the proviso the act does not cover or attempt to regulate comic sections of newspapers for the simple reason that only a page or two—i. e., only a minor portion of newspapers—is devoted to comic strips. To me it seems anomalous that the addition of a gratuitous proviso by the legislature should be responsible for this court holding the act here involved unconstitutional as an infringement of the equal protection clause." 322 P.2d at page 861. "The majority opinion points out 'that newspapers might print or publish anything found in any comic book without being subject to the restrictions imposed.' That is not the question. We are only concerned with *whether the legislature could reasonably conclude that newspapers do not in fact publish the same things that are found in many comic books.*" 322 P.2d at page 862. "To use the language above quoted, it is a matter of common knowledge that newspapers are doing a distinctively different sort of business from that done by dealers in comic books. * * I am unwilling to say that a newspaper is the same thing as a comic book. And I do not think it unreasonable for the legislature to come to this rather obvious conclusion and to find a different set of laws necessary to regulate the comic book business from that necessary to regulate the newspaper business." 322 P.2d at page 863. We deem the views expressed by the minority to be sound and we hold that there is no unlawful classification with respect to newspapers in the ordinance now under consideration.

So far as concerns the exemption of accounts of crime which delineate actual historical events or occurrences found in sacred scripture the same general considerations are applicable as in the case of newspaper comics. Counsel by way of argument set forth numerous instances of carnage or the like found in history or in scripture, and assert that they cannot be reasonably differentiated from the crime comics which gave rise to the argument. This argument is governed by the principles just discussed and cannot be sustained.

[15] Vagueness of definition has not been overlooked as a basis for possible reversal. It is argued that the ordinance definition of the crime requires a dealer or a parent or another to speculate upon whether he is within the ordinance (1) when the former displays crime comics in such manner that a child may approach the rack, pick up the book and examine it, or (2) when the parent or another hands it to a child. We see nothing puzzling or uncertain about this. Also it is argued that fairy tales and folk tales may fall within the definition of crime comic book; that the phrase "account of crime" is subject to debate concerning its scope; that one cannot know when an animal commits a crime on a human being. These synthetic problems are illustrated by situations which, though counsel assert the contrary, are within the doctrine of United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989: "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. [Citations.] And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." Jordan v. De George, 341 U.S. 223, 231,

71 S.Ct. 703, 708, 95 L.Ed. 886: "We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. [Citations.] Impossible standards of specificity are not required. [Citations.] The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." United States v. Petrillo, 332 U.S. 1, 7, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877: "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. * * * The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

We perceive no difficulty in construing or applying the terms of the ordinance to the factual situations suggested by appellants, for the language is plain and is easily understood by the ordinarily intelligent person. It is true, as stated in Chaplinsky v. State of New Hampshire, 315 U.S. 568, 574, 62 S.Ct. 766, 770, 86 L.Ed. 1031, that "[a] statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. Cf. Fox v. Washington, 236 U.S. 273, 277, 35 S.Ct. 383, 384, 59 L.Ed. 573, [575]." We have such a statute at bar.

The trial judge correctly concluded that County Ordinance 6633 is valid.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

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Carmela VALENZUELA, Plaintiff and Respondent,

v.

Alfred VALENZUELA, Defendant and Appellant.

Civ. 9528.

District Court of Appeal, Third District, California.

March 10, 1959.

Proceeding on motion to amend an interlocutory and final decree of divorce by striking therefrom a provision directing husband to pay certain community obligations of the parties. The Superior Court, Sacramento County, James H. Oakley, J., entered an order denying motion and husband appealed. The District Court of Appeal, Warne, J. pro tem., held that where wife's complaint did not allege existence of any community obligations nor ask that husband be ordered to pay any community debts, and case was heard as a default matter, trial court lacked jurisdiction to render a judgment affecting the community obligations, and therefor judgment was void in so far as it directed husband to pay certain community obligations.

Order denying defendant's motion to amend reversed, and trial court ordered to grant the motion.

Peek, J., dissented.

1. Divorce ⇐203

Where wife's divorce complaint did not allege existence of any community obligations nor ask that husband be ordered to pay any community debts, and case was heard as a default matter, trial court lacked jurisdiction to render a judgment affecting the community obligations, and therefore divorce judgment was void in so far as it directed husband to pay certain community obligations. West's Ann.Code Civ. Proc. § 580.

2. Divorce ⇐203

Where wife in her divorce complaint did not pray for alimony, and did not ask

for an order directing husband to pay community debts, and matter was heard as a default, order directing husband to pay certain community debts was void, and such portion of the divorce judgment could not be sustained on theory that it was so germane to the issue of divorce that defendant should have anticipated such an order.

3. Divorce ⇐163, 181

Even though error in awarding relief in a divorce action in excess of that demanded in the complaint was not urged by a timely appeal or motion for relief, defendant could nevertheless attack provisions of the decree at any time if they were void on the face of the record. West's Ann.Code Civ.Proc. § 473.

Leonard P. Burke, Sacramento, for appellant.

Richard A. Case, Sacramento, for respondent.

WARNE, Justice pro tem.

Defendant appeals from an order denying a motion to amend the interlocutory and the final decree of divorce by striking the following order therefrom:

> "It Is Further Ordered, Adjudged and Decreed that the Defendant Alfred Valenzuela pay the community obligations of the parties hereto and he is Ordered to pay the same, namely the sum of $500.00 as and for payment to the Director of Internal Revenue for Income taxes due and payabel [sic] and he is further ordered to pay the sum of $2,400.00, a Community Obligation, to the Merchants Service Bureau of Sacramento or Enriquetta Valenzuela, its assignor."

The appeal comes before this court on the judgment roll only.

On November 14, 1956, plaintiff filed her complaint for divorce requesting support for her minor child. She made no request for alimony. The complaint alleged that the community property consisted of a 1955 Oldsmobile automobile, household furniture, furnishings and appliances, and a television set. She asked that she be awarded her share of the community property and that the defendant be ordered to pay the sum of $50 per month for the support of the minor child of the parties. There is also a prayer "For such other and further relief as * * * seems meet and proper in the premises." The complaint did not allege the existence of any community obligations nor ask that defendant be ordered to pay any community debts. The defendant was personally served with process but failed to appear and answer. His default was entered on December 13, 1956. The trial court by its interlocutory decree awarded all of the community property to the plaintiff and ordered the defendant to pay to the plaintiff the sum of $50 per month for the support of said minor child and further ordered defendant to pay the community obligations hereinabove mentioned. All of the terms of the interloctutory decree were incorporated by reference in the final decree of divorce, which was entered on January 29, 1958. No appeal was taken from either the interlocutory or the final decree, but on March 4, 1958, defendant made a motion to strike from the decree the provision which ordered him to pay the above-mentioned community obligations.

In support of his motion defendant relied on section 580 of the Code of Civil Procedure. It was error for the trial court to order the defendant to pay the community obligations since that relief was not demanded in the complaint for divorce and the case was heard as a default matter. Code Civ.Proc. § 580; Parker v. Parker, 203 Cal. 787, 791–792, 266 P. 283; Eddy v. Eddy, 64 Cal.App.2d 672, 673–674, 149 P.2d 187; Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64.

[1] As stated in Burtnett v. King, 33 Cal.2d 805, 806–807, 205 P.2d 657, 658, 12 A.L.R.2d 333: "The statutes are very specific in their requirements for a judgment following a default. 'The relief grant-

ed to the plaintiff, if there be no answer, *cannot exceed* that which he shall have *demanded* in his complaint; but *in any other case,* the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.' [Emphasis added.] Code Civ.Proc., § 580. In cases where no answer has been filed and a default has been entered, but the clerk may not enter a default judgment, the plaintiff may apply to the court 'for the relief *demanded* in the complaint' and after evidence is heard, the court may render a default judgment 'for such sum *(not exceeding the amount stated in the complaint),* as appears by such evidence to be just.' [Emphasis added.] Code Civ.Proc., sec. 585(2). Manifestly 'demanded' means claimed, asserted a right to or prayed for. * * *" There was no demand in the instant case that defendant pay the community obligations; hence the relief accorded not only exceeded the demand it adjudicated a matter not even asserted, claimed or prayed for. Under such circumstances the trial court wholly lacked jurisdiction to render a judgment affecting the community obligations. Having no jurisdiction, the judgment was void on that issue.

[2] There is, however, an exception to the above rule. The exception being that if the relief in excess of prayer is alimony the judgment although erroneous, is not void. Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246; Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868; Karlslyst v. Frazier, 213 Cal. 377, 2 P.2d 362; Parker v. Parker, 203 Cal. 787, 266 P. 283; Cohen v. Cohen, 150 Cal. 99, 88 P. 267. As stated in Craft v. Craft, 49 Cal.2d 189, 316 P.2d 345, 347: "* * * These decisions were explained upon the theory that the question of support money, unlike that of the division of community property, is so germane to the issue of divorce that a defendant must anticipate an award of alimony regardless of whether there is a prayer for such relief." It is obvious that a different situation is presented where, as here, there is not only a failure to pray for alimony, but the order has nothing to do with support money. The trial court awarded the support she asked for the minor child. It is our opinion that the order to pay community debts was not so germane to the issue of divorce that it should have been anticipated by the defendant.

[3] Respondent contends that since there was no allegation in the affidavit filed in support of defendant's motion to amend that the judgment was taken by mistake, inadvertence, surprise or excusable neglect it is not a proper matter under section 473 of the Code of Civil Procedure. She also argues that the appeal is "void" as not being taken within sixty days after the entry of the interlocutory decree. Further, that the motion was not made within the statutory period advised by section 473 of the Code of Civil Procedure. There is no merit in either contention. The motion was not made on the ground of mistake, inadvertence, surprise or excusable neglect, but was made pursuant to that portion of the last paragraph of 473, which provides: "The court may, * * * *on motion of either party after notice to the other party, set aside any void judgment or order.*" (Emphasis added.) Although, as said in Craft v. Craft, supra, "The error was not urged by a timely appeal or motion for relief under section 473 of the Code of Civil Procedure, but defendant may nevertheless attack the provisions of the interlocutory decree at any time if they are void on the face of the record."

The order denying defendant's motion to amend the judgment by striking therefrom the portion hereinabove mentioned is reversed, and the trial court is ordered to grant said motion.

SCHOTTKY, J., concurs.

PEEK, Acting Presiding Justice.

I dissent. The apparent premise of the majority opinion is that since "there was no demand in the instant case that defendant pay the community obligations; hence the relief accorded not only exceeded the

demand it adjudicated a matter not even asserted, claimed or prayed for," and that the trial court "wholly lacked jurisdiction to render a judgment affecting the community obligations."

This is not a case where a defaulting defendant who, without notice that the community property of the parties will be adjudicated, is therefore taken by surprise by the order of the court as was the situation presented in the Burtnett case, the one primarily relied upon in the majority opinion.

Here the plaintiff itemized with particularity the nature and extent of the community property and prayed that she be awarded her share. Factually the present case appears to me to be much more similar to that of Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246. Since the appeal is on the judgment roll alone and all intendments are in favor of the verity of the judgment, it may well have been that here, as in the Bowman case, there was testimony by plaintiff that if the husband were ordered to pay the debts she would waive alimony since such an award would give her the unobstructed use of the property and thus enable her to maintain a home for herself and the minor child of the parties. The award would thereby take on the nature of alimony and would be within the jurisdiction of the court to make under the decision in the Burtnett case. It also must be noted that the order adds nothing to what the defendant was already obligated to pay and hence he can show no damage resulting therefrom.

In the early case of Frankel v. Boyd, 106 Cal. 608, 614, 39 P. 939, it was held that the statutory authority given a court to award community property must be construed as meaning the residue of such property after the payment of the existing debts of the husband contracted upon the faith of such property. If, as the court therein concluded, the community property to be distributed must be considered as the residue which remains after the discharge of the community debts, how then can it be said that the disposition of the community debts as ordered by the trial court in this case was something wholly outside of the issues and without the jurisdiction of the court? See also Hill v. Hill, 150 Cal.App.2d 34, 309 P.2d 44; McKannay v. McKannay, 68 Cal.App. 701, 230 P. 214; Farmers' Exch. Nat. Bank v. Drew, 48 Cal.App. 442, 192 P. 105.

I would affirm the judgment.



168 Cal.App.2d 406

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Willie James HOPPER, Defendant and Appellant.

Cr. 1255.

District Court of Appeal, Fourth District, California.

March 5, 1959.

Prosecution for manslaughter based on unlawful killing of a human being in the driving of a vehicle with gross negligence. The Superior Court, Kern County, R. B. Lambert, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Shepard, J., held that evidence, including testimony that defendant was wilfully driving at a dangerously high rate of speed, and struck the rear of decedent's slowly moving automobile, and that defendant was intoxicated, sustained conviction.

Judgment affirmed.

1. Criminal Law ⇐260(11)

Where a cause reaches the District Court of Appeal on sole ground of insufficiency of the evidence to support findings of the trial court, District Court of Appeal may not reweigh the evidence or resolve conflicts therein in favor of the defendant,

but the credibility of the witnesses and the weight to be given their testimony are committed exclusively to the trier of fact.

2. Criminal Law ⇐446

A certificate of death is prima facie evidence of the facts therein stated. West's Ann.Health & Safety Code, § 10551.

3. Criminal Law ⇐317

While a defendant's failure to testify will not supply a complete hiatus in the necessary elements of the prosecution's proof, nevertheless a defendant's failure to take the stand to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.

4. Automobiles ⇐355(13)

In prosecution for manslaughter based on unlawful killing of a human being in the driving of a vehicle with gross negligence, evidence, including testimony that defendant was wilfully driving at a dangerously high rate of speed, and struck the rear of decedent's slowly moving automobile, and that defendant was intoxicated, sustained conviction. West's Ann.Pen.Code, § 192, subd. 3(a).

Gerald J. Levie, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

SHEPARD, Justice.

Defendant was charged with the crime of manslaughter under Penal Code, § 192, subd. 3(a) in that on or about 15 May 1958 he did unlawfully kill one J. A. Bellatti, a human being, in the driving of a vehicle with gross negligence. He was tried before the court without a jury. The court found him guilty as charged, and granted probation for three years on condition that he spend six months in the custody of the sheriff as a preliminary condition thereof. Defendant appeals.

By stipulation of the parties the trial was had on the record of the evidence adduced at the preliminary examination. Defendant did not testify in his own behalf.

Defendant in his brief to this court makes only two points: 1. That the evidence was insufficient as a matter of law to sustain the finding of the trial court for the reason that no corpus delicti was proven in that the death of the decedent was not the proximate result of appellant's driving. 2. That the evidence was insufficient as a matter of law to sustain the finding of the trial court in that the people failed to prove the death of decedent was the result of appellant's driving with gross negligence.

[1] When a cause reaches this court on appeal on the sole ground of insufficiency of the evidence to support the findings of the trial court "we may not reweigh the evidence or resolve conflicts therein in favor of the defendant. The credibility of the witnesses and the weight to be given their testimony are committed exclusively to the trier of fact." People v. Flummerfelt, 153 Cal.App.2d 104, 106(2), 313 P.2d 912, 913. "The right to draw proper inferences from the evidence is a function of the jury; and as long as its conclusions do not do violence to reason, an appellate court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. Circumstantial evidence may be as convincing in its force and as conclusive as the testimony of witnesses to an overt act." People v. Perkins, 8 Cal. 2d 502, 511, 66 P.2d 631, 635. " 'We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' " People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780. "Proof of the corpus delicti in a murder case 'consists of two elements, the death of the alleged victim[s] and the exist-

ence of some criminal agency as the cause, either or both of which may be proved circumstantially or inferentially.'" People v. Williams, 151 Cal.App.2d 173, 177(5), 311 P.2d 117, 118.

Viewing the duty of this court in the light of these rules we find the evidence is substantially as follows: A California patrol officer proceeding in a northerly direction on Highway 6 near Rosamond in Kern County, met the defendant who was traveling south "in excess of ninety miles per hour" in a white Buick automobile. This was a "mile or so" from the place the accident occurred. The officer immediately turned his car around and pursued the defendant at about 110 miles per hour, proceeding around a long sweeping curve. The curve and a slight grade obscured defendant's car momentarily. While in the curve the officer saw a dust cloud come up about three-fourths of a mile ahead. The officer arrived about 60 seconds after seeing the dust cloud come up, and determined the point of impact with deceased's car to be coincidental with the dust cloud. About one to five minutes before meeting defendant's car the officer had met deceased's car bound south, following a road grader at about 25 miles per hour. At the point of impact the defendant was found still behind the wheel of his car. Deceased's car was overturned near the point of impact with deceased pinned underneath it. Deceased was taken to the Mojave Medical Center Hospital and died there about two and a half days after the accident.

[2] Defendant's car at the time the officer arrived was at rest west of the highway about 15 feet from the vehicle of the deceased, which was also west of the highway. The defendant's car was white. The deceased's car was orange color. The damaged portion of the front of defendant's car showed orange paint smears. The left rear of deceased's vehicle had been struck and at that point showed white paint transfers. The officer noticed the odor of alcohol on defendant's breath. The parties stipulated that the doctor who had taken blood tests from defendant shortly after the accident would, if called, testify that an analysis of appellant's blood showed 232 milligram per cent alcohol concentration and that a person with such concentration would be under the influence of intoxicants. The officer's official written report was placed in evidence at defendant's own request, and is therefore in evidence in its entirety. It shows a chart of the tire marks made by both vehicles, clearly indicating that defendant's car, while traveling in a straight line, struck the rear of deceased's car. Defendant is therein quoted as saying that he "had been drinking beer last night and this morning. Did not know how much. Could not remember anything about accident." Other passengers were quoted in the report as placing the defendant as the driver of the car. Said report shows that the officer took the statement of the deceased while in the Mojave Medical Center Hospital the day before deceased's death and that deceased then stated "I was southbound about 20 miles per hour following the grader. I did not have any idea anything was wrong until I was struck from rear". None of the witnesses reported seeing any other cars that might possibly have been involved in any way in the accident. The certificate of death, which was also placed in evidence, recites the cause of the deceased's death as "Extensive fractures and hemorrhages with prolonged shock, from car accident." The certificate of death is prima facie evidence of the facts therein stated (Health & Safety Code, § 10551; People v. Crozier, 119 Cal.App.2d 204, 208 (3), 258 P.2d 1029; Bryson v. Manhart, 11 Cal.App.2d 691, 696(2), 54 P.2d 778.

[3] While the defendant's failure to testify will not supply a complete hiatus in the necessary elements of the prosecution's proof nevertheless a defendant's failure to take the stand "to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfa-

vorable to the defendant are the more probable." People v. Adamson, 27 Cal.2d 478, 489, 165 P.2d 3, 9.

[4] From the foregoing facts this court is of the opinion that the trial court was amply justified in concluding that the defendant was wilfully driving at a dangerously high rate of speed; that he approached the deceased from the rear; that he was intoxicated; that the accident was the result of gross negligence; and that the circumstances are not only consistent with the hypothesis of guilt but are inconsistent with any other rational hypothesis.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.



168 Cal.App.2d 360

John CRESPO, Plaintiff and Respondent,

v.

Wallace H. COOK et al., Defendants.

Kaiser Foundation Hospital, a corporation, Defendant and Appellant.

Civ. 18013.

District Court of Appeal, First District, Division 2, California.

March 5, 1959.

Malpractice action. The Superior Court, Alameda County, Chris B. Fox, J., after a verdict for defendant, granted plaintiff's motion for a new trial on grounds of irregularity in the proceedings of the jury and misconduct of the jury, and corporate defendant appealed from such order. The District Court of Appeal, Draper, J., held that where no affidavit was filed by plaintiff in the trial court to the effect that prior to rendition of the verdict he did not know of facts constituting claimed misconduct by a juror in allegedly making a telephone call to a doctor and in asking him a hypothetical question, trial court did not have authority to grant a new trial upon ground of misconduct of the jury and District Court of Appeal, 17 months after expiration of time to file such affidavits, would not act upon proof in the form of affidavits by plaintiff that he did not have knowledge of the alleged concealment or misconduct before return of the verdict but would deny motion to introduce such evidence in the District Court of Appeal.

Order reversed.

1. New Trial ⇐143(2, 5)

Generally, affidavits of jurors cannot be used to impeach their verdict, and the only exception to such rule created by statute is that assent to a verdict by a resort to the determination of chance may be proven by jurors' affidavits, and a judicial exception to such rule is that such affidavits may be used to set aside a verdict where the bias or disqualification of a juror was concealed by false answers on voir dire examination. West's Ann.Code Civ.Proc. § 657, subd. 2.

2. New Trial ⇐143(2)

Although occurrences during the trial and deliberation of a jury may tend to prove existence of prejudice, bias essential to permit proof by a juror's affidavit must exist at time of voir dire, and must have been concealed on that examination.

3. New Trial ⇐157

A party moving for new trial upon ground of misconduct of a juror must show affirmatively that neither he nor his counsel knew of the facts constituting the claimed misconduct before rendition of the verdict.

4. Appeal and Error ⇐891
New Trial ⇐140(1)

Where no affidavit was filed in trial court by plaintiff to the effect that prior to rendition of the verdict he did not know of facts constituting claimed misconduct by a juror in allegedly making a telephone call to a doctor and in asking him a hypothetical question, trial court did not have authority to grant a new trial upon ground of misconduct of the jury, and District Court of Appeal, 17 months after expira-

tion of time to file such affidavits, would not act upon proof in the form of affidavits by plaintiff that he did not have knowledge of the alleged concealment or misconduct before return of the verdict but would deny motion to introduce such evidence in the District Court of Appeal. West's Ann.Code Civ.Proc. §§ 658, 659a, 956a.

5. New Trial ⇐153

Affidavits by a party seeking a new trial on ground of misconduct of the jury are not to be considered where they are filed in the trial court after time limited by statute. West's Ann.Code Civ.Proc. §§ 658, 659a.

Lamb & Hoge, San Francisco, for appellant.

Fitz-Gerald Ames, Sr., San Francisco, for respondent.

DRAPER, Justice.

Jury verdict in this malpractice action was for defendant. Plaintiff's motion for new trial was granted solely on the grounds of irregularity in the proceedings of the jury and misconduct of the jury. Code Civ.Proc. § 657, subds. 1 and 2. Defendant appeals from this order.

The claim of misconduct and irregularity is based wholly upon the actions of juror Myra Lewis. On voir dire, she testified that she had been a registered nurse most of her life, but that for the "last year or two" she had been a building manager. She was not asked what type of building she managed. She was asked in some detail whether her acquaintance with doctors, and the fact that she had worked with them, would give rise to any bias or prejudice in their favor, and answered that it would not.

Plaintiff's motion for new trial was supported by three affidavits. Attorney Madden deposed that he appeared at the request of plaintiff's attorney "to take in the verdict" and that "just before the jury came in" defendant's attorney told him that juror Lewis was in fact the manager of a medical office building. The affidavit of plaintiff's attorney Ames states that, upon receiving this report from Madden, he investigated. He found that Miss Lewis is manager of a building devoted to medical offices. It is owned by 5 doctors, and has 13 doctor tenants. One of defendant's two medical witnesses "is a friend of" one doctor owner and one doctor tenant of this building "through his status as an alumnus" of the same medical school which owner and tenant attended. Both of defendant's medical experts are "acquainted with and friends of" all the tenants of this building "by virtue of their medical staff membership" at Peralta Hospital.

The jury retired at 11:30 a. m. and returned its verdict at midnight. The affidavit of the foreman of the jury, Paul A. Leininger, states that for 9 of its 15 ballots, the jury stood 8 to 4 for plaintiff, for 3 ballots was 6 to 6, and finally reached a defense verdict by a 9 to 3 vote. The only allegation referring to Miss Lewis was the following:

> "That one of the trial jurors, Miss Myra E. Lewis, Juror No. 8, revealed to the other jurors the fact that she had called a doctor friend of hers and asked him a hypothetical question involving a hypothetical doctor and a hypothetical set of facts and that she was informed that the doctor cited in the hypothetical question would not be liable; said Juror Myra E. Lewis was a very domineering factor throughout the discussions in the jury room from almost the very inception of argument to the time of the final verdict; that I was one of the three jurors who voted against the verdict that was rendered in favor of the defendant."

[1, 2] For all its obvious weaknesses, it is apparent that the affidavit of Leininger is essential to show misconduct of the jury or irregularity in its proceedings. But the general rule is that the affidavits of jurors cannot be used to impeach their verdict. Kollert v. Cundiff, 50 Cal.2d 768, 772, 329 P.2d 897. The only exception created by statute provides that assent to a verdict "by a resort to the determination of chance" may be proven by jurors' affidavits. Code

Civ.Proc. § 657, subd. 2. Judicial decisions recognize another exception, that such affidavits may be used to set aside a verdict where the bias or disqualification of a juror was concealed by false answers on voir dire examination. People v. Castaldia, 51 Cal. 2d 569, 335 P.2d 104; Kollert v. Cundiff, supra, 50 Cal.2d at page 773, 329 P.2d 897. Although occurrences during the trial and the deliberation of the jury may tend to prove the existence of prejudice (Estate of Mesner, 77 Cal.App.2d 667, 676, 176 P.2d 70), the bias essential to permit proof by a juror's affidavit must exist at time of voir dire, and must have been concealed on that examination (Pollind v. Polich, 78 Cal. App.2d 87, 92, 177 P.2d 63; Williams v. Bridges, 140 Cal.App. 537, 35 P.2d 407). The only evidence that evidence was taken out of court is the affidavit of foreman Leininger, and that affidavit can be received only if it shows such bias and concealment.

Here the showing of bias or its concealment is at best tenuous. Miss Lewis fully revealed her wide acquaintance with doctors. She was not asked about the type of building she managed. No relationship of any owner or tenant of that building to a party is shown, but at most a friendly acquaintance of owners and tenants with experts called by the defense. As to actual bias, there is no showing that her claimed telephone call to "a doctor" was designed to elicit an answer favoring one party, nor that the "hypothetical case" stated related to the facts of the case at bar. There is no showing that Miss Lewis was one of the 9 jurors who voted for a defense verdict. In view of this weak showing, we might incline to reverse the order despite the broad discretion granted to the trial court in determining the facts on such a motion. Abercrombie v. Thomsen, 59 Cal.App.2d 331, 335–337, 138 P.2d 701. However, that issue is not determinative, since the order granting the new trial lacks the required support in another particular.

[3] The rule is clear that a party moving for new trial upon the ground here urged must show affirmatively that neither he nor his counsel knew of the facts constituting the claimed misconduct before rendition of the verdict. Forman v. Alexander's Markets, 138 Cal.App.2d 671, 674–675, 292 P.2d 257; Sherwin v. Southern Pac. Co., 168 Cal. 722, 726, 145 P. 92. Here no affidavit whatever was filed by plaintiff in the trial court. The affidavit of plaintiff's attorney is somewhat weakened by the affidavit of Attorney Madden, who was associated of record with plaintiff's counsel after the jury's deliberation began. His affidavit shows that defense counsel told him of Miss Lewis' employment before the jury returned its verdict.

[4, 5] Plaintiff, however, seeks to remedy this defect by application to this court to take evidence (Code Civ.Proc. § 956a) in the form of affidavits by plaintiff and his attorney that neither had any knowledge of the alleged concealment or misconduct before return of the verdict. This novel effort must fail. Motions for new trial upon the grounds here urged must be made on affidavits. Code Civ.Proc. § 658. The code specifies the time within which such affidavits must be filed, and specifically limits extension of such time to 20 days. Code Civ.Proc. § 659a. Affidavits filed in the trial court after the limited time are not to be considered. Sitkei v. Frimel, 85 Cal.App. 2d 335, 338–339, 192 P.2d 820; Lewith v. Rehmke, 10 Cal.App.2d 97, 105, 51 P.2d 476; Terry v. Lesem, 89 Cal.App. 682, 685–686, 265 P. 523; Morris v. Purity Sausage Co., 1 Cal.App.2d 120, 36 P.2d 126. Whatever might be our authority to consider such affidavits filed in this court within the time prescribed by the code, we clearly cannot act upon proofs made 17 months after expiration of the time to file such affidavits.

Motion for leave to introduce evidence in this court denied. Order reversed.

DOOLING, J., concurs.

KAUFMAN, Presiding Justice.

I concur.

It is my view that the record does not disclose irregularities in the proceedings of the jury or any misconduct of the jury.

A motion for new trial was granted on these two grounds. The trial court in granting this motion was guilty of an abuse of discretion, for there is no legal authority for the granting of the motion on these grounds in the face of the record before us. George v. City of Los Angeles, 51 Cal.App. 2d 311, 124 P.2d 872; Kollert v. Cundiff, 50 Cal.2d 768, 329 P.2d 897.

Here, the record discloses that no false answers were given on voir dire. Likewise, the record does not disclose that the verdict was arrived at by chance. Affidavits of jurors cannot be used to impeach their verdict. The only statutory exception to this rule is where the verdict was arrived at by resort to the determination of chance. Judicial decisions recognize one other exception, to wit, that such affidavits may be used to set aside a verdict where the bias or disqualification of a juror was concealed by false answers on voir dire examination. This case comes within neither of these exceptions.



168 Cal.App.2d 537

COUNTY OF LOS ANGELES, Plaintiff and Respondent,

v.

George KASPARIAN, Defendant and Appellant.

Civ. 23315.

District Court of Appeal, Second District, Division 3, California.

March 9, 1959.

Proceeding by County of Los Angeles to recover from defendant aid paid by county to defendant's father and mother under Old Age Security Law. From judgment of the Superior Court of Los Angeles County, Burnett Wolfson, J., fixing defendant's liability, defendant appealed. The District Court of Appeal, Vallée, J., held that in determining financial responsibility of defendant for the support of his parents, amount paid by defendant, a sole proprietor, to former partners on purchase price of their interests in business was deductible from his gross income, and that statute does not authorize court to fix amount responsible relative shall pay in the future but merely authorizes court to order relative to pay any sum which may become due in future for which relative may be liable.

Reversed and remanded.

1. Social Security and Public Welfare ⇐50

Statutes respecting determination by board of supervisors of ability of responsible relatives to contribute to support of applicant for old age assistance, provide measures of extent of responsible relative's liability and the superior court is authorized to determine whether the party was pecuniarily able to contribute to support of his parents. West's Ann.Welfare & Inst. Code, § 2000 et seq.

2. Social Security and Public Welfare ⇐48

Statute respecting liability of responsible relative to contribute to support of old age assistance applicant is for guidance of board of supervisors in fixing liability of responsible relatives and does not affix a liability for any amount named therein without regard to his ability to pay which is a question of fact. West's Ann.Welfare & Inst.Code, §§ 2140, 2181, 2224.

3. Social Security and Public Welfare ⇐50

In proceeding by county to recover aid paid by county to defendant's father and mother under Old Age Security Law, amount paid by defendant, a sole proprietor, to his former partners on the purchase price of their interest in business was deductible from defendant's gross income in calculating amount he was able to contribute, but amount paid for increased inventory and the amount paid for new equipment constituted increases in capital which were not deductible. West's Ann.Welfare & Inst. Code, § 2181.

4. Constitutional Law ⇐208(I)
Social Security and Public Welfare ⇐25

Provision of statute respecting determination of ability of responsible relative to pay to county furnishing old age assistance which limits deductions of income taxes to 20% is not unconstitutional since there was a reasonable basis for the classification and all persons within the class were treated equally. West's Ann.Welfare & Inst. Code, § 2181.

5. Social Security and Public Welfare ⇐50

Under proceeding for determination as to whether responsible relative was pecuniarily able to contribute to support of persons for whom old age assistance was granted by county, court cannot fix the amount relative should pay in the future since it is authorized merely to order relative to pay any sum which may become due in the future for which relative may be liable, and the sums for which relative may be liable may vary from time to time. West's Ann.Welfare & Inst.Code, § 2224.

6. Social Security and Public Welfare ⇐50

In proceeding by county to recover aid paid to defendant's father and mother under Old Age Security Law, order of trial court that defendant was to pay so much money per month, continuing for such time as old age aid was extended to his father and mother, until further order of the court, was invalid since court could not, by statute, fix amount defendant should pay in future. West's Ann.Welfare & Inst.Code, §§ 2000 et seq., 2224.

7. Social Security and Public Welfare ⇐48

County board of supervisors may change amount of old age aid granted from time to time and may re-establish the amount responsible relative has pecuniary ability to pay. West's Ann.Welfare & Inst. Code, §§ 2160.6, 2184, 2220, 2222, 2224.1.

Fadem & Memel and Jerrold A. Fadem, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Alister McAlister, Deputy County Counsel, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from an adverse judgment in an action to recover aid paid by the County of Los Angeles to his father and mother under the Old Age Security Law. Welf. & Inst.Code, § 2000 et seq.

Prior to June 1, 1956, the board of supervisors of the county granted the applications of Bedros Kasparian and Mary Kasparian for aid to the aged and fixed the amount to be paid to them. Beginning June 1, 1956, to and including March 31, 1957, the county paid Bedros and Mary, respectively, $85 a month for four months and $89 a month for six months, a total to both of $1,748, pursuant to the grants. On May 22, 1956, the board established $150 a month as the pecuniary ability of defendant, an adult son of Bedros and Mary, to contribute to their support; and on October 2, 1956, established $155 a month as his pecuniary ability. The county demanded of defendant that he pay it $1,530, the sum of the established pecuniary ability from June 1, 1956, through March 1957. Defendant refused to pay.

The prayer of the complaint was that the county recover the $1,530 and that defendant be ordered to pay the county $155 on the first day of each month as reimbursement to it for old-age aid extended to Bedros and Mary, such payments to continue until further order of the court. In his answer defendant denied that his income was sufficient to pay the amounts established by the board.

Findings were waived. Judgment was that the county recover $2,610 from defendant, representing reimbursement for the amounts granted from June 1956 through December 1957, and that defendant pay the county $155 a month from January 1, 1958, until further order of the court.

The facts with respect to defendant's ability to pay were stipulated. Defendant is married and has three minor children. His parents live with him and his family. Defendant's income is derived from a sole proprietorship business. He operates a 5-man custom furniture manufacturing shop. During 1956 the business produced a net

income of $17,742.66. Defendant had previously been in partnership with two other persons. He had purchased their interests and was paying for them in installments. In 1956 he paid these items: 1) to his former partners, $3,333.36 on the purchase price of their interests; 2) federal and state income taxes, $5,558.76; 3) increased inventory for the business, $5,238.40; 4) new equipment for the business, $1,874.87. For the taxable year 1956 defendant's federal income tax liability was $3,274 and his state tax liability was $138. He paid a balance of $2,146.76 on 1955 federal income taxes. During the period from June 1, 1956, to June 1, 1957, he drew $125 a week from the business and from June 1, 1957, he drew $135 a week. Since April 1, 1957, defendant has contributed $35 a month to his parents' support.

In determining the figure of $155 a month as the amount defendant was pecuniarily able to contribute from June 1, 1956, through December 1957, the court disregarded the amounts he expended on the purchase of his former partners' interests, for increased inventory, and for new equipment. Defendant contends these amounts should have been deducted in determining his financial responsibility for the support of his parents in 1956 and 1957. The court apparently allowed a deduction of 20 per cent on account of income taxes paid.

[1,2] The Welfare and Institutions Code, to which all references apply unless otherwise indicated, is the measure of the extent of a responsible relative's liability to the county. County of Contra Costa v. Lasky, 43 Cal.2d 506, 509, 275 P.2d 452. The superior court is authorized to determine whether defendant was pecuniarily able to contribute to the support of his parents. County of Los Angeles v. Hurlbut, 44 Cal.App.2d 88, 106, 111 P.2d 963.

Section 2181 provides:

"The board of supervisors shall determine the ability of responsible relatives to contribute to the support of applicant and designate the amount of aid, if any, to be granted. The maximum degree of liability of the responsible relative shall be determined by 'Relatives' Contribution Scale.' In determining ability to contribute, the financial circumstances of responsible relatives shall be given due consideration and, in unusual cases, contributions at less than the amount fixed by 'Relatives' Contributions Scale' may be made as the board of supervisors may deem justifiable.

"For purposes of this chapter, income of a responsible relative is defined as the sum of the income constituting the separate property of the responsible relative, the income (excluding earnings) which is community property subject to the direction and control of the responsible relative, and the earnings of the responsible relative but not of his or her spouse.

"In computing net income, a flat 20 percent allowance shall be permitted in lieu of a reduction for the actual amount of personal income taxes * *.

"A responsible relative who is self-employed shall also be allowed to deduct the expenses necessary for obtaining the income."

The scale is set out in the section. The "Relatives' Contribution Scale" set up by section 2181 is for the guidance of the board of supervisors in fixing the liability of responsible relatives. It does not fix a liability on a responsible relative for any amount named therein without regard to his ability to pay. The question of ability to pay is one of fact. County of San Bernardino v. McCall, 56 Cal.App.2d 99, 102, 132 P.2d 65.

Section 2140 provides that the State Board of Social Welfare shall have the power to "prescribe, by regulation, the form of application, the manner and form of all reports and such additional rules and regulations as are reasonably necessary for carrying out the provisions of this chapter, and not inconsistent therewith." Section

2224 states, "A form shall be sent to the relative requiring the information essential to the determination of the relative's liability to support under said scale." Pursuant to these provisions, the Board of Social Welfare prescribed the form and content of a Statement of Responsible Relative which, under the heading "Definitions," states "the expenses necessary for obtaining the income" (section 2181) a responsible relative who is self employed is allowed to deduct in the determination of his net income. It says:

"Expenses of Income From Self-Employment and Other Sources * * Allowable expenses to be recorded * * * are:

"1. Principal, interest, taxes, insurance, repairs, etc., in connection with income from any real or personal property.

"2. Expenses necessary to the operation of a farm or business or conduct of a trade or profession, such as interest and principal payments, depreciation, taxes, salaries and wages, cost of merchandise sold, rent, repairs, incidental supplies, and all other expenses, including travel, necessary to operate and maintain an enterprise and preserve the capital investment. Obligations incurred for the business or farm operation which are due but unpaid are recognized when determining net income. Do not include living expenses, personal social security taxes, other personal insurance or retirement contributions (voluntary or involuntary), personal income taxes, stock or bond deductions of any kind. * * *"

The "net income" of a responsible relative, as defined by the statute and the rules of the Board of Social Welfare, is the measure of defendant's pecuniary ability. The rules prescribe the formula whereby to compute the amount of the income of a self-employed responsible relative in determining how much he shall contribute to the county. Pertinent here is that in making the calculation there are to be deducted from gross income "Principal"; "interest"; "interest and principal payments"; "cost of merchandise sold"; "all other expenses * * * necessary to operate and maintain an enterprise and preserve the capital investment."

[3] The item of $3,333.36 paid by defendant in 1956 to his former partners on the purchase price of their interests in the business clearly comes within "Principal" and "interest and principal payments," and is deductible from defendant's gross income in calculating the amount he is able to contribute to the county. See County of San Bernardino v. McCall, 56 Cal.App. 2d 99, 132 P.2d 65, in which payments on a mortgage on the relative's home and on his personal note were allowed as deductions from income.

The items of $5,238.40 paid for increased inventory and $1,874.87 paid for new equipment do not come within any of the items specified as deductible in either the statute or the rules of the Department of Social Welfare. Those items are capital expenditures; they are an increase of capital. The rules of the department permit deduction of "depreciation" and "cost of merchandise sold." The costs of increased inventory and new equipment are deductible by taking the cost of merchandise sold and the depreciation at the end of each year. To permit deduction of the cost of increased inventory and new equipment would result in permitting a double deduction—first when the goods and equipment were purchased, and again when they were sold or depreciated. It is reasonable depreciation and cost of merchandise sold —not the initial cost—which may be deducted in computing net income.

[4] There is no merit in defendant's contention that the provision of section 2181 limiting the deduction of income taxes paid to 20 per cent is unconstitutional. See Kelley v. State Board of Social Welfare, 82 Cal.App.2d 627, 632–633, 186 P.2d 429; County of Los Angeles v. Hurlbut, 44 Cal.App.2d 88, 93, 111 P.2d 963.

Exemptions of specific amounts have been upheld. See In re Gilbert's Estate, 73 Ariz. 261, 240 P.2d 534; In re Bierman's Estate, 118 Mont. 481, 167 P.2d 350. There is no constitutional infirmity in allowing a deduction of 20 per cent in lieu of the actual amount of personal income taxes. There is reasonable basis for the classification, and all persons within the class are treated equally. See Mallatt v. Luihn, 206 Or. 678, 294 P.2d 871, 882.

[5–7] Defendant asserts the court erred in adjudging that the county recover $155 a month payable on the first of each month commencing January 1, 1958, and "continuing for such time as Old Age Aid is extended to Bedros Kasparian and Mary Kasparian, until further order of Court such payment to apply as current reimbursement to plaintiff for Old Age Assistance granted" to Bedros and Mary. The point is well taken. Section 2224 authorizes the court to render judgment for "such portion of the aid granted as said relative is able to pay" and to make "an order requiring the payment of any sums which may become due in the future for which the relative may be liable." The statute does not authorize the court to fix the amount the relative shall pay in the future. It authorizes the court merely to order the relative to pay any sums which may become due in the future for which the relative may be liable. The sums for which the relative may be liable of course may vary from time to time. The board of supervisors may change the amount of aid granted from time to time, as it did in this case, and it may reestablish the amount of defendant's pecuniary ability to pay, as it did in this case. See Welf. & Inst.Code, §§ 2160.6, 2184, 2220, 2222, 2224.1.

The judgment is reversed for further proceedings consistent with this opinion.

SHINN, P. J., and PARKER WOOD, J., concur.

51 Cal.2d 746

GOUGH INDUSTRIES, INC. (a Corporation), Respondent,

v.

STATE BOARD OF EQUALIZATION, Appellant.

Sac. 6879.

Supreme Court of California, In Bank.

March 13, 1959.

Action for refund of sales tax and interest paid under protest. The Superior Court, Sacramento County, John Quincy Brown, J., rendered judgment for plaintiff, and defendant appealed. The Supreme Court, McComb, J., held that where California manufacturer of electrical products sold goods for use in Saudi Arabia and shipped goods by truck carrier to packer pursuant to buyer's instructions, and title passed to buyer at time goods were delivered to packer, and packer packed and crated goods according to buyer's instructions and forwarded them by truck carrier to ocean carrier which transported them to Saudi Arabia as contemplated by the agreement of sale, a continuous export journey began when manufacturer delivered goods to truck carrier at manufacturer's plant, and consequently the transaction was free from California sales tax under import-export clause of federal Constitution.

Affirmed.

Opinion, 332 P.2d 378, vacated.

1. Commerce ⇐30

Where California manufacturer of electrical products sold goods for use in Saudi Arabia and shipped goods by truck carrier to packer pursuant to buyer's instructions, and title passed to buyer at time goods were delivered to packer, and packer packed and crated goods according to buyer's instructions and forwarded them by truck carrier to ocean carrier which transported them to Saudi Arabia as contemplated by the agreement of sale, a continuous export journey began when manufacturer delivered goods to truck carrier at manufacturer's plant, and consequently the transaction was free from California sales tax under import-export clause of federal Constitution. U.S.C.A. Const. art. 1, §§ 9, cl. 5, 10, cl. 2.

2. Commerce ⇐30

Where an article is manufactured and sold in one of the states for export to a foreign country, it is free from state's sales tax under the import-export clause of the United States Constitution if at the time title passed the certainty of the foreign destination was plain. U.S.C.A.Const. art. 1, §§ 9, cl. 5, 10, cl. 2.

Edmund G. Brown and Stanley Mosk, Atty. Gen., James E. Sabine, Asst. Atty. Gen., and Ernest P. Goodman, Deputy Atty. Gen., for appellant.

Pillsbury, Madison & Sutro, Sigvald Nielson, Francis N. Marshall, Noble K. Gregory and Robert F. Miller, San Francisco, for respondent.

McCOMB, Justice.

Defendant appeals from a judgment awarding plaintiff a refund of sales tax and interest paid under protest.

Facts: Plaintiff is a California manufacturer and seller of electrical products. During 1949 plaintiff sold goods to Arabian American Oil Company and Trans-Arabian Pipe Line Company for use in Saudi Arabia. The purchasers requested price quotations from plaintiff and other suppliers. Bidders were informed that all purchases were made strictly for direct export to scenes of operations in foreign countries and that it was anticipated bidders' quotations would show export prices or export discounts applicable. They were also informed that landing and receiving conditions in Saudi Arabia were such that specialized packing was required and that if they could not fulfill these specialized packing requirements with their own fa-

cilities, they should so indicate on their quotations.

Plaintiff quoted prices for delivery of the goods to an export packer's plant. The purchasers then submitted an export purchase order requiring that the packages be marked with the name of the port of entry in Saudi Arabia. The purchase order showed that ocean transportation had been arranged for and that proof of export would be furnished. It also showed a required date of export and a special export number and contained the following condition: "The property hereunder is for export and is to be delivered by you directly to a carrier or a forwarding agent for shipment to a point outside the United States, in accordance with shipping instructions hereafter to be furnished you."

Plaintiff was then instructed to deliver the goods to "Trans-Arabian Pipeline Co., Saudi Arabia, c/o Foreign Trade Export Pack. Co., 445 Figueroa St., Wilmington, Calif., for export packing and forwarding." Plaintiff shipped the goods by truck carrier to the packer. Title passed at the time the goods were delivered to the packer. The packer packed and crated the goods according to the purchaser's specifications and forwarded them by truck carrier to the ocean carrier, which transported them to Saudi Arabia.

As will hereinafter appear, if at the time title passed to the purchaser the goods were goods in export, the proceeds of the sales were not properly includable in plaintiff's retail sales in the determination of the amount of sales tax assessable against it by the State of California. On the other hand, if at the time title passed the goods were not goods in export, such proceeds were properly includable in plaintiff's retail sales.

[1] The question for us to determine, therefore, is: *Had a continuous export journey begun at, or prior to, the time the goods were delivered to the packer?*

Yes. The export journey began when plaintiff delivered the goods to the truck carrier at its plant. The stipulated evidence, all the inferences therefrom, and the findings of the trial court establish the continuous and unbroken character of the journey. Therefore, the goods were goods in export at the time title thereto passed, and the transaction was not subject to the state sales tax.

Article I, section 10, clause 2, of the United States Constitution reads as follows: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80, involved the sale of oil in California to a foreign government, title having passed in this state. The Supreme Court of the United States held that the imposition of a California sales tax on the transaction was unconstitutional under the import-export clause of the United States Constitution set forth above and indicated that the important factor was that at the time of the delivery certainty of the foreign destination was plain.

In Matson Navigation Co. v. State Board of Equalization, 136 Cal.App.2d 577, 289 P.2d 73 (hearing denied by the Supreme Court), the same conclusion was reached relative to the imposition of a California sales tax on the sale of a steamer sold by the Matson Company to a Panamanian corporation, title having passed in this state.

In Spalding & Bros. v. Edwards, 262 U. S. 66, 43 S.Ct. 485, 67 L.Ed. 865, a Venezuelan firm ordered a New York commission house to buy a quantity of bats and balls for its account. The commission house placed the order with the manufacturer, instructing it to deliver the packages to an exporting carrier in New York

for shipment to Venezuela. Title passed when the goods were delivered to the carrier. The Supreme Court held that at that time the goods had been committed to export and that the tax was therefore invalid under article I, section 9, clause 5, of the Constitution, which prohibits Congress from taxing exports.*

[2] From the foregoing authorities, it appears that where an article is manufactured and sold in one of the states for export to a foreign country, it is free from state sales tax under the import-export clause of the United States Constitution if at the time title passed the certainty of the foreign destination was plain.

In the present case all the contract documents specified the exportation, and all steps in the transportation were carried out without deviation.

The trial court specifically found that the export journey started when the goods left plaintiff's plant in Los Angeles; that it was a continuous journey from Los Angeles to Saudi Arabia; that there was no stoppage in transitu or attempt to cause one, or any delay for an unreasonable length of time; that any delay (if any there were) did not break the continuous stream of foreign commerce; and that all packing and crating by the export packer "was an incidental part of the total export journey rather than the primary station of commencing an export journey to Saudi Arabia."

From the foregoing, it appears that: (a) the agreement of sale contemplated shipment of the goods in export, that is, from a seller in the United States to a buyer in a foreign country; (b) from the beginning of the transaction, the goods were committed to go all the way to the foreign country; (c) the movement of the goods had actually started when the tax was sought to be imposed; and (d) the journey was continuous and unbroken by any action or delay taken for a purpose independent of the transportation of the goods.

Therefore, it is immaterial that the goods were shipped to the packer in Wilmington and there packed for ocean travel, such being incidental and necessary for the safe transportation of the goods (Southern Pacific Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498, 526–527, 31 S. Ct. 279, 55 L.Ed. 310), or that there was a change in the form of transportation from overland travel by truck to overseas travel by ship, with incidental preparation for the latter (Hughes Bros. Timber Co. v. State of Minnesota, 272 U.S. 469, 474, 47 S.Ct. 170, 71 L.Ed. 359; Southern Pacific Terminal Co. v. Interstate Commerce Comm., supra).

Empresa Siderurgica, S.A. v. Merced County, Cal., 337 U.S. 154, 69 S.Ct. 995, 93 L.Ed. 1276, relied on by defendant, is not applicable to the facts in the instant case. In that case a property tax against the purchaser on various parts of a cement plant which had been sold and dismantled for shipping to South America was upheld on (1) parts that were crated and ready for shipment, (2) parts dismantled but not yet packed, and (3) parts not yet dismantled. No tax was levied on parts that had already been shipped.

The fundamental difference between the Empresa case and the present one is this: In the Empresa case, the movement of the goods sought to be taxed had not started when the tax was imposed, while in the present case the movement of the goods had started on a continuous journey in foreign commerce from Los Angeles to Saudi Arabia when the tax was imposed.

The judgment is affirmed.

GIBSON, C. J., SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., and WHITE, J. pro tem., concur.

* "Export" has the same meaning under both section 9 and section 10, article I, of the federal Constitution.

51 Cal.2d 699

In re Charles Howard BOYCE on Habeas Corpus.

Crim. 6368.

Supreme Court of California,
In Bank.
March 10, 1959.

Proceeding by prisoner for writ of habeas corpus while confined in state prison under judgment of conviction of burglary. The Supreme Court, Shenk, J., held that where prisoner, when present with counsel in municipal court, pleaded guilty to burglary but prisoner was not represented by counsel when sentenced, prisoner was entitled to have judgment set aside and to have his custody transferred from superintendent of prison to sheriff for rearraignment, judgment, and sentence with counsel in attendance.

Judgment of conviction set aside, and custody of prisoner ordered transferred from prison to sheriff for rearraignment, judgment, and sentence with counsel in attendance.

Criminal Law ⇐988
Habeas Corpus ⇐109

Where prisoner, while present in court with counsel, pleaded guilty to burglary but prisoner was not represented by counsel when sentenced, his constitutional right to counsel had been violated and judgment was set aside and his custody was ordered transferred from superintendent of prison to sheriff for rearraignment, judgment, and sentence with counsel in attendance. West's Ann.Pen.Code, § 859a; West's Ann.Const. art. 1, § 13.

Charles Bagby, San Francisco, under appointment by the Supreme Court, for petitioner.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Arlo E. Smith and Preble Stolz, Deputy Attys. Gen., for respondents.

SHENK, Justice.

In this proceeding the petitioner, Charles Howard Boyce, seeks a writ of habeas corpus while confined in the state prison at Soledad under a 1957 judgment of conviction of burglary. It is contended that, because he was denied the right of counsel at the time he was sentenced, his present confinement is illegal.

The attorney general, in behalf of Lawrence E. Wilson, superintendent of the prison at Soledad, has filed a return consisting in part of excerpts from the clerk's minutes in the criminal proceedings. People v. Charles Howard Boyce, No. 8186, Kern County Superior Court. It appears from the minutes that on the 20th day of November, 1957, the petitioner entered a plea of guilty while present in court with his counsel, and that on November 27, 1957, the petitioner, through his counsel, applied for probation. The application for probation was denied on December 18, 1957, and it further appears from the minutes of that day that the "defendant was duly informed by the Court of the complaint filed against him [and] * * * of his arraignment and plea of guilty in Municipal Court under the provisions of section 859a of the Penal Code.

"The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant replied that he had none. And, no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment [sentencing petitioner to prison for the term prescribed by law]. * * *"

The attorney general concedes in his return that the petitioner was not represented by counsel when sentenced.

It was held in the case of In re Roberts, 40 Cal.2d 745, 255 P.2d 782, that a defendant is entitled to counsel when judgment is pronounced and sentence imposed, and

that a deprivation of that right is a violation of article I, section 13 of the Constitution.* In that case it appeared that the defendant had been represented by counsel at all prior stages of the proceedings, but that he was without counsel at the time the judgment and sentence were pronounced. The court stated at page 748 of 40 Cal.2d, at page 784 of 255 P.2d: "There is nothing in the record to indicate that Roberts was ever informed of his right to counsel or that he knew he was entitled to the aid of an attorney. There was no express waiver of the right, and we are of the opinion that none may be implied. See In re Levi, 39 Cal.2d 41, 46–47, 244 P.2d 403. The judgment must therefore be set aside and the matter remanded to permit Roberts to be arraigned with counsel."

In the case of In re Levi, 39 Cal.2d 41, 244 P.2d 403, it appears that following revocation of probation the defendant was sentenced without the presence of counsel. The court held that judgment pronounced in the absence of counsel, as in the case of that pronounced in the absence of the defendant, is vulnerable to attack by habeas corpus for the reason that certain rights available to the defendant at that time would normally not be understood and taken advantage of unless counsel were present. The court ordered the transfer of the petitioner to the custody of the sheriff with directions that he again be arraigned for pronouncement of judgment. The attorney general in the present case concedes that the Levi case "is substantially indistinguishable from the instant case and therefore recommends that the writ issue releasing the petitioner from the custody of the Superintendent of the California State Prison at Soledad and committing the petitioner to the custody of the Sheriff of Kern County to be arraigned for the pronouncement of judgment."

In view of the showing made on the return of the order to show cause, together with the recommendation of the attorney general, we are committed by the Roberts and Levi cases to order the issuance of the writ but for the limited purpose stated in those cases.

Accordingly the judgment is set aside and the custody of the petitioner is ordered transferred from the Superintendent of the California State Prison at Soledad to the Sheriff of Kern County for rearraignment, judgment and sentence by the court with counsel in attendance.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

McCOMB, J., concurs in the order.



51 Cal.2d 675

Milica P. WATENPAUGH, Plaintiff and Respondent,

v.

STATE TEACHERS' RETIREMENT SYSTEM et al., Defendants and Respondents;

Frank Marion Watenpaugh, Jr., et al., Appellants.

L. A. 24893.

Supreme Court of California, In Bank.

March 10, 1959.

Action brought by widow of member of state teachers' retirement system to determine whether death benefits thereunder should be paid to her or to his children by a previous marriage. The Superior Court,

* Article 1, section 13 provides in part: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. * * *"

San Diego County, L. N. Turrentine, J., rendered judgment for plaintiff, and an appeal was taken. The Supreme Court, Gibson, C. J., held that purpose of Education Code section, authorizing revocation of nomination of beneficiary and nomination of different beneficiary by written instrument duly executed and filed with board, was to protect retirement system against possibility of being called upon to pay twice and to provide a method of ascertaining desire and intent of member with reference to payment of death benefits, and held that such section should be construed to give effect to an executed designation when there is a clear manifestation of intent by member to make change and designation is filed promptly after death.

Affirmed.

Opinion, 328 P.2d 203, vacated.

1. Evidence ⇐269(2)

In action brought by widow of member of state teachers' retirement system to determine whether death benefits thereunder should be paid to her or to his children by a previous marriage, evidence, that decedent had told plaintiff, after their marriage but prior to date when he filled out beneficiary designation form, that he had no pension but that there was a state teachers' retirement fund and in the event of his death she would be beneficiary of fund, was relevant on issue of intent with which decedent had executed designation of beneficiary, and it should not have been rejected.

2. Evidence ⇐269(2)

Declarations of decedent may be admissible under certain circumstances to prove state of mind at given time although uttered before or after that time.

3. Appeal and Error ⇐882(11)

Under the doctrine of invited error, a party may not object to sufficiency of evidence to support finding against him when lack is result of improper exclusion of evidence at his own instance.

4. Appeal and Error ⇐882(11)

A party who has prevented proof of fact by his erroneous objection will not be permitted to take advantage of his own wrong, and reviewing court will assume that fact was duly proved.

5. Schools and School Districts ⇐146

Purpose of Education Code section, authorizing revocation of nomination of beneficiary and nomination of different beneficiary by written instrument duly executed and filed with board, was to protect retirement system against possibility of being called upon to pay twice and to provide a method of ascertaining desire and intent of member with reference to payment of death benefits; and such section should be construed to give effect to an executed designation when there is a clear manifestation of intent by member to make change and designation is filed promptly after death so as to prevent any prejudice to retirement system. West's Ann.Education Code, §§ 14575, 14661.

6. Insurance ⇐587
Schools and School Districts ⇐146

The general rule is that there must be strict compliance with method prescribed by ordinary life policy for change of beneficiary; but provisions for death benefits under retirement systems differ in important respects from ordinary life policies, and cases dealing with ordinary life contracts would not be controlling with regard to necessity for filing of beneficiary change form prior to death of member of state teachers' retirement system; disapproving Wicktor v. County of Los Angeles, 141 Cal.App.2d 595, 297 P.2d 115, Nichols v. Board of Retirement, 121 Cal.App.2d 176, 262 P.2d 862, and Shaw v. Board of Administration, 109 Cal. App.2d 770, 241 P.2d 635. West's Ann.Education Code, §§ 14575, 14661.

Walter Wencke and Robert G. Carlson, San Diego, for appellants.

Vincent Whelan, San Diego, for plaintiff and respondent.

No appearance for defendants and respondents.

GIBSON, Chief Justice.

This action was brought by the widow of Frank M. Watenpaugh, Sr., a member of the State Teachers' Retirement System, to

determine whether death benefits thereunder should be paid to her or to his children by a previous marriage. The children and the retirement system were joined as defendants.

Mr. Watenpaugh was a teacher at San Diego State College, and in 1944 he executed and filed a designation of beneficiary which named his former wife, since deceased, as primary beneficiary and his children as secondary or contingent beneficiaries. The claim of the children is based on this designation. In March 1955 he married plaintiff, and about June 9, 1955, a blank form for designation of beneficiary supplied by the retirement system was filled out, signed and witnessed. It stated that any previous nomination was revoked and named plaintiff as primary beneficiary and defendant children as contingent beneficiaries. Mr. Watenpaugh took the executed designation form home and placed it in a folder on his desk. Sometime later plaintiff moved the folder from the desk to a bookcase, where it remained until after Mr. Watenpaugh's death.

In January 1956 Mr. Watenpaugh suffered a heart attack, and he was confined in a hospital and at home for some time, but he recovered to the extent that he took rides in the country, walked around his property and did some accounting work. He died on March 23, 1956, and two or three weeks later plaintiff discovered the executed designation form in the folder. She gave the form to her attorney, who on April 18 mailed it to the retirement system together with a certificate of death. The retirement system refused to pay the death benefits to plaintiff on the ground that the designation form was not filed by Mr. Watenpaugh during his lifetime.

The original designation form filed with the retirement system in 1944 provided in part: "Should I survive the above named beneficiaries, I understand that such Death Benefit will be paid to my estate or to such other beneficiary or beneficiaries as I may hereafter nominate by written designation duly filed with the State Teachers' Retirement System, all in accordance with the provisions of said statutes." The body of the 1955 designation form contains substantially the same provision, and, in addition, on the back of the form it is stated that the statute provides in effect that a member's contributions will "be paid to his estate or such person as he shall have nominated by written designation duly filed with the Retirement Salary Board. * * * The designation of a beneficiary may be revoked and a new designation made, at the option of designator, the form on the reverse side hereof being used for both the original and changing designations. * * * Acknowledgment of receipt of the first beneficiary designation will not be made, because every person will be followed until a form has been filed in the retirement office. Revocations and designations of new beneficiaries will be acknowledged, to avoid the loss of completed forms in transit, which might not come to light until after death."

The trial court found that by executing the 1955 designation Mr. Watenpaugh intended to revoke the prior designation and to nominate plaintiff as beneficiary and that he believed he had done so. It was further found that by bringing the designation home he placed it under plaintiff's control and in her possession, thereby permitting and authorizing her to do whatever else might be necessary to carry out his intention, including the filing of the designation with the retirement system either during his life or after his death, and that he thus effected a present revocation of the prior designation and a present nomination of plaintiff as beneficiary. The evidence, as summarized above, taken with the permissible inferences which the trial court could draw therefrom, was sufficient to sustain the findings and the judgment in favor of plaintiff.

[1, 2] Moreover, there was other evidence showing the clear intention of Mr. Watenpaugh which was erroneously refused admission. Defendant children objected to evidence of the decedent's oral declarations, and plaintiff made an offer to prove that he told her in March or April of 1955 that he had no pension but that there was a State Teachers' Retirement Fund and in the event

of his death she would be the beneficiary of the fund. She also offered to prove that several months later he told her that in the event of his death she would have to sell the house because she could not keep up the payments, but that if she were careful she would be able to get along on the Teachers' Retirement Fund. The trial court sustained defendants' objection and rejected the offer of proof.

The offered evidence was relevant on the issue of the intent with which decedent executed the designation of beneficiary, and it should not have been rejected. The declarations of a decedent may be admissible under certain circumstances to prove a state of mind at a given time although uttered before or after that time, on the theory that under these circumstances the "stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current." People v. One 1948 Chevrolet Convertible Coupe, 45 Cal.2d 613, 620–621, 290 P.2d 538, 543, 55 A.L.R.2d 1272 (vehicle owner's knowledge that occupant possessed narcotic); see Chafee, Progress of the Law—Evidence, 1919–1922, 35 Harv.L.Rev. 428, 444; Witkin, California Evidence (1958) § 265, pp. 302–303. Declarations have thus been admitted in cases involving mental condition at the time of executing a will (In re Estate of Sargavak, 35 Cal.2d 93, 96–98, 216 P.2d 850, 21 A.L.R.2d 307; In re Estate of Anderson, 185 Cal. 700, 720, 198 P. 407; In re Estate of Carson, 184 Cal. 437, 445, 194 P. 5, 17 A.L.R. 239), making or delivery of a deed (DeCou v. Howell, 190 Cal. 741, 750, 214 P. 444; Williams v. Kidd, 170 Cal. 631, 648, 151 P. 1), transfer of bonds (Schooler v. Williamson, 192 Cal. 472, 476, 221 P. 195), transfer of stock (Hansen v. Bear Film Co., 28 Cal.2d 154, 173–174, 168 P.2d 946), and reconciliation of spouses (Whitlow v. Durst, 20 Cal.2d 523, 524–525, 127 P. 2d 530). In the Hansen and Whitlow cases it is stated broadly that, when intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule. The present case is closely analogous to those involving wills, deeds and other transfers of property, and comes within the rule as above stated.

[3, 4] Under the doctrine of invited error, a party may not object to the sufficiency of the evidence to support a finding against him when the lack is the result of improper exclusion of evidence at his own instance. Gray v. Southern Pacific Co., 23 Cal.2d 632, 644, 145 P.2d 561; Ralph v. Anderson, 187 Cal. 45, 49, 200 P. 940; Scholey v. Steele, 59 Cal.App.2d 402, 404, 138 P.2d 733; Hansen v. California Bank, 17 Cal.App.2d 80, 95–96, 61 P.2d 794; Martin v. Postal Union Life Ins. Co., 16 Cal. App.2d 570, 576, 61 P.2d 333; First Nat. Bank of Santa Ana v. Kinslow, 2 Cal.App. 2d 456, 458–459, 38 P.2d 163. A party who has prevented proof of a fact by his erroneous objection will not be permitted to take advantage of his own wrong, and a reviewing court will assume that the fact was duly proved. Zainudin v. Meizel, 119 Cal.App.2d 265, 270, 259 P.2d 460.

[5] The relevant statutes do not, as contended by defendant children, require that the designation form be filed with the Retirement Board by the member prior to his death. Section 14575 of the Education Code, as it read prior to 1957, provided in part that, upon death of a member before retirement, "there shall be paid to such beneficiary as he has nominated by written designation duly filed with the Retirement Board" certain prescribed benefits.[1] Section 14661 then provided in part, "The nomination of a beneficiary under the Retirement System * * * may be revoked at the pleasure of the member * * and a different beneficiary nominated by a written instrument duly executed and

1. The 1957 amendments of sections 14575 and 14661 of the Education Code involved changes not material to this case.

filed with the board." The sections do not expressly preclude a filing of the designation form after the member's death, and no persuasive arguments are presented why they should be so construed.

The purpose of the provisions requiring the filing of a change of beneficiary is largely to protect the retirement system against the possibility of being called upon to pay twice. A second purpose, no doubt, is to provide a method of ascertaining the desire and intent of the member with reference to the payment of death benefits. The statute should be construed to give effect to an executed designation when there is a clear manifestation of intent by the member to make the change and the designation is filed promptly after death so as to prevent any prejudice to the retirement system.

Our interpretation is in accord with the decisions involving War Risk or National Service Life Insurance issued to men in military service, where the purpose of the provisions of the statutes and regulations requiring the filing of a change of beneficiary is also largely to protect the government against being called upon to pay twice. See 2 A.L.R.2d 489, 491. It has been held that literal compliance with such regulations is not necessary to obtain a change of beneficiary where it is established that there was an intention to change and there was some affirmative action evidencing the exercise of the right to change. Aguilar v. United States, 9 Cir., 226 F.2d 414, certiorari denied 351 U. S. 955, 76 S.Ct. 852, 100 L.Ed. 1478; Kendig v. Kendig, 9 Cir., 170 F.2d 750, 751; cf. Shack v. United States, 5 Cir., 234 F.2d 934, 936.

[6] It is true that in ordinary life insurance contracts the general rule is that there must be strict compliance with the method prescribed by the policy for change of beneficiary. See Cook v. Cook, 17 Cal. 2d 639, 648, 111 P.2d 322; Pimentel v. Conselho Supremo, etc., 6 Cal.2d 182, 187–188, 57 P.2d 131. However, the provisions for death benefits under retirement systems differ in important respects from ordinary life insurance policies. For example, the retirement benefits are completely statutory in origin, membership in the retirement system is compulsory, and the requirements for change of beneficiary are not subject to negotiation. The cases dealing with ordinary life insurance contracts are therefore not controlling. Language in Wicktor v. County of Los Angeles, 141 Cal.App.2d 592, 596 et seq., 297 P.2d 115; Nichols v. Board of Retirement, 121 Cal. App.2d 176, 180, 262 P.2d 862; and Shaw v. Board of Administration, 109 Cal.App. 2d 770, 774, 241 P.2d 635, indicating that the interpretation of the provisions of retirement acts for public employees is to be governed by the same principles as those applicable to ordinary life insurance is disapproved insofar as it conflicts with the views expressed herein.

The judgment is affirmed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.



51 Cal.2d 751

PEOPLE of the State of California, Appellant,

v.

Albert Ernest LOVE, Respondent.

Cr. 6372.

Supreme Court of California, In Bank.

March 13, 1959.

Prosecution for homicide. Jury found defendant guilty of murder of first degree but was unable to reach verdict on issue of punishment and on second trial on issue of punishment jury fixed the same at death. The Superior Court, Butte County, J. F. Good, J., entered order granting defendant's motion for new trial on ground of newly

discovered evidence and the People appealed. The Supreme Court, Traynor, J., held that where trial court had before it fact that witness who had previously testified as to defendant's prior threats against deceased recanted and testified that since treatment for alcoholism his memory had improved and he could not now state definitely whether defendant had actually made threats against deceased, trial court did not abuse its discretion in granting a new trial.

Affirmed.

1. Criminal Law ⇐938(1), 1156(3)

Motion for new trial on ground of newly discovered evidence is directed to sound discretion of trial court, and its ruling will not be disturbed unless an abuse of discretion clearly appears. West's Ann.Pen.Code, § 1181, subd. 8.

2. Criminal Law ⇐942(1)

In prosecution for homicide, where jury found defendant guilty of murder in the first degree, trial judge, who had before him fact that witness who had previously testified as to defendant's alleged threats against deceased had recanted and stated that since his treatment for alcoholism his memory had improved so that he could not definitely state that defendant's threats were actually against deceased, did not abuse discretion in granting new trial on ground of newly discovered evidence. West's Ann. Pen.Code, § 1181, subd. 8.

3. Criminal Law ⇐938(1)

In prosecution for homicide, where jury had found defendant guilty of murder in the first degree but witness who had previously testified as to defendant's alleged threats against life of deceased recanted and stated that since treatment for alcoholism his memory had improved and he could not state whether defendant had actually threatened deceased or threatened to commit suicide, record supported trial court's conclusion that newly discovered evidence was neither merely cumulative nor merely impeaching but was material to defendant in that it would render a different result probable on retrial of cause. West's Ann.Pen.Code, § 1181, subd. 8.

4. Criminal Law ⇐945(1)

Where defendant moved for new trial on basis of newly discovered evidence it was for the trial court to weigh the evidence and consider inferences that might be drawn therefrom to determine whether or not elimination of certain derogatory testimony by introduction of new evidence would probably lead to a different result. West's Ann.Pen.Code, § 1181, subd. 8.

5. Criminal Law ⇐958(1)

Where all relevant facts were a matter of record before the court, there was no merit in contention that new trial on ground of newly discovered evidence should not have been granted because affidavits were not filed in support of motion, since affidavits restating the relevant facts of record would have served no purpose. West's Ann.Civ.Code, § 3532.

6. Criminal Law ⇐1156(3)

Although motions for new trial on ground of newly discovered evidence are not looked upon with favor, it does not mean that once trial court has exercised its discretion and granted a new trial such action is looked upon either with distrust or disfavor.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Doris H. Maier and G. A. Strader, Deputy Attys. Gen., and C. Keith Lyde, Dist. Atty., Oroville, for appellant.

Charles A. Skow, Chico, and Robert W. Anderson, Oroville, for respondent.

TRAYNOR, Justice.

By information defendant was charged with the murder of his wife. He pleaded not guilty and not guilty by reason of insanity. On July 18, 1958, a jury found him guilty of murder of the first degree. Thereafter the issue of punishment was tried before the same jury. It was unable to reach a verdict and was discharged on July 22, 1958. A second trial on the issue of

punishment before another jury commenced on August 12, 1958, and the jury fixed the punishment at death. Thereafter, defendant was found sane at the time of the homicide. He then successfully moved for a new trial on the ground of newly discovered evidence. The People appeal from the order granting a new trial.

On the trial of the plea of not guilty, there was evidence of the following facts:

Defendant and his wife had been married for eight or nine months before the homicide. They had difficulties over finances and the care of Mrs. Love's four-year-old son by a former marriage, and defendant had filed an action for divorce. Mrs. Love had threatened to report defendant as a parole violator. About a week before the homicide Mrs. Love and her two children moved to a friend's home. Shortly after noon on the day of the homicide, Mrs. Love, her small son, her friend, and three of her friend's children left the friend's home in Mrs. Love's car. Mrs. Love had several appointments, including one with defendant's attorney, and the others went along for the ride. While the car was parked outside the attorney's office and Mrs. Love was keeping her appointment, defendant passed on the street, spoke briefly to Mrs. Love's friend, and went on. On the way back to the friend's home, Mrs. Love decided to drive to her own house to see if there was any mail. When they arrived the friend checked the mailbox and returned to the car. The motor stalled as they were about to leave, and defendant drove by as Mrs. Love was trying to start it. A few monents later, defendant drove by again in the opposite direction and asked if Mrs. Love wanted a push, to which she replied, "No." In a few moments he drove by a third time and stopped his car on the opposite side of the street. He shouted to Mrs. Love, "Say, I want to get that fishing equipment that's in the house." Mrs. Love shook her head, and defendant stated, "Oh, I can't, can't I." Defendant then crossed the street with a shotgun, and over the protests of Mrs. Love and the children, shot Mrs. Love at close range. He said, "All right, you lousy son-of-a-bitching rat, take that."

After the shooting defendant returned to his car and drove away. He met his attorney and told him that he had just shot and killed his wife and was on his way to the police station to turn himself in. At his request his attorney went with him. At the station he told the officers that he had shot his wife; that they had been having domestic difficulties; that he had warned his wife about writing a letter but that she had written it anyway;[1] that he should have turned the gun on himself but did not have enough nerve; and that at the time of the shooting, he had held the gun close to his wife's body because he was afraid of injuring the other occupants of the car.

Defendant went to a pawnbroker the day before the homicide and traded an electric razor for the shotgun. About noon on the day of the homicide he took it to the home of his mother and stepfather. His stepfather had told him he wanted a gun to protect his chickens from cats. His mother did not want guns on the premises, however, because she was fearful defendant might commit suicide.

A psychiatrist appointed by the court to examine defendant testified that in his opinion the defendant had the capacity to premeditate and form the intent to kill and that his shooting his wife at short range to avoid injuring others indicated that he was thinking at the time. He also testified, however, that his tests all revealed "a self-protectively evasive, paranoid, impulse-ridden, extremely hostile, opportunistic egocentric, emotionally explosive, schizoid psychopath, who is actively agitated in a ruminatize, brooding and self-centered fashion," and that a "general lack of time perspective and minimal capacity for delay or control of impulses, combined with a psychopathic crude ego integration and immaturity, drive [defendant] to seek constant gratifi-

1. It may be inferred that this letter was one defendant believed his wife had written to his parole officer.

cation of his wishes and whims and keep him in a constant state of turmoil, with periodic explosive outbursts of uncontrolled rage."

Defendant did not testify at the trial of his plea of not guilty. At the first trial on the issue of punishment he testified and asked the jury to give him the death penalty. He did not testify at the second trial on the issue of punishment, but his testimony at the first trial was introduced as part of the basis for a hypothetical question put to a psychiatrist.

It is against this background that we must assess the trial court's granting of the motion for a new trial on the ground of newly discovered evidence. The basis for its ruling was a material change in the testimony of defendant's stepfather. On July 17th, at the trial on the plea of not guilty the stepfather testified that about a month before the homicide defendant threatened to kill his wife if she did not live with him, stating, "If she doesn't live with me I'll kill the bitch." On August 13th, at the second trial on the issue of punishment, the stepfather testified that he could not remember whether defendant had threatened to kill his wife or himself on the occasion referred to in his earlier testimony. In explanation of his change in testimony he stated that he had been drinking for about two months before the homicide, that he was quite drunk at the time the alleged threat was made, and that he had been drinking at the time he gave his former testimony. For the last two weeks, however, he had been receiving treatment for alcoholism at a state hospital, his memory was greatly improved, and he now knew that he could not state whether defendant had threatened to kill himself or his wife.

[1, 2] Penal Code section 1181, subdivision 8 provides that a new trial may be granted when "new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable." The motion is directed to the sound discretion of the trial court, and its ruling will not be disturbed unless an abuse of discretion clearly appears. People v. Greenwood, 47 Cal.2d 819, 821, 306 P.2d 427; People v. Jefferson, 47 Cal.2d 438, 446, 303 P.2d 1024; People v. Tallmadge, 114 Cal. 427, 430, 46 P. 282; Redwood Turkey Hatchery Inc. v. Meadowbrook Farms, 152 Cal.App.2d 481, 485, 313 P.2d 146; Teixeira v. Domingos, 151 Cal.App.2d 380, 384, 311 P.2d 634. No abuse of discretion appears.

When the stepfather testified at the trial on the issue of punishment he was carefully examined by the prosecution, the defense, and the trial court itself. His testimony at that time fully supports the trial court's conclusion that his earlier testimony that defendant threatened to kill his wife was worthless.

The record also supports the trial court's conclusion that the fact that that testimony was worthless could not have been discovered by the exercise of reasonable diligence before or at the time it was given. Thus direct evidence of that fact only became available after treatment for alcoholism had improved the witness' memory, and there does not appear to be anything that defendant's counsel could have done to establish that fact earlier that he did not do. He had interviewed the witness before the first trial and he cross-examined him at that trial, and it affirmatively appears that it was not readily apparent that the witness had been drinking at the time he testified.

[3, 4] Finally the record supports the trial court's conclusion that the newly discovered evidence was neither merely cumulative nor merely impeaching but was "material to the defendant" (Pen.Code, § 1181, subd. 8) in that it would render a different result probable on retrial of the cause. People v. Beard, 46 Cal.2d 278, 281, 294

P.2d 29; People v. McGarry, 42 Cal.2d 429, 433, 267 P.2d 254; People v. Selby Smelting & Lead Co., 163 Cal. 84, 94, 124 P. 692, 1135; Oberlander v. Fixen & Co., 129 Cal. 690, 691–692, 62 P. 254. Thus, the testimony that defendant had threatened to kill his wife if she would not live with him was the only direct evidence of premeditation, and as the trial court pointed out in granting the motion for new trial, it strongly bolstered the circumstantial evidence on which the prosecution also relied. Defendant's securing the gun from the pawnbroker was consistent with the theory that he wanted it only for his stepfather to protect the latter's chickens, and his having it with him on the afternoon of the homicide was consistent with the theory of a contemplated suicide. His driving back and forth past his wife's car was equivocal. There is no evidence that he knew she would be at her house, and his offer to give her a push to get her car started is inconsistent with an existing intent to kill her. Thereafter she denied his request for his fishing equipment. Given that denial, the background of hostility, and defendant's "impulse-ridden * * *, emotionally explosive" character and "general lack of time perspective and minimal capacity for delay or control of impulses," it is not unreasonable to assume that the homicide was the result, not of deliberation and premeditation, but of a sudden impulse. It was for the trial court to weigh the evidence and consider the inferences that might be drawn therefrom to determine whether or not the elimination of the stepfather's testimony would probably lead to a different result.

There is no merit in the contention that the second jury's selection of the death penalty proves the trial court's conclusion wrong. That jury was instructed that the murder was a deliberate and premeditated killing and was therefore foreclosed from considering lack of premeditation as grounds for inflicting the lesser penalty. Thus it cannot be inferred from the verdict fixing the penalty at death that the stepfather's recanting would not result in a different result on a new trial on the issue of guilt.

[5] There is also no merit in the contention that a new trial should not have been granted on the ground that no affidavits were filed in support of the motion. The relevant facts were all of record before the court. Affidavits restating them would have served no purpose. Civ.Code, § 3532; People v. Kitchens, 46 Cal.2d 260, 263, 294 P.2d 17; People v. Ives, 17 Cal.2d 459, 477, 110 P.2d 408; People v. Lee, 9 Cal.App.2d 99, 106, 48 P.2d 1003.

[6] We are not unmindful of the rule that motions for new trials on the ground of newly discovered evidence are looked upon with disfavor (People v. Greenwood, 47 Cal.2d 819, 821, 306 P.2d 427), but the "question as to the effect upon the case of the newly discovered evidence is, from its nature, peculiarly one that is addressed to the discretion of the trial court, and, of course, should be determined by that court with a full realization of the responsibility involved; and the motion should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be or should be different on a retrial." People v. Sing Yow, 145 Cal. 1, 4, 78 P. 235, 236; see also, People v. Shepherd, 14 Cal.App.2d 513, 518, 58 P.2d 970. Distrust or disfavor of the motion does not mean "that when the trial court has exercised its discretion and granted a new trial that such action is looked upon with either distrust or disfavor. In fact, it has been said that one of the most prolific causes of miscarriages of justice is the reluctance of trial judges to exercise the discretion with which they are clothed to grant a new trial when the circumstances show that justice would be thereby served. This by reason of the curtailed power of appellate courts to disturb the discretion of the trial court once it is exercised in such matters. It is recognized that despite the exercise of diligent effort, cases will

sometimes occur where, after trial, new evidence most material to the issues and which would probably have produced a different result is discovered. It is for such cases that the remedy of a motion for a new trial on the ground of newly discovered evidence has been given." Dasso v. Bradbury, 39 Cal.App.2d 712, 716–717, 104 P.2d 128, 130; see also, Redwood Turkey Hatchery Inc. v. Meadowbrook Farms, 152 Cal. App.2d 481, 485, 313 P.2d 146; Teixeira v. Domingos, 151 Cal.App.2d 380, 384, 311 P. 2d 634.

The record in the present case reflects a most careful and conscientious consideration of the motion for new trial by the trial court. Having appraised the weight of the evidence and the probable impact of the newly discovered evidence, it very properly showed no hesitance in granting a new trial. See, People v. Borchers, 50 Cal.2d 321, 330, 325 P.2d 97.

The order is affirmed.

GIBSON, C. J., SHENK, SCHAUER, SPENCE and McCOMB, JJ., and WHITE, J. pro tem., concur.



168 Cal.App.2d 687

W. S. THOMSON, Plaintiff and Appellant,

v.

TALBERT DRAINAGE DISTRICT, etc., Defendant and Respondent.

Civ. 5945.

District Court of Appeal, Fourth District, California.

March 13, 1959.

Action by landowner to enjoin drainage district from permitting use of its drainage lines for disposal of waste water by oil companies or operators of oil wells. After a judgment in favor of plaintiff was entered, landowners within the district upon whose land oil wells were producing surplus waste water, and operators of the wells moved to set aside the judgment on ground that they were indispensable parties and were not joined. The Superior Court, Orange County, Franklin G. West, J., entered an order vacating the judgment and plaintiff appealed. The District Court of Appeal, Shepard, J., held that where permanent injunction prohibiting use of drainage district's system for disposal of waste water from oil wells had immediate and inevitable effect of terminating agreement by which well owners and operators were allowed to place their oil well waste water in district's drainage system, and the rights of well owners and operators under their agreement with the district were valuable, and the loss thereof would work serious hardship and possibly great damage to well owners and operators, well operators were indispensable parties to action to enjoin drainage system from permitting use of its lines for disposal of waste water.

Order affirmed.

1. Judgment ⇐357

If parties seeking to set aside a judgment on the ground that they were indispensable parties and were not joined, or some of them were indispensable to the maintenance of an action, procedure of moving to vacate the judgment was the proper method to seek their rights. West's Ann. Code Civ.Proc. § 389.

2. Injunction ⇐114(1)

Where a permanent injunction prohibiting use of a drainage district's system for disposal of waste water from oil wells had immediate and inevitable effect of terminating agreement by which well owners and operators were allowed to place their oil well waste water in district's drainage system, and the rights of well owners and operators under their agreement with the district were valuable, and the loss thereof would work serious hardship and possibly great damage to well owners and operators, operators were indispensable parties to action to enjoin drainage system from permitting use of its lines for disposal of waste water. West's Ann.Code Civ.Proc. § 389.

Mize, Larsh, Mize & Hubbard, Santa Ana, for appellant.

Rutan, Lindsay, Dahl, Smedegaard, Howell & Tucker, Santa Ana, Hanna & Morton, Harold C. Morton, Max K. Jamison, Los Angeles, for respondent.

SHEPARD, Justice.

This is an appeal from an order vacating a judgment. The order is responsive to a motion based on the sole ground that certain allegedly indispensable parties were not joined and that the judgment is therefore void. Plaintiff has appealed.

Defendant is a political subdivision of the State of California organized for the general purpose of draining undesirable surplus waters from the lands within its boundaries. Plaintiff is a landowner within said district. The parties moving to set said judgment aside and who claim to be indispensable parties, (whom we will hereinafter call "movants") are all landowners within said district upon whose land oil wells are producing surplus waste water, or are lessees operating said wells.

August 5, 1954, lessees, to assist in the contemplated disposal of waste water from oil wells, secured from defendant a license agreement giving lessees for the period of one year and thereafter until six months' notice of termination, permission to dump waste water (from which all oil had been filtered) into defendant's drainage conduits. Said agreement provided further that it might be terminated immediately, without notice, at the option of the District by: "Court action or proceedings or the injunction, order or demand of any Court, or the order or demand of any water authority, State or County Health Officer, or District, County, State or United States authority or authorities of any kind or nature."

July 17, 1957, plaintiff brought suit to enjoin defendant from permitting use of its drainage lines for the disposal of waste water by oil companies or operators. January 3, 1958, defendant gave to said owners and lessees the six months' termination notice provided by the agreement but no point is made of that on this appeal. February 13, 1958, pursuant to a stipulation between plaintiff and defendant a judgment was entered by the court permanently enjoining and restraining defendant from permitting certain of its drainage lines (which had theretofore been used by lessees for said oil well waste water disposal) to be used for the acceptance or disposal of any water from any oil or gas well operation. April 9, 1958 and April 14, 1958, said lessees and owners, respectively, moved the trial court to set aside and vacate the judgment on the sole ground that the parties indispensable to the action were not joined therein. May 1, 1958, the trial court filed its written order granting said motion and ordering said judgment vacated. Plaintiff appeals from said order.

From the affidavits filed in support of said motion it appears that the drainage lines of defendant, in which a license was granted by the agreement for disposal of waste water from oil wells, are the only practicable means presently available for disposal of said waste water, although another main line from another political subdivision was expected to be laid near by within a year or so. It further appears that said wells are subject to water drive, and if they are shut in for any substantial period of time they are likely to become totally and permanently inoperative, with a loss to owners and lessees of many millions of dollars.

Whether or not the movants, or some of them, were indispensable to the plaintiff's action for an injunction against defendant is the sole question argued on this appeal.

[1] If these movants or some of them were indispensable to the maintenance of plaintiff's action, then the procedure of moving to vacate the judgment was the proper method to seek their rights. Elliott v. Superior Court, 144 Cal. 501, 77 P. 1109; Gardner v. Trevaskis, 158 Cal.App.2d 410, 413 (1), 322 P.2d 545.

Section 389, Code of Civil Procedure, insofar as it affects this proceeding, reads as follows: "* * * when a complete determination of the controversy can not be had

without the presence of other parties, the court must then order them to be brought in, * * *" By this section the position of the trial court respecting an indispensable party is defined by the legislature. An entirely satisfactory interpretation of the meaning of the portion of the section quoted, and a review of a large share of the leading cases on the subject has been given us by the Supreme Court in Bank of California v. Superior Court, 16 Cal.2d 516, 106 P.2d 879. Therein the distinction between "proper", "necessary" and "indispensable" parties and the effect of joining or failing to join such parties is thoroughly explained, and with respect to "indispensable" parties the court says that if "the plaintiff seeks some other type of affirmative relief which, if granted, would injure or affect the interests of a third person not joined that third person is an indispensable party * * * All of these persons are, of course, 'necessary' parties, but the decisions show that they come within a special classification of necessary parties, to which the term 'indispensable' seems appropriate. An attempt to adjudicate their rights without joinder is futile." Bank of California v. Superior Court, 16 Cal.2d 516, at page 522, 106 P.2d at page 883, supra. The above opinion is supported by numerous well-reasoned authorities therein cited and is followed by other well-reasoned cases, including Miracle Adhesives Corp. v. Peninsula Tile Ass'n, 157 Cal.App.2d 591, 593(1), 321 P.2d 482.

[2] It is clear that a permanent injunction by the trial court forthwith prohibiting the use of defendant's drainage system for disposal of waste water from oil wells had the immediate and inevitable effect of terminating the agreement by which the movants were allowed to place their oil well waste water in defendant's drainage system. That the rights of movants under said agreement are valuable and that the loss thereof would work serious hardship and possibly great damage to movants is likewise clear. In our opinion, the lessee movants, who are the well operators, are inevitably affected by any decree the court may grant pursuant to the complaint and are indispensable parties, and the order of the trial court vacating the judgment was correct.

The order is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.



Mary R. BURKS, Plaintiff and Appellant,

v.

Boise BLACKMAN, A. E. Campana, Elna Campana, et al., Defendants and Respondents.*

Civ. 17950.

District Court of Appeal, First District, Division 1, California.

March 16, 1959.

Rehearing Denied April 15, 1959.

Hearing Granted May 13, 1959.

Tenant's action against apartment building landlords for injuries sustained when she fell through floor boards on landing of wooden outside stairway. The Superior Court, City and County of San Francisco, Eustace Cullinan, J., rendered judgment for defendants and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that landlords would be liable for injuries sustained by upstairs tenant when landing of outside stairway which was used exclusively by such upstairs tenant but which was connected with other stairways in common use gave way, if reasonable tenant and landlords would have believed that landlords had retained sufficient control over portion of area where injury occurred to be under duty to maintain it.

Reversed.

* Opinion vacated 344 P.2d 301.

1. Landlord and Tenant ⇐164(1)

As a general rule, the tenant takes premises as he finds them and must protect himself against any dangerous condition found therein, and landlord is under no duty to maintain the leased premises free from defective condition which may cause injury to the tenant.

2. Landlord and Tenant ⇐164(1)

Responsibilities of landlord and tenant with respect to maintaining demised premises free from defective conditions may be changed by contract.

3. Landlord and Tenant ⇐164(6)

If landlord leases premises with knowledge of existence of a latent defect which is unknown to tenant and which causes injury to tenant, landlord may be held liable, on a theory something like fraud.

4. Landlord and Tenant ⇐164(1)

Where landlord retains control over parts of premises used by tenants but not demised to any one tenant, landlord is liable for injuries from defects that reasonable inspection would have revealed.

5. Landlord and Tenant ⇐164(1)

Landlord would be liable for injuries sustained by upstairs tenant when landing of outside stairway which was used exclusively by such upstairs tenant but which was connected with other stairways in common use gave way if reasonable tenant and landlord would have believed that landlord had retained sufficient control over portion of area where injury occurred to be under duty to maintain it, rather than only if area was not used exclusively by one tenant.

6. Trial ⇐251(1), 252(1)

Ordinarily, the giving of instructions on issues not involved, even though such instructions are abstractly correct, is error; however, if evidence sufficient to support a finding on such an issue is introduced, then the giving of such instructions is proper.

7. Landlord and Tenant ⇐169(10)

In tenant's action against apartment building landlord for injuries sustained when she fell through floor boards on landing of wooden outside stairway, evidence on issue of visibility of defective condition of stairway would not support finding that tenant had been contributorily negligent in using it for the purpose for which it was intended and giving instruction on contributory negligence was error.

Vernon W. Humber, Thaddeus J. Kukula, San Francisco, for appellant.

Theodore Tamba, San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff was a tenant of an apartment house owned and operated by the defendants. On the rear of the exterior of the building was a maze of stairways and platforms, some used in common by some or all of the tenants, and some used in whole or in part exclusively by one tenant. The back door of plaintiff's apartment opened onto a small platform, designated in the evidence as landing number one. Three steps, designated as steps number one, led from landing number one down to landing number two. These two landings and the steps were used exclusively by the plaintiff and her family. From landing number two, steps, designated as steps number two, led to platform number three, from which steps led to landing number four. These steps and platforms were used in common by several tenants, including the plaintiff. The basic support for these stairways and platforms was common for portions of the areas used exclusively by plaintiff and those used in common with other tenants. These back stairways and platforms were designed so that tenants could reach the area where garbage cans were kept, and to reach an area where the tenants could dry their clothes.

On July 22, 1954, at about 7:15 a. m., plaintiff stepped out on landing number one, walked down the three steps to landing number two, intending to go to the garbage can on the ground level to deposit some refuse. She took one or two steps

on landing number two, when the floor boards collapsed beneath her, and she fell to the cement floor some eight or ten feet below, and was hurt. She brought this action against her landlords, alleging negligence on their part. The jury decided in favor of the defendants. From the judgment entered on that verdict the plaintiff appeals. The appeal is taken on a settled statement.

Plaintiff testified that the only purpose in using these back steps and landings was to dispose of garbage on the ground level or to hang out clothes to dry on a landing on the floor above her. Plaintiff conceded that only she and her husband used landing number two which collapsed, and that that landing was not used by any other tenant. Had she taken but another couple of steps, however, she would have reached the steps and platform used in common with other tenants.

Expert testimony was introduced which demonstrated, without conflict, that the wood and supports of landing number two were badly deteriorated and rotted and that such condition was readily observable upon a reasonable inspection. As already pointed out, the supports which collapsed supported not only landing number two, but also the areas used in common by several tenants.

The court minutely, carefully and exhaustively instructed regarding the landlord-tenant relationship, and the duties imposed on each. These instructions need not be quoted verbatim. Time and time again the trial court instructed, illustrating its instructions with numerous examples, that if the platform which collapsed was used exclusively by the plaintiff and her husband and not used in common with other tenants, the plaintiff could not recover. Under the instructions this test was made the sole test of liability. These formula instructions amounted to a directed verdict in favor of defendants because plaintiff had admitted that she and her husband were the only ones ever to use the landing in question. The basic question presented on this appeal is whether these instructions properly defined the plaintiff's rights and the defendants' obligations under the facts here existing.

[1–3] The instructions were in error. It is, of course, the general rule that a landlord is under no duty to maintain leased premises free from defective conditions that cause injury to his tenants. The lessee, as a general rule, takes the premises as he finds them and must protect himself against any dangerous condition found thereon. This is an application of the rule of *caveat emptor* to leases. Hassell v. Denning, 84 Cal.App. 479, 258 P. 426. Of course, these responsibilities may be changed by contract. In addition, two exceptions have grown up to the general rule that a landlord is not liable for dangerous conditions existing on the leased premises. The first exception relates to situations where the landlord leases premises with knowledge of the existence of a latent defect which is unknown to the tenant and which causes injury to him. The landlord may then be liable. This exception is based on something like fraud. Shotwell v. Bloom, 60 Cal.App.2d 303, 140 P.2d 728; Prosser on Torts, 2d Ed., 466. Admittedly, the jury was properly instructed as to this exception.

[4] The second exception to the rule limiting the landlord's immunity is the one that has given the most trouble to the courts. Generally stated, it is that, where a landlord retains control over parts of the premises used by the tenants but not demised to any one tenant, the landlord is liable for injuries from defects that a reasonable inspection would have disclosed. This exception to the general rule of non-liability grew up because of the problems presented by the use of multiple dwelling units. In most apartments and other multiple dwelling units there are hallways, stairways and the like not in fact leased to any one tenant but which are used in common by several tenants. These, as a matter of practical and legal necessity, the landlord must keep in a state of repair. 1 Tiffany, Landlord and Tenant, § 89, p. 631; Jones, Landlord and

Tenant, § 614, pp. 705, 706; II Underhill, Landlord and Tenant, § 485, p. 799; Harkrider, Tort Liability of a Landlord, 26 Mich.L.Rev. 260, 402. This rule had its origin in the fact that, in multiple dwelling units, as a matter of common sense and fairness, the landlord should maintain and keep in repair areas of common use. This rule has repeatedly been recognized in California. Harris v. Joffe, 28 Cal.2d 418, 170 P.2d 454; Bock v. Hamilton Square Baptist Church, 219 Cal. 284, 26 P.2d 7; Dorfer v. Delucchi, 61 Cal.App.2d 63, 141 P.2d 905; Goddard, California Landlord-Tenant Law and Procedure, 3d Ed., p. 111.

It is important to note that this exception to the general rule grew out of the particular fact situation involving an area not used by any one tenant exclusively. But this does not mean that this is the only fact pattern to which the rule is applicable. As early as 1910 Tiffany foresaw the unreasonableness of an arbitrary application of the exception and warned against it. In Vol. I of his book on Landlord and Tenant at page 639 Tiffany states: "It has been apparently decided in several cases that though the landlord owes to his tenants the duty to keep the common passageways, stairs, platforms and the like in safe condition for the use of the various tenants and their guests, there is no analogous obligation in the case of a passageway or platform, the use of which is not common to two or more tenants, but which one tenant alone has the right to use, although such passageway or platform is not a part of the leased premises, but is retained by the landlord, and the tenant is given merely the right to make use thereof. * * * *It might be questioned, it is conceived, whether the lessor, retaining possession and control of an approach to a single tenement, necessary for access thereto, should not be under the same duty of exercising diligence to keep it safe as in the case of an approach to several tenements, since he invites its use by the tenant and the tenant's visitors.*" (Italics added.)

The suggested extension of the rule is a sound one. From a standpoint of reason and logic, in such cases, the ultimate fact question should be whether or not, from a realistic and common sense viewpoint, the landlord has retained control of the particular area involved. In determining this question many factors should be considered. One such factor is whether or not the area was used by one or by more than one tenant, or by the tenant and the landlord. But this factor, although important, is not the only factor to be considered. The vice of the instructions here given is that they make this factor the exclusive one, that is, the jury was told that unless such joint use existed no liability could be imposed.

There are some California cases which seem to indicate that if the use is exclusive by the tenant there cannot be any liability on the landlord. These cases all involved private and separate and distinct stairways leading to a particular apartment and used exclusively in its entire length by one tenant. These cases held that in such a situation there is no duty on the landlord to inspect and to repair defects. Ellis v. McNeese, 109 Cal.App. 667, 293 P. 854; Epperson v. Mendes, 141 Cal.App.2d 581, 297 P.2d 141; Goodmaker v. Kelley, 154 Cal. App.2d 457, 316 P.2d 746; Schafer v. Mascola, 163 Cal.App.2d 53, 328 P.2d 865. These cases contain general language which support the theory of the instructions here under attack.

Other cases, however, while recognizing that common use is an important factor, do not treat it as the exclusive factor and recognize that the real test is whether the landlord has retained sufficient control over the area in question so as to be responsible for its upkeep. Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Harris v. Joffe, 28 Cal.2d 418, 170 P.2d 454. An instruction to the effect that a landlord is under a duty to provide a safe means of entrance and exit for his tenants, without mentioning common use, has been upheld. Rodenberger v. Frederickson, 111 Cal.App. 2d 139, 244 P.2d 107.

It is quite significant that in phrasing the exception to the general rule of landlord's immunity the Restatement of Torts makes

no mention of common use. Section 360 provides: "A possessor of land, who leases a part thereof and retains in his own possession any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe." This Restatement rule has been approved in California. Harper v. Vallejo Housing Authority, 104 Cal.App.2d 621, 232 P.2d 262. In other states it has been specifically held that the fact that the particular area is not actually in common use by more than one tenant does not preclude the exception to the rule under consideration from being applicable. Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377; Farguet v. De Senti, 110 Conn. 367, 148 A. 139; Ruane v. Doyle, 308 Mass. 418, 32 N.E.2d 244.

[5] The other Division of this court recently passed on this very subject in Yazzolino v. Jones, 153 Cal.App.2d 626, 315 P. 2d 107 (hearing in Supreme Court denied). The facts of that case are very similar to those here involved. There, the plaintiff, a guest of an upstairs tenant, was injured on a portion of the outside stairway used exclusively by the upstairs tenant, but which stairway was connected with other stairways in common use. That is precisely the fact situation here involved. In the course of its opinion the court stated (153 Cal.App.2d at page 633, 315 P.2d at page 112): "The stairway led from the ground to the back door of the lower flat and to the back door of the upper flat. There was no independent stairway for each floor of the building. As the plaintiff correctly points out in his brief, actual use is not the determinative factor. [Citation.] It is, therefore, of no significance that the upstairs tenant did not use the stairway or that the Duffys [lower tenants] has used the stairway only once in six months. If the upstairs tenant had wanted to use the stairway to get to the back door of her flat, she would have had to use the lower portion of the stairway. There is no question therefore that the lower portion of the stairway was a common areaway. *It would be ridiculous to say that, although the lower portion of the stairway was a common areaway, the upper portion was not because it led only to the flat of the upstairs tenant, as the defendant argues.*" (Italics added.)

We agree that it would have been "ridiculous" to hold in the Yazzolino case that the landlord was responsible for the repair of one-half of the stairway and not responsible for the repair of the other half. Yet in the instant case, the trial court, by rigid adherence to the common use theory, told the jury that if they should find that the portion of the passageway involved was used exclusively by the plaintiff, a fact admitted by the plaintiff, no liability could attach to the landlord even though other portions of the same passageway were used by the other tenants. Under the instructions here involved if the plaintiff had advanced but a couple of steps further she would have reached the magic area of common use and would clearly have been entitled to recover. The law is not so unrealistic and formalistic as to require a landlord to repair part of a maze of connected stairways and permit him, with immunity, to discontinue such repairs on contiguous parts, even though some of the supporting beams are common to both portions of the stairway. Yet that is exactly what the jury was instructed was the law. The ultimate factual question that should have been submitted to the jury was whether a reasonable tenant and landlord would believe that the landlord retained sufficient control of the portion of the area where the injury occurred, and not solely whether the

area in question was or was not used exclusively by the tenant.

[6] The trial court also committed reversible error in giving instructions on contributory negligence. It is true that defendants pleaded contributory negligence in their answer as an affirmative defense, but the record shows that no evidence, sufficient to support a finding on this issue, was introduced. It is the law that the giving of instructions on issues not involved, even though such instructions are abstractly correct, is error. Shippy v. Peninsula Rapid Transit Co., 197 Cal. 290, 240 P. 785. Of course, if evidence, sufficient to support a finding on the issue is introduced, then the giving of such instruction is proper. Washington v. City and County of San Francisco, 123 Cal.App.2d 235, 266 P.2d 828; see cases collected 24 Cal.Jur. p. 830, § 95.

[7] Defendants contend that there was sufficient evidence introduced by the plaintiff on this issue to warrant giving the instructions. Plaintiff admitted that she had used the stairway, intermittently, for about a year, and evidence was introduced to show that the porch and its supports were visibly rotted. But on the issue of the visibility of the defective condition George Washington, plaintiff's expert witness, testified that, although the rot was visible, it was only by bending over the platform and looking underneath that it could be seen. Later in his testimony he stated that one not an expert on rotten wood would not be able to observe the defective condition by ordinary use of the platform. Defendants introduced no evidence on the issue. Obviously, this evidence would not support a finding that the plaintiff was contributively negligent in using the platform for the purpose it was intended. On the retrial unless sufficient evidence is introduced on this issue, the instructions on contributory negligence should not be given.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

168 Cal.App.2d 690

In the Matter of Arbitration between RHEEM MANUFACTURING COMPANY and STOVE MOUNTERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 61, AFL–CIO.

STOVE MOUNTERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 61, AFL–CIO, Appellant,

v.

RHEEM MANUFACTURING COMPANY, Respondent.

Civ. 18204.

District Court of Appeal, First District, Division 2, California.

March 16, 1959.

Rehearing Denied April 15, 1959.

Hearing Denied May 13, 1959.

Proceeding in the matter of the arbitration between employer and union. The union applied for modification or vacation of severable portion of arbitration award. The Superior Court, Alameda County, Donald K. Quayle, J., entered an order denying the application, and the union appealed. The District Court of Appeal, Kaufman, P. J., held that where terms of submission agreement were exceedingly narrow and specific and limited decision of arbitrators "to issues set forth above," question of vacation for certain employee for a lesser period than ten days was not implicit in and did not necessarily arise from issue inquiring of arbitrators whether employer was required to pay ten days' vacation pay to that employee.

Order affirmed.

1. Arbitration and Award ⇐73

Opinion and award of arbitrators are sole guides to evidentiary facts, and courts are not called on to review evidence produced in arbitration proceeding. West's Ann.Code Civ.Proc. §§ 1288(d), 1289.

2. Arbitration and Award ⇐73

A court may not substitute its interpretation of arbitration agreement for that of arbitrators. West's Ann.Code Civ.Proc. §§ 1288(d), 1289.

3. Arbitration and Award ⇐57

Though, as a general rule, in case of submission of special claims to arbitration, award must be limited to particular matter submitted, it may well extend to questions that necessarily arise therefrom. West's Ann.Code Civ.Proc. §§ 1288(d), 1289.

4. Contracts ⇐284(1)

Agreements for submission to arbitration are to be construed broadly. West's Ann.Code Civ.Proc. §§ 1288(d), 1289.

5. Labor Relations ⇐435

Where terms of agreement for submission to arbitration pursuant to collective bargaining agreement were exceedingly narrow and specific and limited decision "to issues set forth above", question of vacation for certain employee for lesser period than ten days was not implicit in and did not necessarily arise from issue submitting to arbitration question whether employer was required to pay ten days' vacation pay to that employee. West's Ann.Code Civ.Proc. §§ 1288(d), 1289.

6. Arbitration and Award ⇐29

An arbitrator derives his power solely from submission agreement, and he has no legal right to decide issues not submitted. West's Ann.Code Civ.Proc. §§ 1288(d), 1289.

Johnson, Thorne, Speed & Bamford, San Jose, for appellant.

Harry L. Fledderman, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

This is an appeal by petitioners from an order of the Superior Court of Alameda County denying an application for the modification or vacation of the severable portion of an arbitration award. Petitioners and appellants herein are members of Stove Mounters' International Union, Local 61. Respondent, Rheem Manufacturing Company, is their employer. The appellant union argues on appeal that the award does not conform to the findings and must be modified and corrected under Code of Civil Procedure, section 1289, or in the alternative, vacated under Code of Civil Procedure, section 1288(d).

The opinion and award of the arbitrators are the sole guides to the evidentiary facts. The record in the instant case reveals the following:

In 1951, respondent acquired a factory at Newark, California. Appellant had served as bargaining agent for the employees of the factory under the previous owner, and continued in this capacity after the change in ownership. Later, the parties were covered by a collective bargaining agreement which had become effective June 15, 1955, and was scheduled to remain in effect for two years. Respondent's Newark operation was not satisfactory from an economic standpoint. During the second half of 1956, respondent decided to close down and transfer production elsewhere. Most of the employees were separated from the payroll in November, 1956. Some employees were retained until the end of the year to finish up work in process and take inventory. On December 31, 1956, the Newark premises were sold.

As each employee was separated, he was given a pro rata vacation allowance for the portion of a year from June 15, 1956 (the beginning of the previous vacation period) until the date of separation. In November 1956, a separated employee, filed a grievance pursuant to the collective bargaining agreement, claiming a right to a full year's vacation pay under the agreement. The Union contended that those employees who had worked eighty days subsequent to June 15 were entitled to the full allowance of ten or fifteen days' pay (depending on their years of service).

The relevant portion of the collective bargaining agreement relating to vacation pay is as follows:

"All employees with twenty-four (24) months' service shall receive ten (10) days' vacation pay provided they worked eighty (80) working days from June 15, 1955, to June 15, 1956. Vacation and holiday days for the purpose of computing vacation pay, shall be considered as days worked. Em-

ployees who quit, and are otherwise eligible, shall be paid on a pro-rata basis of one-sixth (1/6) of eighty (80) hours for each two (2) months of service to date of termination." Another paragraph provided for 15 days vacation for employees with 15 years of service, computed on the same formula.

A second controversy arose, relating to holiday pay. A third issue had already arisen between the parties before the Company's decision to terminate operations. These three issues were submitted to arbitration under an agreement dated April 16, 1957. This agreement is in part as follows:

"Pursuant to that Agreement between Rheem Manufacturing Company (hereinafter called the 'Company') and the Stove Mounters International Union of North America, Local No. 61, dated June 15, 1955, it is hereby agreed that the following issues arising out of grievances presented but not adjusted thereunder, are herewith submitted to arbitration:

"Issue I. Is the Company required to pay 10 days vacation pay to John J. Silva, who last physically worked for the Company on or about November 9, 1956, at which time said employee had worked 80 working days since June 15, 1956, and had over 24 months service with the Company?

"Issue II. Is the Company required to pay holiday pay to John J. Silva for 'Holidays' falling within the 30 calendar day period following November 9, 1956, the last date on which said Silva physically worked for the Company?

"Issue III. In order to receive 15 days vacation pay, need the 15 years service required by Article XIII Subsection 3 be continuous?"

The agreement also stated: "The arbitrators shall confine their decision to the issues set forth above and the decision of the majority of the arbitrators shall be final and binding upon the parties hereto."

After hearings held as specified in the agreement, the Arbitration Board reached its decision and made an award as follows:

"1. The Company is not required to pay 10 days vacation pay to John J. Silva.

"2. The Company is required to pay holiday pay to John J. Silva for the 'holidays' falling within the 30 calendar days following November 9, 1956.

"3. In order to receive 15 days vacation pay, the 15 years service required by Article XII, Subsection 3, need not be continuous."

No appeal is taken as to the awards on Issues II and III. The union-appointed arbitrator dissented on Issue I, as he thought the majority misinterpreted the submission, went beyond the collective bargaining agreement, and failed to distinguish between the legal effect of the destruction of a plant by unavoidable circumstances and voluntary sale by an employer. The opinion of the chairman indicated that were the issue open to him, his award as to Issue I might be different. He stated as follows:

"The wording of the Submission Agreement is important in that it restricts the Board to a yes-or-no answer. It is fundamental that the powers of an arbitration board are created and limited by the submission agreement; and to make assurance doubly sure, the parties have directed that 'the arbitrators shall confine their decision to the issues set forth above.' The Union contends that Mr. Silva should have received a full ten days' pay. The Company argues that it was not contractually required to pay him anything, but made a pro-rata allowance until November 9, 1956, for equitable reasons. As it will appear, there is reason to believe that his pro-rata allowance should have been computed to December 31, 1956. But the parties have framed the issue in such a fashion as to preclude a decision in such terms. We must decide whether Mr. Silva was entitled to ten days, or was not entitled to ten days; and nothing more."

The first argument of the appellant is that the above is an erroneous construction of the submission agreement by the Arbitration Board; that therefore, this court should construe the submission agree-

ment to imply a power to award vacation pay in a smaller amount than that set forth and thus amend the award to conform to the findings under Code of Civil Procedure, section 1289. This section provides that an award must be corrected or modified:

"(a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

"(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

"(c) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

"The order must modify and correct the award, so as to effect the intent thereof, and promote justice between the parties."

[1,2] Appellant states that the above section is applicable, as the undisputed evidence indicates that all disputes arising out of the enforcement and interpretation of the collective bargaining agreement and the final termination of employment, should be finally settled in the single arbitration proceeding. However, the only portion of the record which supports the latter contention is the affidavit in support of the application for the order vacating the award made by appellant's attorney. Even if there were any merit in this position, as we pointed out above, the opinion and the award of the arbitrator are the sole guides to the evidentiary facts, and this court is not called on to review the evidence produced. Appellant's own authority points out that a court may not, under well-established principles of law, substitute its interpretation of the agreement for that of the arbitrator. In re United Automobile Workers, 15 LA 781 (N.Y.Sup.Ct.1951).

Appellant's second argument is that the arbitrators here imperfectly executed their powers as an award of vacation for a lesser period than 10 days is implicit within the matter specifically submitted under Issue I, and asks in the alternative, that this court vacate the award and order a rehearing pursuant to Code of Civil Procedure, section 1288(d). This section provides that an award must be vacated:

"(d) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made.

"Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

[3–6] While as a general rule, in the case of submission of special claims to arbitration, the award must be limited to the particular matter submitted, it may well extend to questions that necessarily arise therefrom. 6 C.J.S. Arbitration and Award § 80(b), p. 222. We agree with the appellant that submission agreements are to be construed broadly, but we cannot agree that in the instant case, the question of vacation for a lesser period was implicit or necessarily arose from Issue I as stated in the submission agreement. In the instant case, the terms of the submission agreement are exceedingly narrow and specific. An arbitrator derives his power solely from the agreement. He has no legal right to decide issues not submitted. Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 260 P.2d 156; Flores v. Barman, 130 Cal.App.2d 282, 279 P.2d 81.

Appellant relies heavily on Straus v. North Hollywood Hospital, Inc., 150 Cal. App.2d 306, 309 P.2d 541. In that case, the issues submitted were considerably broader than in the instant case, and the court held that a provision in the underlying agreement that the arbitrators had the power to terminate the contract were automatically imparted into the submission agreement. Even if we were to agree here that the broader provisions of the col-

lective bargaining agreement were automatically imparted into the very narrow and specific provisions of the submission agreement, the result desired by the appellant would not necessarily follow. In McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal.2d 45, 315 P.2d 322, 333, our Supreme Court held that even a broadly phrased arbitration provision covering all disputes or grievances arising over the interpretation or application of this agreement does not include the arbitration of a breach of the no-strike clause. The court pointed out that the arbitration procedure was designed to cope with the usual employee complaints, not the special one in issue. Simons v. Mills, 80 Cal. 118, 22 P. 25 and Sampson Motors, Inc. v. Roland, 121 Cal.App.2d 491, 263 P.2d 445, also relied on by the appellant, do not support his argument. In the former, the submission agreement authorized the arbitrators to decide on the amount of money due each party in a partnership dispute and to settle all differences between the parties. The articles of co-partnership were made a part of the submission. The court affirmed an award which allocated accounts receivable between the parties. In the Sampson case, the contract specifically permitted the arbitrators to settle all disputes arising under the contract. In the case of Arbitration between A. D. Juilliard & Co. and Baitch & Castaldi, Inc., 1956, 2 Misc.2d 753, 152 N.Y.S.2d 394, it was held that the arbitrators did not exceed their powers in granting to the petitioners damages for non-acceptance of goods of $19,000, when the demand was for the agreed price and cost of showing goods in the amount of $43,000. However, the court stated the rules of the American Arbitration Association pursuant to which the arbitration was held, expressly provided that the arbitrator may grant any relief he deems just within the scope of the agreement. In Twin Lakes Reservoir & Canal Co. v. Platt Rogers, 112 Colo. 155, 147 P.2d 828, the relief given by the award was embraced in the submission agreement.

Returning to the authorities in our state, we cannot agree that cases like Bierlein v. Johnson, 73 Cal.App.2d 728, 166 P.2d 644, are not persuasive here. In that case, the parties entered into an agreement to set up a company called "Endura Company". One of the several issues submitted to arbitration was, "If Endura Company, Inc., is not organized in accordance with the agreement * * * what are the proportionate interests of plaintiff and defendant in said business?" 73 Cal.App.2d at page 731, 166 P.2d at page 646. The court held that a cash award in full settlement of one party's interest in the business was not within the matters specifically submitted and not implicit therein. We recently cited this case with approval in Pacific Fire Rating Bureau v. Bookbinders' and Bindery Women's Union, 115 Cal.App.2d 111, 251 P.2d 694. The case of Drake v. Stein, 116 Cal.App.2d 779, 254 P.2d 613 also supports our view. Even if we were to agree with the appellant that a claim for a lesser amount of vacation was implicit, (which we do not) there would only be an error of judgment not subject to judicial review in the absence of fraud or gross misconduct. Sapp v. Barenfeld, 34 Cal.2d 515, 212 P.2d 233.

We need go no further in deciding this case than the facts of the case require. The submission agreement here, as pointed out in the opinion of the chairman, limits the decision of the arbitrators "to the issues set forth above." The issue as framed is limited to the question: "Is the Company required to pay *10 days* vacation pay * * *?" We need not decide what might have been the extent of the arbitrators' power if the submission agreement had not contained the language: "The arbitrators shall confine their decision to the issues set forth above." With that express limitation in the agreement, we conclude that the appellant has not met his burden of proving error under either

Code of Civil Procedure, section 1288(d) or Code of Civil Procedure, section 1289. Accordingly, the order denying appellant's motion and in effect confirming the award must be affirmed.

Order affirmed.

DOOLING and DRAPER, JJ., concur.



168 Cal.App.2d 680

In the Matter of the ESTATE of Theresa PADULA, Deceased.

John PADULA, etc., and John E. Glover, Contestants and Appellants,

v.

J. O. WHITESIDE, etc., Petitioner and Respondent.

Civ. Nos. 23202, 23203.

District Court of Appeal, Second District, Division 1, California.

March 13, 1959.

As Modified on Denial of Rehearing April 9, 1959.

Hearing Denied May 6, 1959.

Two cases, wherein a consolidated appeal was taken from judgments of the Superior Court of Los Angeles County. Roger Alton Pfaff, J., and from orders denying motions for new trial. The District Court of Appeal, Fourt, J., held that, under circumstances, trial court had power to approve payments made by executor of fees which had been allowed for services rendered in deceased ward's guardianship proceeding but had not been paid therein.

Affirmed.

1. Guardian and Ward ⇐37

Court in guardianship proceeding could have created lien upon assets in guardianship estate, and such lien could have survived transition of original property into assets which were equivalent of original property.

2. Executors and Administrators ⇐481

Under circumstances, trial court had power to approve payments made by executor of fees which had been allowed for services rendered in deceased ward's guardianship proceeding but had not been paid therein.

3. Executors and Administrators ⇐221(6)

Evidence supported claim against deceased ward's estate for advances made to guardianship estate.

4. Appeal and Error ⇐879

Errors affecting a party who does not appeal will not be reviewed, even though excepted to by him in trial court and included in bill of exceptions.

John E. Glover, Los Angeles, for appellants.

Covert & Covert, by D. P. Covert, Glendale, for respondent.

FOURT, Justice.

This is a consolidated appeal in two cases: in one case, John E. Glover is appealing from the judgment and order denying his motion for a new trial concerning objections filed by him to the current account and report of J. O. Whiteside, as executor of the Estate of Theresa Padula; and in the other case John E. Glover is appealing from the judgment and order denying his motion for a new trial wherein with respect to a previously rejected claim against the Estate of Theresa Padula he was awarded judgment in the sum of $4,000, but the payment thereof was made subordinate to the payment in full of the claim of one Louis Padula against said estate in the sum of $2,063.48.

[1, 2] On appeal it is urged that the trial court erred in failing and refusing to surcharge the executor in the sum of $1,665 for amounts heretofore paid in the estate proceeding for certain services which were rendered prior to the death of Theresa Padula in the guardianship proceeding, wherein the court allowed said fees but did not order them paid, said fees consist-

ing of the sum of $1,000 paid to Donald Paul Covert as attorney for the guardian, the sum of $500 paid to J. O. Whiteside as guardian, and the sum of $165 paid to P. W. Croate as a real estate broker. It is further contended that none of the above items is entitled to any preference; that the estate is a deficiency estate and that each of the above items should be reduced pro rata with all general claims.

Appellant concedes that the court in the guardianship proceeding could have created a lien upon the assets in the guardianship estate, and that such a lien could have survived a transition of the original property into new assets which were the equivalent of the original property. Appellant states his position to be as follows: "The only theory upon which that portion of the judgment can be sustained is upon the basis that the Court impliedly *ordered* and established an equitable lien in favor of the parties against the funds and assets which had come into the hands of the executor or held they already had one by operation of law *without an order*." Appellant argues that the existence of power to create such a lien does not signify that a lien is created in the absence of an order creating it, and he then concludes that an order in the guardianship proceeding specifically establishing a lien upon the assets in the guardianship proceeding would necessarily be prerequisite to the existence of a lien on assets in the probate estate.

In re Estate of Clanton, 171 Cal. 381, 153 P. 459, upon which appellant relies, the guardian rendered his account to the administrator, who admitted the existence of the guardian's claims. Objections thereto were filed by heirs. Certain of the expenditures had been made by the guardian without formal allowance previously made by the court, and the guardian had presented no creditor's claim against the estate of the deceased incompetent. The primary asset of the estate consisted of certain real property which was leased at the date of death of the incompetent. The guardian surrendered the property to the administrator who was authorized to and did sell the interest of the estate in said real property and the administrator received the proceeds therefrom. It was contended that the guardian's lien was destroyed by the sale. In its opinion, the court stressed the fact that the proceeding was in equity, and then stated (171 Cal. at page 385, 153 P. at page 461): "It is the guardian's duty after the death of the ward to settle his account with the court, or with the administrator. Section 1754, subd. 3, Code Civ.Proc. To be sure, the provisions of that section refer to obligations which may be enforced under the guardian's bond, but they accurately define the duties of the guardian. The court of equity, having the entire matter before it, *could declare the existence of the lien upon the proceeds of the sale of the land,* and *could direct the payment of the amount due the guardian out of that sum.*" (Emphasis added.) The court further states (171 Cal. at page 387, 153 P. at page 462): "It was proper for the court to allow the expenses incurred in the settlement of the account, including the fees of the attorney for the guardian."

Appellant also cites In re Estate of Schluter, 209 Cal. 286, 286 P. 1008, in support of his contention. In this case the guardian was appointed by the Superior Court in Monterey County, where the ward was temporarily present. Upon the death of the ward in Monterey County, the guardian presented her final account and an order was made settling the account and allowing her, as a charge and lien against the property and estate of said decedent, various items paid before and after her appointment as guardian for support and maintenance of said ward, together with fees for her services and those of her attorney. Probate proceedings were instituted in Los Angeles county, and a claim for said amounts, supplemented by a copy of the order made by the Monterey County court, was presented to and rejected by said executrix. Thereafter, upon motion filed by said guardian, an order was made subjecting the assets of the probate estate to said charge; and the executrix appealed, contending that the court was without jurisdiction to subject the estate to said lien. In affirming the order, it was stated (209

Cal. at page 292, 286 P. at page 1010) that the Monterey court "had jurisdiction to make said order extending respondent's lien to the Los Angeles property and the Los Angeles court acquired jurisdiction thereof subject to restrictions, orders, or liens imposed upon it by said Monterey court; * * *."

In Erickson v. Smyth, D.C., 108 F.Supp. 412, certain items, including a $75,000 fee paid for legal services rendered in obtaining the removal of a guardian, were claimed as deductible charges in ascertaining the net taxable estate for federal estate tax purposes. Court approval of the fee paid had not been sought in the guardianship proceeding or in the probate proceeding and the federal court in determining the enforceability of the claim under California law stated (at pages 414 and 415): "After her father's death, plaintiff could have enforced her claim against his estate by presenting it in the final account in the guardianship court. Upon approval of the court, plaintiff would have had a lien for the amount of the claim against the assets of the estate in the hands of the executor. In re Estate of Schluter, 1930, 209 Cal. 286 [287], 286 P. 1008; In re Estate of Clanton, 1915, 171 Cal. 381, 153 P. 459; In re Guardianship of Jacobson, 1947, 30 Cal.2d 312, 182 P.2d 537; In re Estate of Eaton, 2d Dist. 1940, 38 Cal.App.2d 180, 100 P.2d 813." It is true that the Erickson case was reversed in 9 Cir., 221 F.2d 1, but the reversal was upon grounds other than the statement of law above set forth.

In Riley v. Superior Court, 49 Cal.2d 305, 316 P.2d 956, in a proceeding in certiorari wherein the administratrix petitioned to annul an order of the superior court awarding additional fees to a guardian and her attorney, it was contended that the probate court lacked jurisdiction to award compensation to the guardian or her attorney or to declare a lien for such fees against the estate of the deceased ward. The additional fees related to services performed in connection with a prior appeal from the order discharging the guardian and allowing fees to the guardian and her attorney. In affirming the order declaring a lien for said fees upon assets which had been turned over to the administratrix, the court stated (49 Cal.2d at page 312, 316 P.2d at page 960, "We held in In re Estate of Clanton, 171 Cal. 381, 385, 153 P. 459, and In re Estate of Schluter, 209 Cal. 286, 292, 286 P. 1008, that the court has jurisdiction to award the guardian fees and to declare a lien in the guardian's favor even though all the property has been turned over to the administrator of the deceased ward's estate. Both of these cases made it clear that actual control of the ward's estate was not essential to the court's jurisdiction. The allowance for attorney fees and fees for the guardian are a charge against the estate of the ward (Guardianship of Cookingham, 45 Cal.2d 367, 375, 289 P.2d 16)."

After the decision of the Supreme Court in the aforementioned certiorari proceeding, the administratrix then perfected her appeal involving the identical proceedings and documents and the matter was again reviewed in Guardianship of Blair, 163 Cal. App.2d 319, 328 P.2d 986. The order was affirmed and the additional fees and expenses awarded to the guardian and additional fees awarded to her attorney were declared to be a lien upon the assets of the estate which had been turned over to the administratrix.

The reasonableness of the fees is not an issue in the proceeding engaging our attention. Said fees had been allowed for services rendered in the guardianship proceeding, but were not paid therein. Said fees had heretofore been paid from the assets of the probate estate. Suffice it to say that under the circumstances, the trial court clearly had the power to approve the payments made.

[3] Appellant next contends that the trial court erred in allowing the claim of Louis Padula in the amount of $2,063.48 as a general claim against the estate. Appellant argues that the $518 paid direct to Dr. Matousek and the $233 paid for a burial plot in Calvary cemetery and the payments from a joint account maintained by Louis

Padula with the guardian for maintenance of the ward in the sum of $1210.95, were not loans or advances made to the guardianship estate. By an agreement dated January 24, 1954, in which the claim of the Estate of Joseph Padula, Deceased, and Theresa Padula against Ralph Padula was compromised, Louis Padula in his individual capacity agreed to relinquish his right to reimbursement from his mother's guardianship estate for funds theretofore loaned or advanced to his mother or to her guardian. From this it can be inferred that the parties to the agreement, including Ralph Padula, appellant's assignor, contemplated that Louis Padula intended to assert a claim for reimbursement for any future loans or advances to his mother or to her guardian and impliedly acquiesced therein. Considerable testimony and documentary evidence was presented to the trial court pertaining to what was received by Louis Padula from his mother and what was paid out by him for his mother's benefit and to explain the basis used in the computation of his creditor's claim.

In our opinion this claim was supported by substantial evidence and the finding of the trial court that it should be allowed should not be disturbed on appeal.

Appellant's judgment of $4,000 constituted a general claim against the estate and in view of the terms of the aforesaid agreement of January 24, 1954 to which appellant's assignor was a party, it was proper for the trial court to determine that payment to appellant should not be made "unless and until payment in full has been made to Louis Padula of his claim in the amount of $2,063.48."

[4] It is not necessary for us to consider the argument presented by respondent to the effect that the trial court erred in awarding a $4,000 judgment in favor of appellant on the rejected claim assigned to him by Ralph Padula. Respondent is not a party appealing in this case, and "It is well settled that on appeal errors affecting a party who does not appeal will not be reviewed, even though excepted to by him in the trial court and included in the bill of exceptions." Salter v. Ulrich, 22 Cal.2d 263, 268, 138 P.2d 7, 9, 146 A.L.R. 1344.

The judgments and orders appealed from are, and each of them is, affirmed.

WHITE, P. J., and LILLIE, J., concur.



168 Cal.App.2d 510

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jesse LAWRENCE, Defendant and Appellant.

Cr. 3487.

District Court of Appeal, First District, Division 1, California.

March 9, 1959.

Defendant was convicted of the sale and possession of heroin and from a judgment of the Superior Court, City and County of San Francisco, Harry J. Neubarth, J., the defendant appeals. The District Court of Appeal, Fred B. Wood, J., held that the evidence sustained the conviction as to possession but not as to sale, that informer witness properly claimed the privilege against self-incrimination and that other rulings were either not erroneous or not prejudicial.

Affirmed in part and reversed in part.

1. Criminal Law ⇐409

In prosecution for the unlawful sale and possession of heroin, defendant's admission that some of the heroin found in his apartment belonged to him and was used for his asthma was not an admission that he had sold heroin to purchaser. West's Ann.Health & Safety Code, § 11500.

2. Poisons ⇐9

Evidence sustained conviction for the unlawful possession of heroin. West's Ann.Health & Safety Code, § 11500.

3. Witnesses ⇐308

It is the function of the trial court and not of the witness to determine whether a question tends to incriminate.

4. Witnesses ⇐308

The test whether a question tends to incriminate is whether any direct answer to proposed question has a tendency to incriminate the witness, and the court properly considers all the circumstances in determining whether there is a real danger that a direct answer to a question may incriminate.

5. Witnesses ⇐297(13)

In prosecution for unlawful sale and possession of heroin, informer witness admitting his co-operation with officers and participation in sale of which defendant stood charged properly invoked the privilege against self-incrimination, where if the witness had testified contrary to the testimony given on voir dire, he would have given evidence tending to have convicted him of perjury in giving of his former testimony and would have been liable to prosecution therefor because the statute of limitations had not yet run.

6. Witnesses ⇐305(1)

A witness who testifies upon a preliminary examination does not thereby waive the privilege of not incriminating himself when called to testify at the trial which ensues and the same is true of a person who testifies before a grand jury.

7. Witnesses ⇐305(1)

If a witness voluntarily gives testimony on direct examination which would otherwise be privileged, he is subject to cross-examination concerning the matters testified to in chief.

8. Witnesses ⇐305(1)

In prosecution for unlawful sale and possession of heroin, giving of testimony by informer witness upon his voir dire did not preclude him from later asserting the privilege against self-incrimination when later called as a witness when the trial was resumed before a jury upon the question of defendant's guilt.

9. Criminal Law ⇐541

In narcotics prosecution, refusal to permit defendant to read to the jury informer's testimony given on voir dire at the first trial or that given on voir dire at the second trial was proper as not within the statute admitting testimony given on a former trial by a witness who cannot with due diligence be found within the state, where the witness was physically present in the courtroom and his failure to testify stemmed merely from the exercise of his right to assert his privilege against self-incrimination. West's Ann.Pen.Code, § 686.

10. Constitutional Law ⇐70(1)

The rewriting of a statute is a legislative and not a judicial function.

11. Criminal Law ⇐720(1)

In narcotics prosecution, defendant was not illegally deprived of witness' testimony by statements of the prosecutor that the witness would be subject to prosecution for perjury because the witness asserted his right not to incriminate himself.

12. Criminal Law ⇐1171(3)

In narcotics prosecution, conduct of the prosecutor in telling informer witness that he would be subject to prosecution for perjury because witness had asserted his right against self-incrimination was not prejudicial to the defendant, where the evidence was clear and convincing with respect to charge for possession of heroin and was harmless with respect to sale in view of reversal of conviction upon that count. West's Ann.Health & Safety Code, § 11500.

13. Criminal Law ⇐1166½(12), 1171(1)

In prosecution for the unlawful possession of heroin, alleged misconduct of prosecutor and the trial court was not prejudicial to the defendant. West's Ann. Health & Safety Code, § 11500.

14. Criminal Law ⇐766

Refusal of instruction advising jury that the defendant could not be convicted if the jury did not believe that he had had a fair trial was proper, since whether

defendant had a fair trial was a question of law, not a question of fact for the jury.

15. Criminal Law ⇐790

Refusing requested instruction that defendant must not be subjected to any more restraint than was necessary for his arrest and detention, and that if unnecessary force was used he was denied due process and was entitled to an acquittal, was proper, since while such use might render an arrest or search illegal, such use of force would not absolve the defendant from the consequences of his crime and grant him an acquittal.

Arthur D. Klang, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Preble Stolz, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Defendant was convicted of two violations of section 11500 of the Health and Safety Code: Sale and possession, respectively, of heroin.

As to the sale, there is a total gap in the chain of evidence. Willie Dandridge, an informant-participant who had no narcotics upon his person was furnished $200 in currency (identifiable by the serial numbers of the bills) and was under observation of the officer-witnesses until he entered defendant's place of residence. He remained inside for a period of 2½ to 3 hours. Upon leaving, he took a taxi, rode in it for two blocks, got out, delivered a package of heroin to one of the officers, was searched and found to have none of the state money in his possession.

One Gerald Williams entered defendant's apartment a few minutes after Dandridge did and remained there until Dandridge left. Defendant's wife, Norvelle Lawrence, entered a few minutes after Williams and remained inside for an appreciable length of time. Upon her departure she went to a certain department store and made some purchases, using one of the $10 bills that had been given the informant by the state. The sum of $250, including $170 of the money the state had furnished Dandridge, was found in a box on a bedside table in defendant's apartment. Plaintiff says there is no testimony that Williams was searched upon his apprehension after leaving defendant's apartment, and we have found none.

Heroin was found in the apartment: some on a cocktail table in the front room; some on a bed in the bedroom; and some in the pockets of a pair of trousers hanging on a closet door. Confronted with two of these items at the time of their seizure, defendant admitted they were his. He said he realized it was heroin and that he used it for his asthma.

Plaintiff says that this admission, the presence of the state money in his apartment, and a certain telephone conversation between Dandridge and defendant, definitely connect defendant with the sale, to the exclusion of his wife, Gerald Williams and the cabdriver.

The telephone conversation occurred shortly before Dandridge entered defendant's apartment. One of the officers placed the call, listened in, and narrated it as follows: "A voice said, 'Hello?' * * * Mr. Dandridge said, 'Hello, is that you Jesse?' The answer was: 'Yes.' He said, 'Is anything happening?' to which the reply by Mr. Lawrence was, 'Yes.' He says, 'Well, I'd like to get something. Can I come by?' And the voice on the other end of the line said, 'Yes.'" Those words indicate that defendant was at home and that Dandridge was welcome to visit him. What more, if anything, they meant, is too speculative to constitute a link in a chain of evidence competent to convict defendant of selling Dandridge a package of heroin.

If the presence of some of the state money in the box on the bedside table points to defendant as the seller, that very circumstance points with equal accuracy to his wife whose apartment also it was. In her case there was the added circumstance that she had some of the money upon her

person and used it in making certain purchases. There is the possibility, too, that if Williams had been searched the missing $20 of the money might have been found. Nor is it beyond the realm of the possible that Dandridge paid the money to Williams who transferred it to defendant in payment of a debt. None of these mutually inconsistent possibilities rises to the dignity of proof that defendant or his wife or Gerald Williams effected the sale.

[1] Nor was defendant's admission that some of the heroin found in his apartment belonged to him and was used for his asthma, tantamount to an admission that he had sold some heroin to Dandridge. He said, as to the heroin on hand, that he had it there for his own use, a fact corroborated to some extent by one of the officers who testified that in his opinion defendant was under the influence of narcotics at the time of his apprehension. It is unlike the statement defendant Palacio made in People v. Valencia, 156 Cal.App.2d 337, 319 P.2d 377. The officer and his informant sought to purchase narcotics from one Valencia, who took them to a certain hotel, went in alone and then returned saying that his "connection" wanted $120 for six grams. The officer gave $150 to Valencia who reentered the hotel and came back with Palacio. A conversation concerning narcotics ensued, in which the officer indicated hesitancy in letting Palacio have the money. Palacio replied: "That's not the way I work. I always give something in return." The officer then asked if the narcotics were good and Palacio said, "I have real good stuff." Thereupon, Valencia handed Palacio the $120. These and other circumstances were deemed sufficient supporting proof even though the officer did not see Palacio hand the narcotics to the informer. Those facts bear no real similarity to the facts of our case.

The facts here presented bear a marked resemblance to those in People v. Barnett, 118 Cal.App.2d 336, 257 P.2d 1041. There, the informant-participant was out of sight and hearing of the officer-witness for one and a half hours, during which time contact with others than the defendant was possible. Another similar case is People v. Morgan, 157 Cal.App.2d 756, 321 P.2d 873, in which there was no proof that the informer-participant contacted no one in going to and returning from the defendant's apartment. Similarly, in People v. Richardson, 152 Cal.App.2d 310, 313 P.2d 651, there was at least one person in addition to defendant with whom the informant made contact and from whom he might have made the purchase.

People v. Holland, 158 Cal.App.2d 583, 322 P.2d 983, invoked by plaintiff, is altogether different from our case. There the informant-participant was in plain view and under continuous observation of various officers from the beginning to the end of the sale transaction and had no contact with any other person than the defendant. So, too, in People v. Alvidrez, 158 Cal.App. 2d 299, 322 P.2d 557, the informant-participant in the sale transaction was, an examination of the record of the case indicates, under constant visual observation of the officers and had no contact with any other person than the defendant.

[2] As to the charge of unlawful possession of heroin, defendant's conviction is amply supported by the evidence: Heroin found in various places in his apartment, coupled with his admission to an officer that some of it belonged to him, that he realized it was heroin, and that he used it for his asthma. Defendant argues that the things found during the search of his premises were illegally admitted in evidence, upon the theory that the arrest which preceded the search was illegal. Defendant unsuccessfully urged this point upon the former appeal. People v. Lawrence, 149 Cal.App.2d 435, 443–445, 308 P.2d 821. The pertinent evidence upon retrial was substantially the same as upon the first trial. We concur in the analysis made and the views expressed by the reviewing court upon the former appeal.

Defendant claims he was erroneously deprived of the testimony of Dandridge to

defendant's prejudice and that this requires reversal in respect to his conviction of possession as well as for the sale of heroin. Upon the voir dire examination conducted before the court outside the presence of the jury to determine the admissibility in evidence of packages of narcotics that had been seized, Dandridge testified on behalf of the defendant. His testimony was consistent with and substantially the same as that given by him during the voir dire examination upon the former trial. Summarized on pages 447–448 of 149 Cal.App. 2d, on pages 827–828 of 308 P.2d.

The trial court found the seizure legal and declared the evidence admissible, whereupon the trial before the jury was resumed. When Dandridge was again called by the defendant, he refused to answer certain questions, invoking the privilege against self-incrimination. The court ruled he need not answer. Defendant questions this ruling upon the ground (1) it was not a proper claim of the privilege against self-incrimination and (2) Dandridge waived the privilege by testifying upon the voir dire.

[3, 4] It is, of course, the function of the trial court, not of the witness, to determine whether a question tends to incriminate. The test is " 'whether any direct answer to a proposed question has a tendency to criminate' the witness which is but another way of saying that the court must determine that no direct answer which the witness may make can tend to criminate him." In re Berman, 105 Cal.App. 37, 49, 287 P. 125, 130. The court properly takes into consideration all of the circumstances of the case in determining whether there is a real danger that a direct answer to a question may incriminate. Overend v. Superior Court, 131 Cal. 280, 283, 63 P. 372.

In the Berman case, the witness had previously given testimony upon deposition, to which his attention was directed. As to each of 12 questions and answers appearing in the deposition, this "question was put to him: 'I ask you whether the answer just read is not a true statement of fact in response to the question just read?' " 105 Cal.App. at page 39, 287 P. at page 126. Of this, the reviewing court said "if he had answered 'No,' he would have given evidence, which beyond all peradventure of doubt would have tended to convict him of perjury. It would have been a direct answer. How could the trial judge possibly find that no direct answer could tend to criminate him?" 105 Cal.App. at pages 49–50, 287 P. at page 130. It is not only a direct admission of crime that is privileged but also testimony which "might furnish a link in the chain by which a conviction might hang * * *." People v. McCormick, 102 Cal.App.2d Supp. 954, 960, 228 P.2d 349, 352, and cases there cited.

[5] So, too, in our case, if Dandridge had testified contrary to the testimony he gave on voir dire, at this trial and upon the former trial, admitting his cooperation with the officers and participation in the sale of which the defendant stood charged, he would have given evidence which would have tended to have convicted him of perjury in the giving of his former testimony. He would have been liable to prosecution therefor because the statute of limitations had not yet run as to either of those events.

[6–8] We do not consider that Dandridge's giving of testimony upon voir dire precluded him from asserting the privilege when later called as a witness when the trial was resumed before the jury upon the question of defendant's guilt. It is established in this state that a witness who testifies upon a preliminary examination does not thereby waive the privilege of not incriminating himself when called to testify at the trial which ensues. Overend v. Superior Court, supra, 131 Cal. 280, 63 P. 372. The same is true of a person who testifies before a grand jury. He does not thereby waive the right to assert the privilege when called as a witness at the trial. In re Sales, 134 Cal.App. 54, 24 P.2d 916. It is true that if a witness voluntarily gives testimony on direct examination which would otherwise be privi-

leged he is subject to cross-examination concerning the matters testified to in chief. People v. Freshour, 55 Cal. 375, 376. That, however, is not this case. The voir dire examination was in the nature of a special inquiry before the court to determine the admissibility of evidence, properly conducted outside the presence of the jury, not limited to evidence that would be admissible at the trial of the issue of guilt. Unlike the question whether a confession was freely and voluntarily made, it is not proper, when the court has determined the search and seizure lawful, to submit that question and the evidence from which it was determined to the jury for its determination in the trial proper. People v. Gorg, 45 Cal.2d 776, 780–781, 291 P.2d 469; followed upon the former appeal herein, People v. Lawrence, supra, 149 Cal.App.2d 435, 446–447, 308 P.2d 821. This seems comparable to the case of the witness who testifies upon the preliminary examination or before the grand jury, quite unlike the situation which obtains when a witness voluntarily testifies upon direct examination and thereby subjects himself to proper cross-examination in the very same proceeding or inquiry. In the only case involving this question which has come to our attention it was held that a witness had not, by testifying on voir dire, waived his claim of privilege. Hutchins v. State, 1951, 212 Miss. 145, 54 So.2d 210, 212, citing a dictum in Summerville v. State, 1949, 207 Miss. 54, 41 So.2d 377, 382. In the Hutchins case, the witness was a co-defendant but that was not the reason for the ruling on this point, as we read the decision in that case.

[9, 10] We find no error in the court's refusal to allow defendant to read to the jury Dandridge's testimony given on voir dire at the first trial or that given on voir dire at the second trial. It is not a case within the purview of section 686 of the Penal Code, which admits testimony given on a former trial by a witness who is "deceased, insane, out of jurisdiction, or who can not, with due diligence, be found within the state * * *." Obviously, the witness Dandridge did not come within any of the quoted exceptions. He was physically present in the courtroom. His failure to testify stemmed merely from the exercise of his legal right to assert his privilege against self-incrimination, not because of death, insanity, absence from the jurisdiction or lack of anybody's ability to find him. Defendant would have us read this statute as if it said that the former testimony can be used if the witness is unavailable for any reason not chargeable to the party calling him. That simply cannot be done. It would amount to a rewriting of the statute, a legislative not a judicial function.

[11] Defendant advances the argument that the prosecution illegally deprived him of Dandridge's testimony by statements made by the prosecutor to the effect that Dandridge was or would be subject to prosecution for perjury. That would be to speculate as to the motives of Dandridge for asserting his constitutional privilege. Also, it ignores the fact that Dandridge was accorded and received the benefit of independent legal counsel, an attorney of his own choosing, before he asserted his right not to incriminate himself, and the judge who presided at the trial found that the privilege was properly asserted. No basis has been shown for a reviewing court to hold that defendant was improperly deprived of Dandridge's testimony.

[12] The further contention is made that the conduct of the prosecutor in telling Dandridge he would be subject to prosecution for perjury must have prejudiced the jury against Dandridge as a witness and thus prejudiced defendant's case. That result does not follow. Whatever the effect might have been had Dandridge testified, the fact is he did not testify and such failure to testify did not stem from any judicial error. We perceive no possible prejudice to defendant in respect to the charge and conviction of possession of heroin, the evidence in support of which is clear and convincing. What effect it might have had upon the defense against the charge of selling heroin is moot in

view of the reversal of defendant's conviction upon that count.

[13] Defendant has tendered some thirty assignments of misconduct upon the part of the prosecutor and the trial court. It seems unnecessary to discuss them in detail. Some of them bear only upon the sale count, not the count for possession of narcotics. Some pertain to rulings which were correct in law. In some instances, defendant failed to object to remarks of the prosecutor which he now questions, or to ask that the court admonish the jury. In some instances the prosecutor's remarks were not based upon evidence but were in effect later cured by evidence introduced or by stipulation made. Some incidents are of no apparent significance. None do we find prejudicial, particularly in view of the clear and convincing evidence that defendant had heroin in his possession.

[14] Defendant claims that some 20 rulings of the trial court were erroneous. Two of these incidents pertained to the legality of the search, which we have already discussed. Two pertained to the sale count. Three occurred outside the presence of the jury. Denial of defendant's request for a directed verdict of acquittal on the sale count presents nothing in addition to the questions considered upon the appeal from the judgment. As to the remaining incidents we find no error. It seems necessary to discuss only the refusal of two instructions defendant requested. One of these instructions read as follows: "I herewith advise you that this defendant cannot be convicted if you believe he has not had a fair trial." No authority is cited for the propriety of this instruction. Whether or not the defendant has had a fair trial is a question of law, not a question of fact for the jury's determination. Although a defendant might be entitled to a reversal on appeal on these grounds, he would not be entitled to an acquittal on the basis of the jury's determination of this question.

[15] The other rejected instruction read: "The defendant must not be subjected to any more restraint than is necessary for his arrest and detention. Accordingly, if you believe from the evidence that unnecessary force was used upon him in effecting his arrest on these charges, he has been denied due process of law and is entitled to an acquittal at your hands." The use of unnecessary force may under appropriate circumstances render an arrest or a search illegal and the objects seized inadmissible as evidence, but such use of such force does not operate, like a pardon, to absolve a man from the consequences of crime and grant him an acquittal.

As to count III, possession of heroin, the judgment of conviction and the order denying a new trial are affirmed. As to count II, sale of heroin, the judgment and the order are reversed.

PETERS, P. J., and BRAY, J., concur.



168 Cal.App.2d 590

SOUTHERN CALIFORNIA AIRCRAFT CORPORATION, Plaintiff and Appellant,

v.

CITY OF ONTARIO, a Municipal Corporation, Defendant and Respondent.

Civ. 5972.

District Court of Appeal, Fourth District, California.

March 11, 1959.

Action for declaratory relief. The Superior Court of San Bernardino County, Jesse W. Curtis, Jr., J., rendered judgment for defendant, and the plaintiff appealed. The District Court of Appeal, Griffin, P. J., held that where city leased certain land and improvements at city owned airport to plaintiff and lease required city to pay all assessments, taxes and similar charges levied on leased property and required

plaintiff to pay all such charges on plaintiff's property, the tax levied on possessory interest of plaintiff in leased premises was tax on plaintiff's property and consequently plaintiff and not the city was required to pay such tax under the lease.

Affirmed.

1. Aviation ⇐225

Where city leased certain land and improvements at city owned airport to plaintiff and lease required city to pay all assessments, taxes and similar charges levied on leased property and required plaintiff to pay all such charges on plaintiff's property, the tax levied on possessory interest of plaintiff in leased premises was tax on plaintiff's property and consequently plaintiff and not the city was required to pay such tax under the lease. West's Ann.Civ. Code, §§ 1636, 1654; West's Ann.Const. art. 13, § 1.

2. Appeal and Error ⇐1008(3)

It is not within the function of the District Court of Appeal to declare that the interpretation given by the trial court should be supplanted by any other construction of which the instrument is susceptible.

Jack Gold, Beverly Hills, for appellant.

Lynn W. Kloepfer, Ontario, for respondent.

GRIFFIN, Presiding Justice.

[1] Plaintiff and appellant Southern California Aircraft Corporation, an aircraft manufacturer, brought this action against defendant and respondent City of Ontario for declaratory relief. It involved a provision of a lease of certain land and improvements at the Ontario International Airport owned by and located in the City of Ontario, whereby defendant leased these premises to plaintiff under a lease dated October 31, 1950, for a term of five years, with option of renewal. The particular paragraph of the lease here under question is paragraph 6. It provides:

"Taxes and Assessments.

"The City shall pay all assessments, taxes and similar charges levied upon the Leased Property. Southern California shall pay all such charges upon Southern California's property and all utility charges incurred by it at the Leased Property during the term of this lease."

The "Leased Property" described in the lease was certain described real property and certain hangars erected thereon, together with certain described personal property and office buildings. Additional real property was leased under one of the options.

In 1956, for the first time, the assessor of San Bernardino County assessed the possessory interest of plaintiff in the leased premises and levied a tax thereon in the sum of $3,036.90. The county demanded payment by the lessee and the lessee informed lessor of said demand. The lessee then demanded that lessor pay said tax. Upon refusal of payment by lessor, lessee paid it and duly presented a verified claim to lessor city for reimbursement of said sum, which claim was rejected on July 12, 1957. Plaintiff brought this action. It was submitted to the trial court for decision on the pleadings as framed. The city contended that no tax was levied upon the "Leased Property" set forth in the lease; that the possessory right of plaintiff under the lease was personal property of lessee and completely separate and distinct from the "Leased Property" itself, as appeared upon the rolls of the County Assessor; and that under the second sentence of paragraph 6 of the lease "Southern California shall pay all such charges upon Southern California's property * * *"; that plaintiff became liable for such taxes; that if the parties had agreed and intended that the city should pay the possessory interest tax, it would have been a simple matter to insert such a provision in the lease; and that in a contract between a public body and a private party it is presumed all uncertainty was caused by the private party. It is also contended that

where the construction given an instrument by the trial court is reasonable, an appellate court will not substitute another reasonable interpretation where either construction might be sustained, citing such authorities as Hammond Lumber Co. v. City of Los Angeles, 12 Cal.App.2d 277, 55 P.2d 891; Civil Code, Sec. 1654; Johnston v. Joint Highway District No. 12, 138 Cal. App. 450, 32 P.2d 681; Berger v. Sequoia Union High School District, 139 Cal.App. 2d 364, 293 P.2d 467, and Adams v. Petroleum Midway Co., 205 Cal. 221, 270 P. 668.

Plaintiff contends that the appellate court is not bound by the construction placed on the provisions of the lease by the trial court since it was based solely on the terms of the lease, without the aid of extrinsic evidence, particularly where a different interpretation may appear to be more reasonable, citing such authority as In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; that a lease must be interpreted according to the intent of the parties and every provision in it should be construed so as to give the proper force and effect to the language used, citing Civil Code sec. 1636; California Building Co. of San Diego v. Halle, 80 Cal.App.2d 229, 181 P.2d 404, and Hyatt v. Allen, 54 Cal. 353; that although it would have been clearer to state that the city should pay any possessory interest tax levied, the provisions of paragraph 6 of the lease clearly indicate that the city agreed to pay such tax since the city's leased property was exempt from taxation under Article XIII, section 1 of the California Constitution and accordingly the possessory interest tax was the only tax the parties could have had in mind in providing in paragraph 6 that the "City shall pay all assessments, taxes and similar charges levied upon the Leased Property", citing Hammond Lumber Co. v. City of Los Angeles, supra, and Hammond Lumber Company v. County of Los Angeles, 104 Cal.App. 235, 284 P. 896.

Apparently the parties here did not have this particular form of tax in mind at the time the lease was drawn [1950]. The assessor of the county did not assess this form of property right until 1956, although such form of taxation was recognized in other counties as early as 1936. Hammond Lumber Co. v. City of Los Angeles, 12 Cal. App.2d 277, 55 P.2d 891, supra. In that case it was held that in the absence of any agreement in the lease by a city to an individual of certain tidelands the duty to pay taxes on the usufructuary interest was upon the individual and not upon the municipality. Whether the defendant here was liable for any tax or assessment on the property at the time the lease was drawn would not necessarily be determinative of the question. The city's present exemption from taxation on its airport property may not apply at sometime in the future. Article XIII, section 1 was amended in 1914 to require taxation of publicly-owned property acquired by an entity outside its boundaries and the section could be further amended to remove the tax exemption on property used for proprietary purposes such as municipal airports. Such an amendment has been advocated by various writers. 24 Sou.Cal.Law Review, p. 252; and 27 Sou.Cal.Law Review p. 415. In the Wherry Housing cases (De Luz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 290 P.2d 544, 549; Victor Valley Housing Corp. v. County of San Bernardino, 45 Cal.2d 580, 582, 290 P.2d 565, and companion cases for other counties), the lessees were required under their leases with the United States to pay "all taxes, assessments, and similar charges * * * upon the Government or upon the Lessee with respect to or upon the leased premises." The Federal Government could not be taxed, but it might be well reasoned that at some future date (after the execution of the leases) Congress might consent to taxation of the Government or provide for some in lieu tax. The tax, in the instant case, was levied upon plaintiff and it agreed to pay all taxes on its property. The tax levied on its possessory interest was such a tax.

After considering the arguments and authorities above advanced the learned trial judge concluded as follows:

"Paragraph 6 of the lease appears to impose upon each party the duty of paying taxes upon that which belongs to it. A possessory interest under the lease is property of the plaintiff and a tax thereon should be paid by the plaintiff. Such tax would ordinarily be due from the Lessee unless language in the lease provided to the contrary. Paragraph 6, in the lease in question, is not to the contrary but provides affirmatively that the Lessee shall pay any taxes on that which belongs to it."

[2] This construction is reasonable. Plaintiff's construction does not appear to be the more reasonable. Under the authorities cited it is not within the function of this court to declare that the interpretation given by the trial court should be supplanted by any other construction of which the instrument is susceptible. Paulin v. Paulin, 39 Cal.App.2d 180, 102 P.2d 809; Mettler v. Braly, 148 Cal.App.2d 652, 307 P.2d 419.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.



Carolyn H. GARDNER et al., Petitioners and Respondents,

v.

STATE of California, Harry W. Stewart, Director of Employment, the Den, et al., Respondents and Appellants.*

Civ. 18296.

District Court of Appeal, First District, Division 2, California.

March 12, 1959.

Rehearing Denied April 10, 1959.

See 337 P.2d 519.

Hearing Granted May 6, 1959.

Unemployment compensation proceeding. From a judgment of the Superior Court, County of Santa Clara, John D. Foley, J., the State and others appeal. The District Court of Appeal, Draper, J., held that evidence sustained decision of the trial court granting unemployment benefits to employees of restaurants which were closed without being struck when other restaurants were closed by the strike on the ground that such employees did not voluntarily leave their work.

Affirmed.

* Opinion vacated 346 P.2d 193.

1. Social Security and Public Welfare ⇐430

A statute providing that an individual is not eligible for unemployment benefits if he left his work because of a "trade dispute" was intended to disqualify those workers who voluntarily left their work because of a trade dispute. West's Ann. Unempl.Ins.Code, § 1262.

See publication Words and Phrases, for other judicial constructions and definitions of "Trade Dispute".

2. Social Security and Public Welfare ⇐675

Question of whether employees voluntarily left their work at restaurants not struck by striking other employees so as to disqualify them from unemployment compensation benefits is an issue of fact for the trial court. West's Ann.Unempl.Ins. Code, § 1262.

3. Social Security and Public Welfare ⇐659

The unemployment insurance appeals board which has statewide jurisdiction does not have constitutional authority to make final determinations of fact.

4. Social Security and Public Welfare ⇐661

Where the trial court exercises its independent judgment on the evidence in deciding a question of fact, the only question before the appellate court is whether the evidence viewed in light most favorable to the respondents supports the findings of the trial court.

5. Social Security and Public Welfare ⇐591

Evidence sustained decision of the trial court granting unemployment benefits to employees of restaurants which were closed without being struck when other restaurants were closed by the strike, on the ground that such employees did not volun-

tarily leave their work. West's Ann.Unempl.Ins.Code, § 1262.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw, Deputy Atty. Gen., for appellant State.

Rea, Frasse, Anastasi, Clark & Chapman, San Jose, for appellants employers.

Johnson, Thorne, Speed & Bamford, San Jose, for respondents.

DRAPER, Justice.

The question on this appeal is whether unemployment insurance benefits can be recovered by employees of restaurants which closed, without being struck, when other restaurants were closed by a strike. The Director of Employment denied claims filed by some 50 employees. They appealed. A referee took evidence and decided that the employees were entitled to benefits. On further appeal, the Unemployment Insurance Appeals Board, on the same record, found the employees ineligible for benefits. They brought this mandamus proceeding, which was submitted to the trial court on the record before the administrative body. The court adopted the findings of the referee, and issued peremptory writ requiring payment of benefits to the employees. Director and employers appeal.

The dispute which gave rise to this proceeding occurred in 1955. The local Joint Executive Board is a committee representing two unions of restaurant employees. Santa Clara County Restaurant Association, a group of employers, had some 70 members and some 44 "authorizing employers," for all of whom it acted in negotiation of collective bargaining agreements with the joint board. There were 700–800 restaurants in the area. Board and association had negotiated and executed contracts since 1951.

In 1953, there had been a strike against some members of the association. Although association representatives had stated that a strike against one would be deemed a strike against all, this strike continued for some 6 weeks before members of the association who had not been struck were asked by the association to close. There is conflict in the evidence as to the number of non-struck restaurants which then closed, the figures running from "less than 10" to "70–80% effective." The strike ended the day following whatever closings did occur, but the evidence does not compel the inference drawn by the employers that the unions "capitulated." Some members of the association executed agreements with the unions during the course of the strike.

The 1955 dispute arose in the course of negotiations for modification of the 1953 agreement. On April 11, 1955, the unions voted strike authorization against the entire industry, but authorized the board to determine when and against whom the strike should be called. On April 25, the association voted to adopt the policy that a strike against one is a strike against all. Three days later the board was notified of this action. On May 25, the unions struck 9 or 10 restaurants. The association immediately advised its members, the authorizing employers, and some 425 other restaurants to close. There is sharp conflict as to the effectiveness of this move. There is evidence that only 35 actually closed, and other testimony that the closing was 70% effective. The association released two restaurants from the closing call for hardship reasons. The unions assert that some 30 restaurants signed separate agreements with the unions before settlement of the strike-lockout by agreement executed by association and board June 29.

[1] Plaintiffs were union members and were employees of restaurants which closed although no strike was directly called against them. The claims are for unemployment insurance for the periods these establishments were so closed.

"An individual is not eligible for unemployment compensation benefits, and no such benefit shall be payable to him,

if he left his work because of a trade dispute." Unemp.Ins.Code, § 1262.

Literally read, this section might seem to bar plaintiffs' claims. However, it is clear that, "[f]airly interpreted, it was intended to disqualify those workers who voluntarily leave their work because of a trade dispute." Bodinson Mfg. Co. v. California Emp. Comm., 17 Cal.2d 321, 328, 109 P.2d 935, 940. The problem here is the application of this test of volition to union members who have authorized a strike against some employers, not their direct employers, in the face of employer claims that all employers will close if one or more are struck.

The question has arisen but once in this state. In that case (McKinley v. California Emp. etc. Com., 34 Cal.2d 239, at page 244, 209 P.2d 602, 606), the Supreme Court applied the "volitional test" of Bodinson, saying that where unemployment of workers is "caused by their own action taken with full knowledge of its consequences" benefits cannot be recovered. As said in the concurring opinion (34 Cal.2d at page 248, 209 P.2d at page 609), the determinative factor was that "the union knew that a strike against one would be treated as a strike against all and they intended that the strike should be effective in obtaining concessions from all the employers." McKinley recognizes (34 Cal.2d at page 245, 209 P.2d at page 606) that the "volitional test itself is based upon a just analysis of a substantial subjective element." Application of the volitional test requires "a searching evaluation of the economic realities involved in a particular trade dispute, a study of the interplay of pressure and counterpressure by the contending factions, and a weighing of all the anterior events which have molded and inexorably evolved the pattern of resultant unemployment." Chrysler Corp. v. California Emp. etc. Com., 116 Cal.App.2d 8, 15–16, 253 P.2d 68, 72.

[2] It seems obvious that the question whether the employees voluntarily left their work at the firms not struck by striking other employers is an issue of fact. The degree to which the strike of some caused the lockout of others, the foreseeability of that result, the intent of the parties, turn on evidence which here is in substantial conflict. Necessarily, inferences reasonably to be drawn from facts found upon contradictory evidence also play a large part in determination of the ultimate fact. In McKinley, this question did not arise, since that original proceeding was presented to the Supreme Court upon stipulated facts. The several opinions in that case, however, emphasize the factual nature of the issue in the differing weight given to the stipulated facts and the varying inferences drawn from them.

[3, 4] The issue being one of fact, it seems clear that it is for determination by the trial court. The Unemployment Insurance Appeals Board, which has statewide jurisdiction, does not have constitutional authority to make final determinations of fact. Thus the trial court, in such a case as this, exercises its independent judgment on the evidence. Thomas v. California Emp. Stab. Comm., 39 Cal.2d 501, 504, 247 P.2d 561. It follows that the only question before us is whether the evidence, viewed in the light most favorable to respondents, supports the findings of the trial court. Moran v. Board of Medical Examiners, 32 Cal.2d 301, 308, 309, 196 P.2d 20. It is the finding of the trial court, rather than that of the appeals board, which is to be sustained if supported by substantial evidence.

[5] As shown in our discussion of the evidence, most of the relevant facts are in sharp dispute. The evidence would warrant findings in favor of the director and the employers. But there is ample evidence to support the contrary findings which the trial court made.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

168 Cal.App.2d 594

Francis O. HENRICKSON, Hannah L. Henrickson, his wife and William O. Henrickson, by his guardian ad litem, Hannah L. Henrickson, Plaintiffs, Cross-Defendants and Appellants,

v.

Paul L. SEBANC, Defendant and Cross-Complainants and Respondent.

Civ. 18118.

District Court of Appeal, First District, Division 2, California.

March 12, 1959.

Action to recover for assault and battery. The Superior Court, City and County of San Francisco, Theresa Meikle, J., denied the relief sought, and plaintiffs appealed. The District Court of Appeal, Kaufman, P. J., held that on appeal, all conflicts in evidence must be resolved in favor of results reached below.

Affirmed.

1. Appeal and Error ⇐931(1)

On appeal, all conflicts in evidence must be resolved in favor of results reached below.

2. Assault and Battery ⇐35

In action for assault and battery, evidence would not sustain plaintiffs' contention that their actions had been justified by Civil Code section or that defendant had violated Penal Code subsection and Civil Code section, and evidence justified denial of relief. West's Ann.Civ.Code, §§ 50, 1708; West's Ann.Pen.Code, § 273a.

3. Trial ⇐395(7)

In action to recover for assault and battery, findings supported conclusions of law adverse to plaintiffs.

4. Witnesses ⇐282½

Where witness has been exhaustively cross-examined upon particular point, it is not an abuse of discretion for court to excuse him from further cross-examination, in absence of any suggestion from counsel conducting examination that he wishes to cross-examine witness upon other points.

Earl B. Myers, San Francisco, for appellants.

John E. Benson, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

Plaintiffs, Francis O. and Hannah Henrickson (husband and wife) and their minor son, William O. Henrickson (by his guardian ad litem) appeal from a judgment in favor of the defendant, Paul L. Sebanc, denying them relief on a complaint for assault and battery. The case was tried without a jury. The trial court found that the defendant had not unjustly and without cause or provocation assaulted the plaintiffs; that the plaintiffs had not suffered any injury or damage as a proximate cause of defendant's acts; that defendant acted in self-defense as to the adult plaintiffs; that the medical expenses incurred by Hannah Henrickson and William Henrickson were not incurred by reason of any act of the defendant; and that the defendant was not entitled to any relief on his cross-complaint. No appeal is taken from the judgment on the cross-complaint.

On Appeal, the plaintiffs contend: (1) that the evidence is insufficient to support the judgment; (2) that the findings of fact do not support the conclusions of law; (3) that the court erroneously restricted the cross-examination of the defendant by plaintiffs' counsel.

The facts, as revealed by the record, are as follows: The home of the plaintiffs at 1723–30th Avenue in San Francisco, is two houses away from the home of the defendant at 1731–30th Avenue. The defendant testified that about 6:30 p. m. on May 4, 1956, he was reading the paper after dinner when he heard a "terrific" explosion in the vicinity of the tunnel-like entrance to his home. The explosion caused his two younger daughters, who were playing in the basement, to scream and cry. Mr. Sebanc ran to the front window in time to see the "Henrickson boy" leave the area. Mrs. Sebanc had seen the Henrickson boy go beneath the balcony and then heard the firecracker go off.

Mr. Sebanc ran to the basement of his home to see if his daughters were injured. On finding that they were not, he went outside. He saw the plaintiff, William Henrickson (age 12) coming out of his garage, and accused him of exploding the firecracker, which the boy denied and placed the blame on his two friends, David Welinsky and George Shoblo. Mrs. Betty Aronson, a neighbor who lived at 1727–30th Avenue, between the homes of the plaintiffs and defendant, saw David and George in the Henrickson backyard at the approximate time of the explosion, and heard one of the two remark: "Let's get out of here, Olie's [the nick-name of plaintiff William O. Henrickson] in trouble again." At the trial, David Welinsky denied making this remark, and testified that he lit the firecracker and George threw it.

After plaintiff William O. Henrickson repeatedly denied any connection with the firecracker, the defendant grabbed the boy by the arm and advised the boy that he was taking him to his parents. "Olie" then directed a torrent of filthy language at the defendant. The defendant grabbed the boy and shook him. The boy broke away, thus causing the defendant's open hand to come in contact with the boy's face. The defendant testified that this contact was not the result of a deliberate attempt to slap the boy. The boy ran to the top of his own stairway and the defendant ran after him, and held him at the top of the stairway. Plaintiffs Hannah and Francis Henrickson then came to the door. The defendant sought to explain what had transpired, but was unable to get a word in as Mrs. Henrickson was urging her husband to start a fight with the defendant. The defendant then left the area, and was followed by the three plaintiffs who were about five feet behind him.

On the front lawn of his home, plaintiff Francis Henrickson attacked and struck the defendant with his fist. The defendant returned the blow and the two men began to wrestle on the ground. While the two men were wrestling, Mrs. Henrickson kicked and scratched the defendant, and told her son to get a bat. The boy did so and struck the defendant a number of hard blows with the bat. Mrs. Henrickson and Olie denied that she told him to get a bat. However, defendant's testimony is corroborated by that of his wife and Mrs. Gleason, a neighbor living at 1735–30th Avenue.

The two men were separated by two young men. While the defendant sought to explain, Mrs. Henrickson again struck the defendant. A police officer who had been summoned by Mrs. Sebanc restrained her.

The plaintiff William O. Henrickson testified that on the day in question he was in the basement of his home, when his two friends came in. He warned them against using the firecracker they had. He heard the firecracker go off while he was in the basement. His father came to the basement and then left to tell his mother. He then went outside. The defendant came toward him, called him a dirty name, and asked, "Who shot that firecracker?" After he denied shooting the firecracker, the defendant struck him in the face and held him firmly enough to cause black and blue marks on his arm. He kicked the defendant and ran up the stairs yelling for his parents. The defendant ran after him. The defendant grabbed him at the top of the stairs, and beat him on the neck and slugged him. When his father told the defendant to stop hitting him, the defendant hit his father and pulled his mother down the stairs.

There is further conflicting evidence as to the details of the altercation and the nature of the injuries received by the parties. Dr. Boston Day first saw Hannah Henrickson and William Henrickson *six* days after the incident occurred. Olie's left knee was x-rayed approximately two and one-half months later. Dr. Day testified to contusions, swelling, discoloration and tenderness at various areas of the extremities, and a contusion of the left cheek. The only treatment prescribed by the doctor for Olie was "to rest and cut out his athletic activity for a while until the bruises and contusions cleared up." Olie engaged in various athletic activity including football, baseball and

bicycle riding. The evening of May 4, 1956, Olie went to his brother's house. The day following he thought he went to school, but being reminded it was a Saturday, he didn't know what he did.

Mrs. Henrickson testified to suffering bruises and abrasions and terrible bleeding on her legs because the defendant pulled her down five or six stairs. Olie corroborated his mother's testimony in this respect. Mrs. Eva Gleason, a neighbor, testified that Mrs. Henrickson was not bleeding immediately after the incident, and that a few days earlier Mrs. Henrickson had an injury to her legs. Two other neighbors, Mrs. Aronson and Mrs. Lundblade, corroborated Mrs. Gleason's testimony.

[1, 2] It is axiomatic that on appeal all conflicts in the evidence must be resolved in favor of the result reached below. (Clewett v. Clewett, 136 Cal.App.2d 913, 289 P.2d 512) There can be no question that the evidence amply supports the judgment. The court chose to believe defendant's testimony that "touching" of Olie's face by defendant's hand was not intentional and was caused by Olie's turning away. There is no merit in plaintiffs' argument that their actions were justified by section 50 of the Civil Code or that the defendant violated section 273a of the Penal Code and Section 1708 of the Civil Code.

[3] Plaintiffs' argument that the conclusions of law are not supported by the findings is based on Finding VI which is as follows:

> "With respect to paragraph VI, an Amendment to the first cause of action of the plaintiff William O. Henrickson, it is true that said plaintiff procured medical aid and attention, including x-rays, and that the reasonable sum therefor is $52.50; it is not true that said medical aid and attention, including x-rays, were required by reason of an assault and battery committed upon the plaintiff by the defendant."

The latter portion of the finding refutes plaintiffs' argument.

[4] Nor does the record reveal any abuse of discretion by the trial court in restricting the cross-examination of the defendant. The court stopped further cross-examination for the reason, "I think his statement will be the same." Plaintiffs' counsel did not suggest to the court that he wished to further examine the witness. "* * * Where a witness has been exhaustively cross-examined upon a particular point, it is not an abuse of discretion for the court to excuse him from further cross-examination, in the absence of any suggestion from the counsel conducting the examination that he wished to cross-examine the witness upon other points." Sandell v. Sherman, 107 Cal. 391, 40 P. 493.

We conclude that the judgment finds ample support in the record before us.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.



168 Cal.App.2d 760

Reginald BARTH, a minor, by and through his guardian ad litem Jack Barth, Plaintiff and Respondent,

v.

SAN JUAN DEVELOPMENT COMPANY, a corporation, Clarence Johnson and Kathleen Johnson, his wife, Defendants and Appellants.

Civ. 9495.

District Court of Appeal, Third District, California.

March 18, 1959.

Action for injuries sustained by ten year old boy in explosion of cylinder containing sulphur dioxide removed by children from defendants' premises. The Superior Court, Sacramento County, James H. Oakley, J., entered an order granting

plaintiff a new trial, and defendants appealed. The District Court of Appeal, Schottky, J., held that granting a new trial was not abuse of discretion, in view of erroneous and misleading instruction as to inapplicability of attractive nuisance doctrine, which required a verdict for defendants if they actually failed to foresee intervening cause required to make cylinder dangerous, even if such intervening cause was reasonably to be anticipated.

Order affirmed.

1. Appeal and Error ⇐854(6), 977(1)

Determination of a motion for new trial rests so completely within discretion of trial court that its action will not be disturbed, unless manifest and unmistakable abuse of discretion clearly appears, and order granting a new trial will be affirmed, if it may be sustained on any ground, though reviewing court might have ruled differently in the first instance.

2. Appeal and Error ⇐978(1)

Broad discretion of trial court to grant a new trial because of erroneous instruction may not be disturbed, if instruction was erroneous in any degree, or even if it is only fairly debatable that such instruction may have been misleading.

3. Trial ⇐243, 296(1)

Whether principal instruction was so misleading as to constitute error rests within discretion of trial court, and mere fact that error or misstatement in instruction may have been cured by subsequent or other instructions does not constitute it an abuse of discretion for trial court to grant a new trial.

4. New Trial ⇐39

In action for injuries sustained by ten-year-old boy in explosion of cylinder containing sulphur dioxide removed by children from defendants' premises, granting plaintiff a new trial was not abuse of discretion, in view of erroneous and misleading instruction as to inapplicability of attractive nuisance doctrine, if cylinder, in and of itself, was not a dangerous contrivance and some further independent act had to be performed in regard to it in order to make it dangerous and defendants did not, or as reasonably prudent people could not, reasonably foresee such independent occurrence.

5. Trial ⇐228(3)

Where alternative conjunction "or" is used to connect two premises of instruction, if either premise is true, the conclusion is true.

See publication Words and Phrases, for other judicial constructions and definitions of "Or".

6. Negligence ⇐62(1)

Actual foresight of intervening cause will establish liability of defendant, but lack of actual foresight will not relieve him of liability, if intervening cause was reasonably to be anticipated.

7. Explosives ⇐7

In action for injuries sustained by ten-year-old boy in explosion of cylinder containing sulphur dioxide, instruction as to inapplicability of attractive nuisance doctrine, directing jury to find for defendants, if they did not, "or" as reasonably prudent people could not reasonably foresee intervening occurrence required to make cylinder dangerous, was erroneous and misleading in that alternative language required a verdict for defendants if they actually failed to foresee intervening cause, even though it was reasonably to be anticipated.

Fitzwilliam, Memering & McDonald, Sacramento, for appellant San Juan Co.

Russell A. Harris, Sacramento, for appellant Johnson.

Ralph Drayton, Sacramento, for respondent.

SCHOTTKY, Justice.

San Juan Development Company, a corporation, Clarence Johnson and his wife, Kathleen Johnson, appeal from an

order of the trial court granting plaintiff Reginald Barth a new trial for errors of law committed during the course of the trial in an action to recover for injuries sustained by Reginald Barth when a cylinder containing sulphur dioxide exploded.

Clarence Johnson, an officer of the development company, and his wife lived on a tract of land which was being subdivided by the development company. Johnson conducted a refrigerator repair business and in conjunction therewith stored cylinders on the premises, including the one which exploded. Johnson knew that children often played in the area being subdivided and in and near the portion where he maintained his home.

About a week prior to the accident, Reginald Barth, a ten-year-old boy, and a playmate removed the cylinder in question from an area in the vicinity of Johnson's home and placed it under a shack. Later the two boys took it to the Barth home where Reginald played with it.

On the evening the accident occurred, Reginald's father was cultivating the back yard of his home and at the same time he was burning trash. He had Reginald bring the cylinder into the back yard. Mr. Barth intended to use it to help fill up a hole. Mr. Barth went into the house to eat. Reginald was permitted to eat his dinner outside by the fire. The cylinder was anywhere from one to three feet from the remains of the fire. While Mr. Barth was in his home he heard an explosion. He saw his son was injured, and when he went outside he saw the cylinder had exploded.

There was a wide divergence between the testimony of the expert witnesses offerred by the plaintiff and defendants as to the temperature necessary to build up sufficient interior pressure before the cylinder would explode. Plaintiff's witness testified that a temperature of 315 degrees fahrenheit, which could be obtained by mere radiation from an ordinary trash fire, would be sufficient to build up sufficient interior pressure to cause the cylinder to explode. Defendants' expert witness, however, testified that the tensile strength of the cylinder was such that a temperature of 2400 degrees centigrade was necessary to cause the cylinder to explode unless it was defective. This latter temperature was higher than that which an ordinary trash fire could create.

[1] The only issue involved in this appeal is whether or not errors of law were committed during the course of the trial upon which the court could properly grant a motion for a new trial. The applicable rules of law are succinctly stated in the recent case of Shaw v. Pacific Greyhound Lines, 50 Cal.2d 153, 159, 323 P.2d 391, 394, as follows:

> "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears, and the order will be affirmed if it may be sustained on any ground, although the reviewing court might have ruled differently in the first instance. Brandelius v. City & County of San Francisco, 47 Cal.2d 729, 733–734, 306 P.2d 432. In the Brandelius case it was stated that the granting of a new trial could be reversed 'only if * * * the questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused the jury.' 47 Cal. 2d at page 745, 306 P.2d at page 442."

[2, 3] And as stated by this court in Balthrop v. Atchison, T. & S. F. Ry. Co., 142 Cal.App.2d 823, at page 826, 299 P.2d 341, at page 343:

> "* * * It has been said '"If the challenged instruction was erroneous in any degree, or even if it was only 'fairly debatable' that such instruction may have been misleading, the broad discretion of the trial court may not be disturbed, * * *"'. Sloboden v. Time Oil Co. [131 Cal.App.2d 557,

281 P.2d 85], supra. The mere fact that the error or misstatement in the instruction may have been cured by subsequent or other instructions does not constitute it an abuse of discretion for the trial court to grant a new trial since it is within its discretion to determine whether or not the principal instruction was so misleading as to constitute an error. * * *"

[4] In determining that the court did not abuse its broad discretion in granting the motion for a new trial and that the appeal in the instant case is lacking in merit, it is only necessary to consider one instruction given by the court at the request of appellants. This instruction reads as follows:

"You *will notice* that in order for the doctrine of attractive nuiscance [sic] to apply in this case, it is necessary for the plaintiff to prove by a preponderance of the evidence, *among other items I have mentioned,* that the instrumentality involved, namely, the cylinder, was a dangerous contrivance. If, therefore, you find that the cylinder in and of itself did not constitute a dangerous contrivance, but that in order to make it dangerous it was necessary for a further independent act to be performed in regard to to it, such as *the application of* extreme *heat,* and if you further find that the defendants did not, or as reasonably prudent *people* could not reasonably foresee such *an intervening occurrence,* then and in that event the doctrine does not apply to this case, and you will find a verdict in behalf of the defendants.

"On the other hand, if you find the cylinder in and of itself did constitute a dangerous contrivance, defendants are not relieved of liability if you also find that as reasonably prudent people, they should have anticipated that the cylinder might get into the hands of an unwary child and be subjected to such handling or treatment as to cause him injury."

Respondent contends that the quoted instruction contains at least six errors. Appellants contend that said instruction merely clarified the standard BAJI instructions and that the jury was elsewhere fully and correctly instructed as to the law applicable to all issues in the case. If we were now considering an appeal by plaintiff from a judgment in favor of defendants, there might be some merit in appellants' contentions; but in view of the broad discretion of the trial court in passing upon a motion for a new trial, appellants' contentions are utterly without merit.

A mere cursory reading of the instruction shows that it is erroneous in a number of particulars. In view of the rule hereinbefore set forth, it is only necessary to quote one portion of it to sustain the order of the trial court granting a new trial. That portion reads:

"[I]f you further find that the defendants did not, or as reasonably prudent *people* could not reasonably foresee such *an intervening occurrence,* then and in that event the doctrine does not apply in this case, and you will find a verdict in behalf of the defendants."

[5] The important word in this phrase is the word "or"; it is a conjunction of two alternatives. When used in logical form, known in logic as the "If * * * then" sentence, such as it is used in this instruction, if either of the premises is true the conclusion is true.

[6] The law is clear. Actual foresight of the intervening cause will establish a defendant's liability, but lack of actual foresight will not relieve him of liability if the intervening cause was reasonably to be anticipated. Prosser on Torts, 1st Ed., p. 352 et seq.; Rest. Torts, Negligence, sec. 447; Gibson v. Garcia, 96 Cal.App.2d 681, 216 P.2d 119; Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872.

[7] The alternative language of the instruction required the jury to come in with a defense verdict if they found that the defendants actually failed to foresee the intervening cause.

Apparently the instruction attempted to rephrase a portion of BAJI 104–D which states that if "the defendant foresaw, or by exercising ordinary care, would have foreseen" the intervening cause, then the defendants' act was the proximate cause of the injury. California Jury Instructions, Civil No. 104–D.

In view of our conclusion as to the foregoing portion of the instruction, we deem it unnecessary to prolong this opinion by discussing other particulars in which it is claimed to be erroneous. The quoted portion is certainly sufficient to justify the trial court in concluding, as it no doubt did conclude, that the instruction was not only erroneous but that it was misleading to the jury. There was therefore no abuse of discretion in granting plaintiff's motion for a new trial.

The order is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.



168 Cal.App.2d 579

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Roy STAMPHER, Defendant and Appellant.

Cr. 2871.

District Court of Appeal, Third District, California.

March 11, 1959.

Rehearing Denied April 2, 1959.

Hearing Denied May 6, 1959.

Defendant was convicted of committing lewd and lascivious acts upon body of his twelve-year-old daughter. The Superior Court, Yolo County, C. C. McDonald, J., rendered judgment, and defendant appealed. The District Court of Appeal, Schottky, J., held testimony of prosecutrix was sufficient to sustain conviction and that corroboration of her testimony was not required.

Affirmed.

Peek, J., dissented.

1. Infants ⇐13

While a crime may be committed under Penal Code, § 288, without its amounting to rape, it is impossible that a rape may be committed upon a child under age of fourteen years without thereby violating the provisions of such section. West's Ann.Pen.Code, § 288.

2. Infants ⇐20

Testimony of twelve-year-old prosecutrix was sufficient to support conviction of her father for lewd and lascivious conduct. West's Ann.Pen.Code, § 288.

3. Infants ⇐20

Corroboration of prosecuting witness is not required to sustain conviction for violation of Penal Code, § 288. West's Ann.Pen.Code, § 288.

4. Criminal Law ⇐260(11)

In prosecution for committing lewd and lascivious acts upon body of defendant's twelve-year-old daughter, it was for trial court to decide weight to which testimony of prosecutrix was entitled. West's Ann.Pen.Code, § 288.

Albert H. Gommo, Jr., San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and William O. Minor, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment of conviction of violation of section 288 of the Penal Code and from an order denying a new trial. Trial was had without a jury.

Appellant was accused by information of committing lewd and lascivious acts up-

on the body of the prosecutrix, his 12 year-old daughter. The prosecutrix testified that on or about September 30, 1957, around 4:10 p. m. she came home from school and went into the bathroom. Appellant followed her into the bathroom and asked her to engage in an act of sexual intercourse. The prosecutrix said no, but the appellant pulled her panties down around her ankles, exposed himself and penetrated her privates with his penis while the prosecutrix was seated sideways on the toilet seat and leaning back against the wall. The prosecutrix also testified that appellant had committed similar acts on her during the preceding two years.

Appellant made a statement to the police in which he admitted that on two occasions he had awakened to find the prosecutrix in bed with him and that he was kissing her and otherwise engaged in what might loosely be termed sex play. Appellant denied ever having intercourse with his daughter and testified at the trial that the above portions of the statement made to the police referred to dreams which he had had.

Appellant also wrote letters to the prosecutrix while she was being kept at the Juvenile Detention Home in which he referred to her as "love bug" and made other statements which led the court to comment that some of these were more like letters to a sweetheart than to a daughter.

[1,2] Appellant's first contention is that he was charged with violation of section 288 of the Penal Code and that the only crime that the evidence tended to prove was rape. There is no merit in this contention, for as stated by this court in People v. Paris, 59 Cal.App.2d 699, at page 702, 139 P.2d 671, at page 672, "While a crime may be committed under section 288 without its amounting to rape, it seems impossible that rape may be committed upon a child under the age of fourteen years without thereby violating the provisions of section 288." The testimony of the prosecutrix, as hereinbefore set forth, is ample to support a conviction of lewd and lascivious conduct.

[3] Appellant next contends that the entire proof in this case was the uncorroborated testimony of the 12 year-old prosecutrix. In such a case it is urged "the reviewing Court should scrutinize with discriminating care the testimony given by the prosecuting witness." A sufficient answer to this contention is that corroboration of the prosecuting witness is not required to sustain a conviction for violation of section 288. People v. Westek, 31 Cal.2d 469, 473, 190 P.2d 9. Furthermore, the statement made by appellant to the police and the letters he wrote to the prosecutrix while she was at the Juvenile Detention Home tend to corroborate her testimony.

[4] Appellant contends further that the testimony of the prosecutrix was inherently improbable and that the act could not have happened as described by her. The trial court viewed the scene of the crime and concluded that the act could have occurred as described. The court also found that the prosecutrix told a straightforward story and that it could not discredit her story. Appellant's argument is merely one as to the weight of the evidence, and it was for the trial court to decide the weight to which the testimony of the prosecutrix was entitled.

Appellant contends that the trial judge was guilty of misconduct in limiting his examination of certain evidence at the trial. There is no merit in this contention. It appears in the record that the court did limit appellant's examination, but that this was done when the appellant's examination went into matters which were either immaterial or which had been adequately presented to the court for consideration. There is no contention that the appellant was prevented from introducing any evidence, by testimony or otherwise, which would have had any bearing on the outcome of the case.

Appellant next contends that the court was "inconsistent." This appears to be merely an attempt on the part of appellant to argue with the opinion of the court. It is not claimed that there was a variance

between the findings as stated in the opinion and the proof, nor would the record support such a claim.

We are satisfied that the appellant received a fair trial, that no prejudicial errors were committed, and that the evidence amply supports the judgment of conviction.

The judgment and order are affirmed.

VAN DYKE, P. J., concurs.

PEEK, Justice.

I dissent. Virtually the entire testimony of the prosecutrix, and in particular that which related to the act of intercourse and the relative positions of herself and the defendant, is so incredible as to be wholly unworthy of belief. In fact not only is such testimony incredible, but it is an absolute physical impossibility that the act could have occurred in such a manner.

At the outset we are confronted with that type of offense so frequently referred to as one so easy to charge but so difficult to disprove. With that admonition in mind, it appears to me that the evidence should be examined in greater detail than has the majority. This I believe to be particularly true in view of what I would term an inadequate transcript.

The record, except for the categorical denials of the charge by the defendant, is without conflict. The defendant and the mother of the prosecutrix had never married. Approximately two years after the child was born the mother left her and the defendant, and for several years thereafter the child lived with the defendant. Approximately four years later the mother returned, and she and the defendant resumed their former relationship, during which period the prosecutrix was with them. Thereafter for a time she lived with her mother and apparently for a while with a grandmother. However for the past several years she has lived with her father. According to her mother, the reason she was with her father was that "we just couldn't get along at home." The mention of home referred to the one made by the mother with her present husband who has children of a previous marriage also living with them. During the time the girl was with her mother there was difficulty concerning her relationships with boys. There was additional testimony by the father that he had similar difficulties with her, which testimony was corroborated by the owner of the house where they lived, and likewise corroborated by admissions on the part of the prosecutrix herself. This testimony referred to notes left at the home thanking her for her "favors" which notes were couched in unmistakably direct four-letter words. There was further testimony relative to numerous boys who came to the house, one of whom the girl testified was "run out" by her father, and that on another occasion the father had called the police to remove a boy. Others were requested to leave by the landlady who in turn was told it was none of her business. The prosecutrix also testified she had run away from home on five occasions and had frequented a labor camp but not for several months prior to this proceeding. She further testified she had brought boys home unknown to her father. Additional testimony reflected a strictness on the part of the father in regard to these matters, such as a spanking in the presence of one boy with whom she was found "necking" in the rear seat of an automobile parked in front of her home. It is also noteworthy that during the time the girl was staying with her mother, and when she was approximately nine years of age, she was involved in a case similar to this which occurred in Eureka and which resulted in a conviction. And even before that, when only approximately four years of age, she was likewise involved in a similar case while living with her grandmother in Corning.

In line with the comment of the trial court that possibly penetration did not occur, but that such fact was unimportant

since it was not an element of the offense charged, the majority holds first that it is impossible to commit rape without also violating the provisions of section 288; and second, in any event, whether or not the testimony of the prosecutrix was improbable merely relates to the weight to be given the evidence, and that this is a matter solely for the trial court. I have no quarrel with such observations when taken as general statements of law, but I do quarrel with them when applied unqualifiedly to the facts in this case. Here the charge was predicated on one act—not a series of acts which would enable the court to reject some of the testimony as inherently improbable as it related to some of the acts charged, and to accept the testimony as to other acts. See People v. Russell, 80 Cal.App. 243, 251 P. 699. But to apply the rules enunciated in the majority opinion to one single act where the improbability of the testimony of the prosecutrix permeates the entire record, not alone does violence to common sense but blandly ignores the facts of life. This is not a question of merely proving facts sufficient to bring the case within section 288. This is a case where the testimony, if accepted at all, proved too much. I cannot help but wonder if the majority would apply the same reasoning to a charge of speeding in a 55-miles-per-hour zone where the only testimony was that the vehicle involved was a 1901 model and that it was being driven at a speed of 100 miles an hour. To be consistent it seems to me they must. But, says the majority, its conclusion is not necessarily unreasonable since, in order to attain such a speed, a 1901 model or not, did not the driver first have to reach 55 miles per hour? Or, even assuming it was not quite 100 miles an hour as the only testimony showed, such variance is still unimportant since anything over 55 miles an hour was prohibited, and equally unimportant was the fact the car was a 1901 model which, under no stretch of the imagination, could ever have reached a speed of 55 miles per hour even in its younger years.

I simply cannot accept the incredible testimony of the prosecutrix, nor can I accept the rationalization thereof by the majority. The judgment should be reversed.

Rehearing denied; PEEK, J., dissenting.

Hearing denied; SCHAUER, J., dissenting.



168 Cal.App.2d 584

Matter of Laurie Ruth BARRETT, also known as Laurie Ruth Barton.

Ruth BARRETT, Contestant and Appellant,

v.

Leroy BARTON et ux., Petitioners and Respondents.

Civ. 5940.

District Court of Appeal, Fourth District, California.

March 11, 1959.

Guardians' action to have child declared free from custody and control of her mother. The Superior Court, Orange County, Karl Lynn Davis, J., granted the relief sought, and an appeal was taken. The District Court of Appeal, Stone, J. pro tem., held that evidence sustained finding that there had been an abandonment by reason of mother's failure to provide for, or communicate with, child for more than one year subsequent to filing of guardianship order and prior to filing of petition to declare child abandoned.

Affirmed.

1. Infants ⇐16.3

When a child has been taken from a parent under process of court by force of law, child has not been "abandoned" or "left" within meaning of Code section. West's Ann.Welfare & Inst.Code, § 701.

See publication Words and Phrases, for other judicial constructions and definitions of "Abandoned" and "Left"

2. Infants ⇐16.8

The original "leaving" or change of custody from parent to another is not sole criterion for determining parent's intent to abandon child, and intent to abandon may be shown by proof of parent's failure to provide support or attempt to communicate with child for a period of one year after legal change of custody. West's Ann. Welfare & Inst.Code, § 701.

3. Infants ⇐16.3

Mother who instituted habeas corpus proceeding seeking custody, and contested application for letters of guardianship of person of her child, did not "leave" the child within the meaning of Code section. West's Ann.Welfare & Inst.Code, § 701.

See publication Words and Phrases, for other judicial constructions and definitions of "Leave".

4. Infants ⇐16.3

Even though mother did not "leave" her child, juvenile court had jurisdiction to hear abandonment action and to determine whether there had been an abandonment by reason of mother's alleged failure to provide for, or communicate with, child for more than one year subsequent to filing of guardianship order and prior to filing of petition to declare child abandoned. West's Ann.Welfare & Inst.Code, § 701(a); West's Ann.Civ.Code, § 224.

5. Infants ⇐16.15

The general rule that it is the province of the trier of facts to pass upon credibility of witnesses and weight to be given their testimony applies to abandonment actions. West's Ann.Welfare & Inst.Code, § 701(a).

6. Infants ⇐16.8

In guardians' action to have child declared free from custody and control of her mother, evidence sustained finding that there had been an abandonment by reason of mother's failure to provide for, or communicate with, child for more than one year subsequent to filing of guardianship order and prior to filing of petition to declare child abandoned. West's Ann.Welfare & Inst.Code, § 701(a).

Heinly, Heinly & Tarr, Santa Ana, for appellant.

McCabe & Schumacher, Fullerton, for respondents.

STONE, Justice pro tem.

The mother of Laurie Ruth Barton appeals from a judgment entered pursuant to section 701 of the Welfare and Institutions Code declaring that the child is free from the custody and control of her mother.

The child, Laurie Ruth Barton, was born out of wedlock January 25, 1955, at Long Beach, California, to Ruth Barrett, the appellant. The mother signed a consent for the purpose of care, and pursuant thereto the child was placed in the custody of Leroy C. Barton and Donna R. Barton, his wife, the petitioners. The child was taken directly from the Long Beach hospital to their home where she has remained ever since. Sometime later petitioners commenced adoption proceedings but the mother refused to sign the necessary consent. Instead, on August 11, 1956, she filed a petition for a writ of habeas corpus seeking custody of the child. The petitioners countered with a petition for letters of guardianship which was filed August 15, 1956. The two matters were consolidated for hearing and the court denied the petition for a writ of habeas corpus and ordered that letters of guardianship of the person of Laurie Ruth Barton issue to petitioners. Letters of guardianship were filed February 24, 1956, and no appeal was taken from the order by appellant. On March 26, 1957, petitioners filed this proceeding pursuant to Welfare and Institutions Code, section 701 to have Laurie Ruth Barton declared free from the custody and control of her mother. Admittedly the abandonment action was filed to facilitate adoption of the child by petitioners because the mother would not give her consent. Such procedure is authorized by Civil Code, section 224 which provides that consent of a mother of an illegitimate

child is not necessary under the following circumstances:

"1. When such father or mother has been judicially deprived of the custody and control of such child (a) by order of the juvenile court, declaring such child to be free from the custody and control of either or both of his parents as provided in the Welfare and Institutions Code, adopted May 25, 1937, or any act or acts superseding or amending the same, * * *."

The pertinent section of the Welfare and Institutions Code is 701, and so far as the section concerns this action all that need be considered is the first part of the section and subdivision (a) thereof. They read as follows:

"*Persons declared free from custody and control of parents.* The jurisdiction of the juvenile court extends also to any person who should be declared free from the custody and control of either or both of his parents. The words 'person who should be declared free from the custody and control of either or both of his parents' shall include any person under the age of 21 years who comes within any of the following descriptions:

"(a) Who has been left by either or both of his parents in the care and custody of another without any provision for his support, or without communication from either or both of his parents, for the period of one year with the intent on the part of such parent or parents to abandon such person. Such failure to provide, or such failure to communicate for the period of one year, shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called a person abandoned by the parent or parents abandoning him. If in the opinion of the court the evidence indicates that either or both parents have made only token efforts to support or communicate with the child the court may declare the child abandoned by such parent or parents."

[1–4] As is apparent, the opening sentence of section 701, subdivision (a) uses the word "left". Appellant contends the Juvenile Court had no jurisdiction to hear the petition in this case because the mother did not "leave" her child with the petitioners. Appellant argues that she was deprived of the custody of her child by an order of court made in the guardianship proceeding. She stresses the words of section 701, subdivision (a) "Who has been left", and cites In re Jones, 131 Cal.App. 2d 831, 281 P.2d 310, 313, as authority for her position. The Jones case holds that when a child has been taken from a parent "under process of court—by force of law" the child has not been abandoned or left within the meaning of section 701, subdivision (a) of the Welfare and Institutions Code. This rule of law has been established beyond contradiction. See In re Cattalini, 72 Cal.App.2d 662, 665, 165 P.2d 250; Matter of Cozza, 163 Cal. 514, 528, 126 P. 161; In re Maxwell, 117 Cal.App. 2d 156, 162, 255 P.2d 87.

If the original "leaving" or change of custody from the parent to another were the sole criterion for determining the parent's intent to abandon the child, the appellant would be on firm ground. However, it is not the sole determining factor provided by section 701, subdivision (a). In the case of In re Maxwell, 117 Cal.App. 2d 156, 255 P.2d 87, it is clearly established that the intent to abandon may be shown by proof of the parent's failure to provide support or attempt to communicate with the child for a period of one year after the legal change of custody. The court said, 117 Cal.App.2d at page 165, 255 P.2d at page 93:

"Construing the section strictly, as should be done, it seems obvious that where, after a wardship proceeding, there is no attempt to support or to communicate with the child for a

period of over three years, there has been an 'abandonment' by such nonaction within the meaning of section 701, subdivision (a) of the Welfare and Institutions Code. Regardless of how the child has been taken from her parent, by such nonaction that has continued for at least a year, pursuant to the presumption contained in the subdivision in question, the parent may be deemed by the trial court to have abandoned the child. In such a case the child has been 'left * * * in the care and custody of another without any provision for his support, or without communication from * * * his parents, for the period of one year' within the meaning of the section."

In the case before us the mother in the first instance did not "leave" the child within the meaning of section 701, subdivision (a) as she instituted habeas corpus proceedings seeking custody and she contested petitioner's application for letters of guardianship. The court, none the less, had jurisdiction to determine whether there had been an abandonment thereafter by reason of appellant's alleged failure to provide for, or communicate with the child for more than one year subsequent to the filing of the guardianship order and prior to the filing of the petition to declare the child abandoned. The appellant's contention that the Juvenile Court had no jurisdiction in the matter is without merit.

[5, 6] Appellant raises two additional questions, first, "Was there a sufficient intent to abandon the child established by the evidence?" and second, "Was the presumption provided by section 701(a) of Welfare and Institutions Code overcome by the evidence?" The two questions will be considered together, as basically they must be determined by the sufficiency of the evidence. The general rule that it is the province of the trier of fact to pass upon the weight and credibility of the witnesses applies to actions pursuant to Welfare and Institutions Code, Section 701, subdivision (a). In the case of In re Adoption of Ayers, 116 Cal.App.2d 55, at page 58, 253 P.2d 65, at page 67, the court said:

"The rules are established that (1) whether the presumption that there was intent of the parents to abandon the minor because they have failed for a year to provide for the child has been overcome by other evidence is a question of fact for the trial court (In re Sanders, 88 Cal.App.2d 251, 254 [1], 198 P.2d 523), (2) the question whether the intent to abandon has existed for a period of one year is also a question of fact for the trial court (In re Welch, supra, 108 Cal.App.2d [466], 473, 238 P.2d 1031), and (3) it is the province of the trier of fact to pass on the weight to be given the evidence and the credibility of witnesses in a proceeding pursuant to the provisions of section 701 of the Welfare and Institutions Code, and the decision of the trier of fact supported by substantial evidence, as in the instant case, is binding upon the appellate court."

The case of In re Jones, supra, relied upon so strongly by appellant, dismisses the question with the single sentence, 131 Cal.App.2d at page 836, 281 P.2d at page 313, "Whether an intent to abandon has existed for a period of a year is a question of fact for the trial court".

In this case there was evidence that appellant failed to communicate with the child or the petitioners from the time letters of guardianship issued on February 24, 1956, until the petition was filed in this action on March 26, 1957, or a period of 13 months. There was also evidence that appellant did not contribute to the support of the child during the same period of time although she was able to do so. Appellant points out that she explained that she did not communicate with the child or

attempt to do so because she was under the impression the court order which deprived her of custody forbade her to communicate with the child or bother the petitioners as guardians. She also testified that she thought the petitioners, as guardians, were required to support the child and that nothing was said in the order concerning support by her. She further testified that petitioners asked for no support, which was confirmed by the testimony of petitioners. Appellant also made the plausible explanation that she was advised by her former attorney that her only recourse was to appeal from the guardianship order; that such an appeal would cost $500; and that she had been saving her money for such an appeal up to the time petitioners filed the abandonment proceeding. Such testimony and other adduced by appellant, if believed by the trial court, would have been a complete defense to the abandonment action. Clearly, if believed, it would have negated, explained, and overcome the presumption of an intent to abandon the child. Upon reading the bare record the court could readily agree with appellant, but the trial court not only heard the testimony but also had an opportunity to observe the demeanor of the witness and to judge her credibility. On the other hand, the petitioners testified that appellant neither communicated with nor attempted to communicate with the child or with them, and that she did not contribute to the child's support for over a year. The court believed this evidence and the trial court's determination is binding upon this court. In re Peterson, 56 Cal.App.2d 791, 794, 133 P.2d 831; In re Maxwell, 117 Cal.App.2d 156, 157, 166, 255 P.2d 87.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

168 Cal.App.2d 735

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ernest WILLIAMSON, Defendant and Appellant.

Cr. 6312.

District Court of Appeal, Second District, Division 1, California.

March 18, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., for burglary in the second degree, and he appealed. The District Court of Appeal, White, P. J., held that possession of stolen property is not of itself sufficient to sustain possessor's conviction for burglary, but held that when possession is shown corroborating evidence may be slight.

Affirmed.

1. Burglary ⇐41(1)

Second-degree burglary conviction was sustained by evidence. West's Ann.Pen. Code, § 459.

2. Criminal Law ⇐1159(5)

Conflict in testimony on alibi issue having been resolved by jury against defendant, jury's finding could not be disturbed on appeal.

3. Burglary ⇐36

In prosecution for burglary, familiarity of defendant with premises invaded was circumstance which jury could consider. West's Ann.Pen.Code, § 459.

4. Burglary ⇐42(1)

Fact that property alleged to have been stolen from burglarized premises was in possession of defendant soon after crime is circumstance bearing on defendant's guilt. West's Ann.Pen.Code, § 459.

5. Burglary ⇐42(1)

Possession of stolen property is not of itself sufficient to sustain possessor's conviction for burglary; but when possession

is shown corroborating evidence may be slight. West's Ann.Pen.Code, § 459.

6. Burglary ⇐45

When defendant makes an explanation as to manner in which he came into possession of stolen property, verity of such explanation rests solely with jury.

Harrison M. Dunham, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

WHITE, Presiding Justice.

An information filed by the District Attorney of Los Angeles County accused defendant of the crime of burglary (Penal Code, Section 459). He was tried by a jury, found guilty of burglary of the second degree, and sentenced to state prison. From the judgment of conviction defendant prosecutes this appeal.

We regard the following as a fair statement of the factual background surrounding this prosecution. On June 4, 1957, George H. Harris, a clothing salesman, was employed as a salesman at Rick's Store for Men in Los Angeles, and resided at 1820 Westmoreland Boulevard, Apartment 2, with his wife and child. Defendant had been to the Harris apartment on at least two occasions during April, 1957, visiting with a niece of Mrs. Harris who resided with the latter at that time. On one of these occasions, defendant was introduced to Mr. Harris.

Mr. Garrett, a sales clerk at Rick's Store for Men in Los Angeles, saw defendant at Rick's around June 1, 1957. Mr. Garrett was positive that it was the defendant he had seen there at that time.

On the morning of June 4, 1957, Mr. Harris and his wife left their apartment at about 8 o'clock, leaving no one in the apartment. Mr. Harris locked and secured all the doors and windows before he left. He did not give defendant or anybody else permission to enter his apartment or to take anything from the apartment in his absence.

There were five units in the apartment building where Mr. Harris lived. Two of these apartments were to the front of the building, toward the street. Harris occupied one of these front apartments and the other one, directly above his, was occupied by Flora Jackson. On June 4, 1957, at approximately 9:45 in the morning, Mrs. Jackson was busy in the living room of her apartment. At that time she saw the defendant drive up in a 1947 black Ford and back up in the driveway below. He got out of the car and went around toward the rear. The motor of the car was running all this time. Mrs. Jackson watched him as far as she could see him as he went around toward the rear. She waited and in a few minutes defendant came back. Mrs. Jackson then heard a noise as though a window was being raised. She stood there and waited and in a few minutes she saw defendant come out with some clothes on his arm. He put the clothes on the front seat of the automobile. Then he went back in and came out with a high fidelity phonograph and put that in the trunk of the car. Mrs. Jackson could not tell just exactly what color the clothes were, but to her they looked like suits and they were still on hangers.

Before the car left the driveway, Mrs. Jackson wrote down the license number on a piece of paper which she later turned over to the police. The license number of the car was FUV–684.

Mr. Harris returned at about 1:30 that afternoon. He noticed that a window in his apartment had been forced and the pane shattered. His high fidelity phonograph was missing from the living room. Also missing were a watch, a camera and his wardrobe consisting of several suits (including People's Exhibit 3, which at the time had a label in it), a sport coat, about four pairs of slacks, two jackets, some shirts, sweaters, neckties and a belt. These articles of clothing had been hanging in the closet of the apartment.

Charles B. Burelson, a police officer for the City of Los Angeles, on the afternoon of June 9, 1957, stopped a car with a

license number FUV–684, because of information he had concerning it. In searching the car one of the objects he discovered was a pinkish colored card from the unemployment office (People's Exhibit 2 for identification), bearing the name Williamson. The name on the card was actually Willie Williamson and not Ernest Williamson, the name of defendant. The address given on this card was 856 West 57th Street. Mrs. Eleby lived at 860 West 57th Street and her sister lived next door at 856 West 57th Street, the address on this card. She knew the defendant as he had roomed with her at her residence for about five weeks in 1955. While he roomed there he often visited at her sister's place next door and often drove her sister's daughter to work. Mrs. Eleby did not know a William Williamson. She knew the defendant had a brother but she was not acquainted with him and had never heard of his name.

In a brief conversation on September 12, 1957, defendant told Mr. Dennis, a police officer for the City of Los Angeles, that one Mattie Lee had loaned him this particular Ford automobile with license number FUV–684 on two or three occasions.

Mr. Rick, who operated a secondhand store in Stockton, California, recognized the defendant, as he had seen him in his store three or four times in 1957. He also recognized a suit (People's Exhibit 3) which appellant had sold him in June, 1957. At that time Mr. Rick had observed that the label was torn off and he had asked the defendant why. The latter said he had bought it secondhand. Mr. Rick's records indicated that he paid defendant $7 for the suit on June 24, 1957, with the provision that defendant could buy it back within a certain length of time, and that defendant took the suit out on June 26, but brought it back for Mr. Rick to buy on July 29. When asked whether he had any further dealings with defendant in regard to the suit of clothing Mr. Garrett replied, "Yes he—he had taken it out on the 26th and he had put it back on to buy the 29th".

Sworn as a witness in his own behalf, defendant testified that on June 4, 1957, the date of the burglary, he was working for the Edward Yancey Corporation, building homes in the city of Stockton, California. That at no time during the months of April, May or June, 1957 was he in the city of Los Angeles. That the only time he was in Los Angeles prior to June, 1957 was "pretty near the first of the year", at which time he resided at the Clark Hotel. Defendant, however, further testified that he had gone to the Harris apartment some eight or ten times during March and April, 1957 to visit Mrs. Harris' niece. With regard to the suit in question (People's Exhibit 3) defendant testified it belonged to him and that he made a loan on it at Rick's Store in Stockton during July, 1957. That he had similar transactions with Rick's Store in connection with this suit, "three or four or five times", and had also borrowed money on other suits "quite a few times" over a period of some ten years. Defendant testified that Willie Williamson was his brother and formerly lived in Stockton, though he had worked in Los Angeles. Defendant testified he had never seen the unemployment card (People's Exhibit 2) until it was produced in court. That he did not know the whereabouts of his brother in June, 1957. Defendant further testified that he lived with his mother at 637 Market Street, Stockton, California, for the entire month of May and a portion of the month of June, 1957; and that he saw his mother every day.

Reverend W. D. Peterson testified that he was a minister of a church located at 2354 S. Pilgrim Street, Stockton, California. That he had been a minister for eleven years. That he had known the defendant for approximately ten years.

That in June, 1957 he had seen him in Stockton, California.

Homer Patillo testified that he lived at 637 W. Market Street, Stockton, California, and was a retired government worker.

That he saw defendant in Stockton between the 1st and 15th of June, 1957.

Iantha Williamson, wife of Ernest Williamson, the defendant, testified that the latter was working in Stockton during the months of May and June, 1957. That she was not living with her husband at the time but that she saw him every day. She testified that defendant was living with his mother during the months of May and June, and that he was working for the Edward Yancey Corporation as a carpenter.

[1] As his sole ground for reversal appellant, while conceding that on appeal the court is limited to a determination of whether or not there is contained in the record sufficient substantial evidence to warrant the conclusion arrived at by the duly constituted arbiters of the facts nevertheless, earnestly urges that as a matter of law, the evidence herein lacks that substantiality necessary to support a guilty verdict. With this contention we cannot agree. The applicable rule is thus stated in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779: "The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear *that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.* The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed, and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced, from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. (Citing cases.)" (Emphasis added.)

That a burglary had been committed was indisputably established by the testimony of Mr. Harris, the victim thereof, and that of Mrs. Jackson who lived in the apartment above that of Mr. Harris. Their testimony clearly established that someone had entered the Harris apartment and that such entry was made with the intent to commit larceny.

[2] As to the sufficiency of the evidence to show that appellant was the perpetrator of the crime, the jury had before it the testimony of Mrs. Jackson that he was the man she saw on June 4, 1957, approach the apartment of Mr. Harris. That after she heard a noise as though a window was being raised, she saw him carrying out clothing and a high fidelity phonograph and loading them into an automobile parked in the driveway. Mr. Garrett, another witness for the prosecution, stated he was positive he saw appellant in Los Angeles around June 1, 1957. True, appellant offered an impressive alibi, viz., that he was working in Stockton on the date of the burglary, but this merely created a conflict with the testimony given by witnesses for the People. And this conflict having been resolved by the jury against appellant, the jury's finding thereon cannot be disturbed on appeal. As was said in People v. Mercer, 103 Cal.App.2d 782, 790, 791, 230 P.2d 4, 9: "* * * The question whether or not the defendants sufficiently established an alibi under the evidence was a factual question for the determination of the jury. The burden is upon the defendants to prove their alibis to such a degree of certainty as would, upon a consideration of all of the evidence, leave a reasonable doubt of defendants' guilt in the minds of the jury. (Citing cases.) The jury having found against the defendants' claimed defense of alibi, such finding cannot be disturbed on appeal. (Citing cases.)" See, also, Peo-

ple v. Villarico, 140 Cal.App.2d 233, 238, 295 P.2d 76.

[3] In addition to the evidence above adverted to, there was testimony that appellant was familiar with the burglarized premises, having admitted he had visited the same some eight or ten times. Familiarity of the accused with the premises invaded is a circumstance which the jury may consider (People v. Mercer, supra, 103 Cal.App.2d at page 790, 230 P.2d at page 8; People v. Carroll, 79 Cal.App.2d 146, 148, 179 P.2d 75).

[4–6] Mr. Rick, a secondhand clothing dealer from Stockton, bought the suit marked People's Exhibit 3 from the appellant on June 24, 1957. This was less than three weeks after the burglary. The appellant admitted the truth of this transaction, but stated he was under the impression it was a loan rather than a sale. Regardless of the nature of the transaction, the record thus shows that appellant had possession of this suit shortly after the burglary. Mr. Harris identified this suit as his own and as one of the suits missing from his apartment on June 4, 1957. The fact that property alleged to have been stolen from the burglarized premises was in the possession of the appellant soon after the crime is a circumstance bearing on the appellant's guilt. People v. Citrino, 46 Cal. 2d 284, 288, 294 P.2d 32; People v. Brown, 136 Cal.App.2d 244, 246, 288 P.2d 984; People v. Mercer, supra, 103 Cal.App.2d at page 789, 230 P.2d at page 8. While possession alone of stolen property in a burglary is not of itself sufficient to sustain the possessor's conviction of that burglary, nevertheless, when, however, possession is shown, the corroborating evidence may be slight. In the instant case, Mr. Harris identified the suit of clothes as his and the peculiar manner in which the suit had been altered in the waist, coupled with the fact that it fit Mr. Harris "perfectly", entitled the jury to conclude that the identification thereof was sufficient. Added to this is the testimony of Mr. Rick that appellant told him that the reason the label on the suit was missing was because appellant had purchased it secondhand. When an accused makes an explanation as to the manner in which he came into the possession of stolen property, the verity of such explanation rests solely with the jury (People v. Taylor, 4 Cal.App.2d 214, 217, 218, 40 P.2d 870). There is a further circumstance that while appellant stated he did not recognize, nor had he ever borrowed the automobile described by Mrs. Jackson as the one used by the burglar, the jury was entitled to consider that an employment card (People's Exhibit 2) bearing the name Willie Williamson, the name of appellant's brother, and an address next door to the address where appellant had lived in 1955 was found in the vehicle. The jury could therefore, disbelieve appellant when he denied ever having borrowed the automobile. Also, appellant stated to Officer Dennis on September 12, 1957, that he had in fact borrowed this particular automobile on two or three occasions.

Appellant places reliance on the cases of People v. Draper, 69 Cal.App.2d 781, 160 P.2d 80 and People v. Graziano, 83 Cal. App.2d 701, 189 P.2d 518. However, these cases are easily distinguishable from and unlike the factual situation present in the case at bar wherein appellant was recognized at the time and place of the burglary loading articles similar to those stolen, into a waiting automobile, that he had a portion of the stolen property in his possession shortly after the crime was committed, and was admittedly familiar with the burglarized premises. In view of the foregoing, we are unable to say that "upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below" (People v. Newland, supra, 15 Cal.2d at page 681, 104 P.2d at page 780). Therefore, we are without authority to interfere with the determination of the jury.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Aubrey Guy POUNDS, Defendant and Appellant.

Cr. 6494.

District Court of Appeal, Second District, Division 2, California.

March 18, 1959.

Rehearing Denied April 9, 1959

Hearing Denied May 13, 1959.

Defendant was convicted of knowingly uttering and passing, through innocent agency of third party, check bearing forged signature of payee. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgment of conviction and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Herndon, J., held that evidence sustained conviction.

Affirmed.

1. Forgery ⇐44(3)

Evidence sustained conviction for knowingly uttering and passing, through innocent agency of third party, check bearing forged signature of payee. West's Ann.Pen.Code, § 470.

2. Criminal Law ⇐62

Where a person has caused a crime to be committed through instrumentality of an innocent agent, the person is the principal.

3. Forgery ⇐1, 16

Crime of forgery consists either in false making or alteration of a document without authority or the uttering or making use of such document with intent to defraud. West's Ann.Pen.Code, § 470.

4. Forgery ⇐16

To constitute forgery by uttering or passing a forged instrument, the instrument must be uttered, published, passed, or attempted to be passed as true and genuine, it must be known by person uttering or passing it to be false, altered, forged, or counterfeited, and the uttering or passing must be done with intent to prejudice, damage, or defraud someone. West's Ann. Pen.Code, § 470.

5. Forgery ⇐44(3)

Possession of recently forged instrument by one claiming under it, like possession of recently stolen goods, is evidence against the possessor. West's Ann.Pen. Code, § 470.

6. Criminal Law ⇐507(1)

Persons who were innocent participants, not accomplices, in commission of crime of knowingly uttering and passing check bearing forged signature of payee, were not "aiders and abettors" and, therefore, it was not necessary that their testimony be corroborated. West's Ann.Pen. Code, § 470.

See publication Words and Phrases, for other judicial constructions and definitions of "Aiders and Abettors".

7. Criminal Law ⇐507½

In prosecution for knowingly uttering and passing check bearing forged signature of payee, evidence sustained trial court's implied finding that certain prosecution witnesses were innocent participants, not accomplices. West's Ann.Pen.Code, § 470.

8. Indictment and Information ⇐110(15)

In prosecution for knowingly uttering and passing check bearing forged signature of payee, information, which charged the offense substantially in the statutory language, sufficiently informed defendant as to nature of crime with which he was charged. West's Ann.Pen.Code, §§ 470, 952.

9. Indictment and Information ⇐196(5)

Defendant, who failed to demur to the information, waived any claim that the information was not sufficiently definite and certain to inform him as to nature of crime with which he was charged.

Aubrey Guy Pounds, in pro. per.

Stanley Mosk, Atty. Gen., John M. Huntington, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

After conviction in the court below of knowingly uttering and passing a check for $100 bearing the forged signature of the payee (Penal Code, § 470), appellant appeals from the judgment and the order denying his motion for a new trial contending (1) that the evidence was insufficient; and (2) that the information was fatally defective.

There being no semblance of merit in this appeal, our summary of the evidence will be condensed. The maker of the check testified that he drew the instrument to the order of Dorothy Comby and mailed it to her. He did not authorize anyone other than the payee to endorse it. Dorothy Comby testified that she did not receive the check; nor did she authorize appellant, or anyone else, to sign her name thereon. One Herbert Brown testified that on February 7, 1958, he met appellant at the Central Cafe in Pasadena. Appellant asked Brown to loan him some money. When Brown replied that he had none, appellant asked Brown if he knew where he could cash a check. Brown answered in the affirmative, whereupon appellant said that if Brown would take him home, he would get a check cashed and get some money. Brown got his friend Shamburger to drive appellant to his home. En route, appellant offered to buy some drinks and some gas. Appellant entered his house, and shortly returned with the check which he handed to Brown. Brown noted that it was "a company check". Appellant stated that "it was his girl friend's check" and asked Brown to cash it since he didn't have any identification. Thereupon they proceeded to a liquor store where they sought to cash the check. The clerk in the liquor store declined to cash the check until it was endorsed by Brown and by one Davy, an acquaintance of Brown's, who happened to be in the store at the time. Brown testified that he would not have signed his name to the check had he known the endorsement of Dorothy Comby was not genuine. When the check was cashed, the clerk placed the money on the counter and Brown handed it to appellant.

Appellant testified in his own behalf. His version of the transaction was very different from that described by the other witnesses; it incriminated Brown and portrayed appellant as an innocent bystander.

[1, 2] The prosecution made no attempt to prove that appellant actually forged the endorsement of Dorothy Comby, but proceeded upon the theory that appellant knowingly uttered and passed the forged check through the innocent agency of Brown. It is self evident that the testimony of the witnesses Brown and Shamburger supported this theory. Where a person has caused a crime to be committed through the instrumentality of an innocent agent, such person is the principal. People v. Waxman, 114 Cal.App.2d 399, 408, 250 P.2d 339; cf. People v. Monks, 133 Cal. App. 440, 447, 24 P.2d 508; People v. Keller, 79 Cal.App. 612, 617, 250 P. 585; see 14 Cal.Jur.2d 232, § 47.

[3, 4] "The crime of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud." People v. McKenna, 11 Cal.2d 327, 332, 79 P.2d 1065, 1068; People v. Chapman, 156 Cal.App.2d 151, 156, 319 P.2d 8. "To constitute forgery by uttering or passing a forged instrument, as defined in section 470 of the Penal Code, three important factors are requisite: (1) It must be uttered, published, passed, or attempted to be passed, as true and genuine; (2) It must be known by the person uttering or passing it to be false, altered, forged, or counterfeited; (3) It must be with intent to prejudice, damage, or defraud some person." People v. Smith, 103 Cal. 563, 565, 37 P. 516, 517; People v. Chapman, supra, 156 Cal.App.2d 151, 156, 319 P.2d 8.

[5] We have no hesitancy in declaring the sufficiency of the evidence to sustain the trial court's finding that all these essential elements of the offense were proved

as against appellant. As we have noted, two witnesses testified that appellant produced the check upon emerging from his place of residence and declared that "it was his girl friend's check". But Dorothy Comby, the payee of the check, testified that she neither received it nor authorized anyone to endorse it. Appellant did not testify that Dorothy Comby was his girl friend, nor did he attempt to show that this was a fact, either by his cross-examination of Dorothy Comby, or otherwise. In addition, it is to be remembered that "[t]he possession of an instrument recently forged, by one claiming under it, like the possession of goods recently stolen, is evidence against the possessor". People v. Smith, supra, 103 Cal. 563, 566, 37 P. 516; cf. People v. Cline, 79 Cal.App.2d 11, 14, 179 P.2d 89; People v. Ruiz, 103 Cal.App.2d 146, 149, 229 P.2d 73.

[6, 7] Appellant argues that the witnesses Brown and Shamburger were at least "aiders and abettors" in the transaction so that their testimony required corroboration. This argument fails because the evidence adequately supports the trial court's implied finding that said witnesses were innocent participants and not accomplices. See People v. Santo, 43 Cal.2d 319, 326–327, 273 P.2d 249; People v. Comstock, 147 Cal.App.2d 287, 292, 305 P. 2d 228; People v. Williams, 30 Cal.App. 2d 234, 238, 85 P.2d 974.

[8, 9] Appellant's attack upon the information seems to be based upon the contention that it was not sufficiently definite and certain to inform him as to the nature of the crime with which he was charged. The contention is without merit. Since the information charges the offense substantially in the language of the statute, it is sufficient. People v. Ruiz, supra, 103 Cal.App.2d 146, 148, 229 P.2d 73; Penal Code, § 952. Moreover, appellant waived any claim of uncertainty by failing to demur to the information. People v. Brac, 73 Cal.App.2d 629, 635, 167 P.2d 535; People v. Benenato, 77 Cal.App.2d 350, 363, 175 P.2d 296.

Affirmed.

FOX, P. J., and ASHBURN, J., concur.



168 Cal.App.2d 557

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edd P. STEPHENS, Defendant and Appellant.

Cr. 6377.

District Court of Appeal, Second District, Division 3, California.

March 10, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, Albert E. Wheatcroft, J., for assault with a deadly weapon, and he appealed. The District Court of Appeal, Shinn, P. J., held that the only reasonable conclusion was that defendant had stabbed the victim with a knife.

Affirmed.

1. Assault and Battery ⇐92

In prosecution for assault with a deadly weapon, only reasonable conclusion was that defendant had stabbed victim with knife.

2. Criminal Law ⇐53

Intoxication would have constituted no defense to charge of assault with a deadly weapon.

3. Assault and Battery ⇐56

In prosecution for assault with a deadly weapon, the People were not required to prove that defendant had formulated a specific intent to injure victim.

Edd P. Stephens in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a court trial, Edd P. Stephens was convicted of assaulting Daniel Kohlmeyer with a deadly weapon and was sentenced to state prison. He appeals from the judgment.

Upon application of appellant for appointment of counsel the matter was referred to the Committee on Criminal Appeals of the Los Angeles Bar Association with a request for a report which would direct our attention to any matter disclosed by the record which would indicate that the applicant might be entitled to some relief. This is a voluntary and valuable service which has been rendered by the association for many years. Upon receipt of a report from a member of the Committee that no meritorious ground of appeal had been found, and in accordance with our settled practice, we examined the record in order to ascertain whether appointment of counsel would serve any useful purpose. Having determined that the appeal appeared to be without merit we denied the application for appointment of counsel and notified appellant of our order, substantially extending his time to file a brief. No brief having been filed, we have re-examined the record and are disposing of the appeal by written opinion. Such has been our practice for many years.

Kohlmeyer was the only witness for the People. He testified that on the evening of February 7, 1958 he entered a barroom in Los Angeles and sat down at the bar. Appellant was also seated at the bar, drinking a bottle of beer and making a slight disturbance. A quarrel arose between Stephens and a woman at the door of the establishment; appellant was "pushing her around." Kohlmeyer went to the woman's assistance, whereupon appellant hit him in the face and pushed him down the street. Kohlmeyer retaliated until appellant knocked him down. Kohlmeyer was cut severely in the abdomen, for which surgery was required.

Appellant was represented at the trial by a deputy public defender. He testified in his own defense that he had been drinking heavily. He remembered being at the bar but had no recollection of scuffling with a woman or fighting with Kohlmeyer. He did not have a knife when he entered the establishment, nor did he have one when he was arrested. After his arrest, he was treated for a broken nose and various minor injuries; he did not remember how he came to be injured. On cross-examination he admitted having suffered a prior felony conviction in Kentucky for which he was confined in a reformatory and there was evidence of another felony conviction. The court made no finding as to the former convictions.

[1–3] Although there was no direct evidence that appellant had a knife in his possession, the only reasonable conclusion was that he stabbed Kohlmeyer with a knife. People v. Guiterrez, 140 Cal.App. 720, 35 P.2d 1046; People v. Urrutia, 58 Cal.App. 2d 468, 137 P.2d 48. Even if the court had believed appellant was intoxicated this would not have constituted a defense. The People were not required to prove that he had formulated a specific intent to injure Kohlmeyer. People v. Laya, 123 Cal.App.2d 7, 15, 266 P.2d 157, and cases cited.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

168 Cal.App.2d 543

John A. WALLACE, Petitioner and Appellant,

v.

STATE PERSONNEL BOARD of the State of California, Department of Public Works of the State of California, Frank B. Durkee, Director of the Department of Public Works of the State of California, Charles G. Johnson, Treasurer of the State of California, and Robert C. Kirkwood, Controller of the State of California, Respondents.

Civ. 9447.

District Court of Appeal, Third District, California.

March 9, 1959.

Proceeding for writ of mandate to annul an order of State Personnel Board sustaining action of department of public works treating employee's continued absence without leave as an automatic resignation. From a judgment of the Superior Court, Sacramento County, John Quincy Brown, J., denying petition for writ of mandate, the employee appealed. The District Court of Appeal, Peek, J., held that under applicable statutes and rules it is not necessary that an employee suffer such mental collapse as results in physical incapacity before becoming entitled to sick leave and that failure of State Personnel Board and court to consider substantial evidence of employee's mental illness was improper and resulted in unfair hearing.

Judgment reversed and cause remanded with directions.

1. States ⇐60.2

Where Personnel Transactions Manual contained provision which required employee to be physically incapacitated if his request for sick leave was based upon emotional disturbance but the provision had never been adopted as rule by the Board, the provision could be considered as nothing more than administrative directive for guidance of department heads to assist them in maintenance of uniformity in determination of availability of sick leave to state employees. West's Ann.Gov.Code, § 18100; West's Ann.Const. art. 24, § 4.

2. Administrative Law and Procedure ⇐387

Although construction placed on statute by administrative agency is entitled to great weight, neither administrative officer nor agency may make rule or regulation that alters or enlarges terms of legislative enactment.

3. Statutes ⇐219

Erroneous administrative construction does not govern interpretation of statute.

4. Administrative Law and Procedure ⇐417
States ⇐60.2

Administrative directive which required employee to be physically incapacitated if his request for sick leave was based on emotional disturbance did not have force and effect of law and could not be used to restrict purpose of rule adopted by State Personnel Board and statutory provisions which do not limit sick leave to physical illness. West's Ann.Gov.Code, § 18100; West's Ann.Const. art. 24, § 4.

5. Officers ⇐72(1)

In action to annul order of State Personnel Board sustaining action of department of public works in treating employee's continued absence without leave to be an automatic resignation, action of State Personnel Board and court in failing to consider substantial evidence of mental illness was improper since under applicable statutes and rules it is not necessary that employee suffer such mental collapse as results in physical incapacity before becoming entitled to sick leave. West's Ann.Gov.Code, § 18100; West's Ann.Const. art. 24, § 4.

Frank G. Finnegan, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Willard Shank, Deputy Atty. Gen., and Robert E. Reed and John B. Matheny, for respondent.

PEEK, Justice.

This is an appeal by petitioner Wallace from a judgment denying his petition for a

writ of mandate whereby he sought to annul an order of the State Personnel Board, referred to herein as the Board, and be restored to his former civil service position with the State of California.

From 1949 until he was discharged in 1955, petitioner had been a permanent civil service employee of the Division of Architecture of the Department of Public Works of the State of California, which we shall refer to as the Department, and since 1951 had been employed in the capacity of senior electrical engineer assigned to the Sacramento office of the Department. While at Sacramento his duties, which required substantial travel of from two to four thousand miles per month, included inspecting electrical installations in state construction projects, interpreting plans and specifications and clarifying misunderstandings relative thereto, inspecting installations with respect to whether or not the work was proceeding according to plan, rendering decisions as to intent of design, making final inspections and preparing all necessary reports relative thereto.

On August 1, 1955, petitioner was transferred from Sacramento to the Los Angeles office where he was assigned similar work. Approximately two weeks after his assumption of duties in that office he began to feel ill. This he described as extreme depression, severe headaches, fatigue, muscle tension, insomnia, loss of weight, and mental confusion. This condition became progressively worse, and on August 29, after completing an assignment at Bishop, California, he returned to Sacramento to consult his family physician, Dr. James D. Coyle. Following his examination of petitioner, Dr. Coyle determined that he was suffering from a complete physical and emotional collapse. He prescribed medication and complete rest. Petitioner thereupon requested sick leave for the month of October. His request stated he was suffering from "complete physical and emotional collapse." Attached to said request was a certificate from Dr. Coyle stating: "My present diagnosis, well verified, is Myocardial Strain, aggravated by a severe emotional disturbance. I have advised him that he cannot return to work at least until 11–15–55, and probably not at that time." The department referred his request to Dr. Norris Jones, the medical officer for the Board, who in turn ordered an independent medical examination of petitioner by Dr. Herbert W. Jenkins. Dr. Jenkins concluded his report as follows: "On the basis of his statements and my examination, I do not believe there is any physical reason for his not returning to work. He intimated that he might prefer to take a demotion if he could continue to live in this area. He apparently would be incapacitated by symptoms of nervous origin if he were forced to move to the Los Angeles Area." On the basis of Dr. Jenkins' report, the Department, on November 29, 1955, disapproved petitioner's request for sick leave in its entirety and ordered him to return to work in Los Angeles, stating that should he refuse to do so his services would be terminated by reason of the automatic resignation provisions contained in Government Code, section 19503. Thereafter petitioner filed a further request for sick leave for the month of November which likewise was denied as was his request for the month of December. The amount of his accumulated sick leave is not questioned. On December 10 petitioner appealed to the Board from denials of his applications for sick leave and also appealed from the order of the Department construing his continued absence to be an automatic resignation under the previously mentioned code section.

On March 9 the Board conducted a hearing and thereafter, on June 4, 1956, sustained the action of the Department. Petitioner's request for a rehearing was denied and shortly thereafter he filed the present proceeding in the Superior Court of Sacramento County. The court found in favor of respondents and the present appeal followed.

Petitioner's first contention relates to the specific finding of the trial court "that petitioner as an employee of the State of Cali-

fornia was required, pursuant to Section 18100 of the Government Code, to submit satisfactory proof of the necessity for sick leave, *and that pursuant to Section 502 of the Personnel Transactions Manual, adopted by the State Personnel Board, an employee must be physically incapacitated if his request for absence is based upon an emotional disturbance.*"

In accordance with Article XXIV, section 4, of the Constitution, the Legislature, by Government Code, section 18100, has provided for sick leave credits for all civil service personnel upon the "submission of satisfactory proof of the necessity" therefor, and the Board, pursuant to the rule-making power granted by the Constitution, has, by section 401 of article 18 of the Administrative Code, defined sick leave to be "* * * the absence from duty of an employee because of his illness or injury, his exposure to contagious disease, his attendance upon a member of his immediate family who is seriously ill and requires the care or attendance of the employee, or death in the immediate family of the employee. 'Member of his immediate family' means the mother, father, husband, wife, son, daughter, brother, or sister of the employee, or any person living in the immediate household of the employee."

[1] The Board, in addition, by rule 406, has provided that "the appointing power shall approve sick leave only after having ascertained that the absence was for an authorized reason. He may require the employee to submit substantiating evidence including, but not limited to, a physician's certificate. If the appointing power does not consider the evidence adequate, he shall disapprove the request for sick leave." The above-mentioned provisions are the only ones pertinent to questions raised by petitioner that are to be found in the Constitution, legislative enactments or administrative rules. Section 502, referred to in the findings of the court, has never been adopted as a rule by the Personnel Board and hence can be considered as nothing more than an administrative directive for the guidance of department heads to assist them in the maintenance of uniformity in the determination of the availability of sick leave to state employees.

In their brief respondents admit said section 502 "has no formal status in law but is a source of administrative interpretation of the laws and rules for which the State Personnel Board has administrative responsibility." But respondents then contend that by the same token said section is entitled to great weight.

[2–4] Although the construction placed upon a statute by an administrative agency is entitled to said great weight, nevertheless neither an administrative officer nor an agency may "make a rule or regulation that alters or enlarges the terms of a legislative enactment. [Citations.] Moreover, an erroneous administrative construction does not govern the interpretation of a statute, * * *." Whitcomb Hotel, Inc. v. California Emp. Comm., 24 Cal.2d 753, 757, 151 P.2d 233, 236, 155 A.L.R. 405. It is well established that an administrative directive such as is embodied in section 502 does not have the force of law and hence may not be asserted as a standard for the conduct of the agency if the assertion would in any way effect a change in the meaning of section 401 of the Administrative Code. Conroy v. Wolff, 34 Cal.2d 745, 214 P.2d 529. If, as was held in Nelson v. Dean, 27 Cal.2d 873, 168 P.2d 16, 168 A.L.R. 467, section 151 of the 1937 Civil Service Act (now 18100 of the Government Code) does not limit sick leave to physical illness, then it follows that the administrative directive embodied in section 502 of the Transactions Manual cannot be used to so restrict the purpose and intent expressed in section 401 of the Administrative Code or 18100 of the Government Code. If the provisions of the Transactions Manual may not be so used, then it also follows that the provisions of section 401 of the Administrative Code, which are clear and unambiguous, must be given their obvious meaning that illness may be mental as well as physical.

[5] If, as we have concluded, it was not necessary under the applicable statutes and rules that an employee suffer such a mental collapse as resulted in physical incapacity before becoming entitled to sick leave, then the court and the Board erred in failing to consider the substantial evidence to this effect which was introduced by petitioner. Certainly this must be true since according to the kind of work to be done one may be as incapacitated from performing his duties by reason of mental illness as one also may be incapacitated by reason of purely physical illness.

From examination of the transcript it is quite apparent that the conclusion of the court and the Board was predicated upon the necessity of a showing of physical inability to do the job, and that any question of inability to perform the services demanded by the employment by reason of emotional disturbance was wholly outside of the issues.

The record is replete with instances which point up this conclusion. We refer to the comments by the court in its findings relative to the necessity of physical illness; the colloquies between counsel for the Board and the medical witnesses relative to the lack of objective symptoms indicating physical illness; the testimony of the physician appointed by the Board that he was not asked "to evaluate his nervous symptoms in connection with his job. I was asked to evaluate his physical capacity for work"; and the testimony of Mr. Hunter (acting for the Department) that he ignored not only Dr. Coyle's report but also ignored the concluding sentence of Dr. Jenkins' report that the petitioner "would be incapacitated by symptoms of nervous origin if he were forced to move to the Los Angeles Area"; and finally the letter of Dr. Kelley, a psychiatrist, in corroboration of the testimony of Dr. Coyle.

It necessarily follows that an improper standard was applied for the purpose of determining sick leave, and that the court and the Board, in the application of such standard, completely ignored the substantial evidence of mental illness introduced by the petitioner. The result was an unfair hearing.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



168 Cal.App.2d 499

E. R. ABBEY, Public Administrator, etc. [Raymond A. Brandt, Public Administrator, etc., substituted in place and stead of E. R. Abbey], Plaintiff and Respondent,

v.

Joseph R. LORD, Defendant and Appellant.

Civ. 5971.

District Court of Appeal, Fourth District, California.

March 6, 1959.

Action by decedent's administrator against her husband to quiet title, to certain jointly owned property, to establish a constructive trust in the property, and to obtain declaratory relief. The Superior Court, Orange County, Karl Lynn Davis, J., entered judgment unsatisfactory to husband and he appealed. The District Court of Appeal, Griffin, J., held that where husband unlawfully and feloniously killed his wife, he was not entitled to a one half interest in property held by them as tenants in common, but he was entitled only to the amount of his separate property which he contributed to the common estate, and as to certain joint tenancy property, because of his unlawful killing of his co-tenant, he was not entitled to the full amount thereof, but was entitled only to the amount that he contributed toward such joint tenancy property.

Judgment affirmed.

1. Husband and Wife ⇐14(3)

Although, generally, the taking of title by spouses as joint tenants is tantamount to a binding agreement between them that the property shall not thereafter be held as common property, but instead as joint tenancy property with all the characteristics of such an estate, the character of property thus held may be changed by executed oral agreement between the parties.

2. Joint Tenancy ⇐3

The intention to create a joint tenancy must appear expressly in the instrument, and without such a declaration no joint tenancy results. West's Ann.Civ.Code, § 686.

3. Evidence ⇐313

Uncorroborated testimony as to an oral declaration of a deceased person is the weakest form of evidence and is open to suspicion, but where admissible, it may be weighed by the trier of facts the same as other evidence and may be disregarded where shown to be unconvincing or insubstantial, or because of the witness' interest in the outcome of the case and close relationship.

4. Descent and Distribution ⇐51

Amendment to statute disinheriting one who had been convicted of murder, extending disinherison to one convicted of voluntary manslaughter establishes that the legislature does not favor the policy of giving property benefits to murderers or persons convicted of voluntary manslaughter. West's Ann.Prob.Code, § 258.

5. Insurance ⇐448
Trusts ⇐95

A killer is precluded from receiving and keeping proceeds of a life policy, and a constructive trust is imposed on such proceeds.

6. Evidence ⇐108

Generally, evidence of intention or mental state of a person at a particular time, when material to an issue under trial, is admissible.

7. Evidence ⇐317(18)

Where, in action for a determination of rights to certain jointly owned property between deceased wife and husband, husband contended that wife orally told him that if he would return to her she would make a gift of some of her property to him so that they would hold their property fifty-fifty and that she later did make such a gift and division, reception of evidence, consisting of testimony that wife told certain witnesses she was worried because she had dividend checks coming from certain stock and had not received them, and that she wanted to keep certain money separate from husband but that he would not agree, and that husband wanted half of the property in the event of her divorce, but that she wanted all her property which was more than half, would not be deemed prejudicial error on theory that such evidence was hearsay.

8. Husband and Wife ⇐14(3, 4)

Where husband unlawfully and feloniously killed his wife, he was not entitled to a one-half interest in property held by them as tenants in common, but he was entitled only to the amount of his separate property which he contributed to the common estate, and as to certain joint tenancy property, because of his unlawful killing of his cotenant, he was not entitled to the full amount thereof, but was entitled only to the amount that he contributed toward such joint tenancy property.

9. Joint Tenancy ⇐8

A man should not profit from his own crime and no common-law fiction, such as theory of joint tenancy, ought to impair such judgment.

Rimel & Johnston, Santa Ana, for appellant.

James E. Walker, Santa Ana, for respondent.

GRIFFIN, Presiding Justice.

In July, 1950, defendant-appellant Joseph R. Lord married Regina Dion. He had a separate estate of approximately $12,000, and she had one valued at approximately $20,000. In December, 1953, they

separated under a property settlement agreement. They agreed to divide and apportion their properties in accordance with the contributions each had made to the common fund at the time of their marriage. Under the agreement defendant received about $12,338.87 and Mrs. Lord $20,958.83. An interlocutory decree of divorce was obtained by Mrs. Lord. They later agreed to return to live together as husband and wife and according to Mr. Lord, in consideration of his returning to live with her, they agreed to pool their assets and that each would have a one-half interest therein. Later, some domestic or financial difficulty arose between them. On February 20, 1956, Joseph Lord killed his wife Regina. He was charged with murder and he entered a plea of guilty of manslaughter. The court determined the same to be voluntary. Probation was granted upon the condition, among other things, that defendant serve one year in the county jail. Thereafter, plaintiff, the public administrator, was appointed to administer her estate and brought an action against Joseph Lord to quiet title, to establish a constructive trust in the property, and to obtain declaratory relief.

After they resumed marital relationship and at the time of her death the parties owned, as tenants in common: (a) a fully paid investment certificate No. 10,029, in the sum of $10,000; (b) investment certificate No. 11,020 in the sum of $3,370.95; (c) investment certificate No. 9522 in the sum of $10,299.63; (d) a bank account in the sum of $2,323.77, claimed by Mr. Lord to be in joint tenancy with his wife; and (e) 500 shares of telephone stock valued at $5,000, likewise held in joint tenancy, all totaling $30,994.35.

The trial court found, after taking considerable evidence, that all of the property was owned by them as tenants in common except the 500 shares of telephone stock which was held in joint tenancy; that when defendant husband killed his wife, he destroyed the joint tenancy and thereby converted the stock into a tenancy in common; that it would be unconscionable for defendant to recover out of the common estate more than he ever owned of it or contributed to it; that he only contributed separate property worth 37 per cent of its total value and Regina contributed separate property worth 63 per cent thereof at the time of their marriage and each regained the same proportionate amounts by virtue of the executed property settlement agreement and that Regina Lord never made any gift or transfer of ownership of any of her separate property to defendant and at the time of her death she was still the owner of 63 per cent of the common estate held with defendant. Judgment was entered that plaintiff's title to 63 per cent of the common fund in cash value, equivalent to $19,526.44, be quieted, together with 63 per cent of the gross income accumulated since her death.

It is defendant's position that he was entitled to a one-half interest in items (a), (b), and (c), and was entitled to the full amount of items (d) and (e) because of the joint tenancy holding, he being the survivor, citing such authority as In re Foster's Estate, 182 Kan. 315, 320 P.2d 855; Wenker v. Landon, 1939, 161 Or. 265, 88 P.2d 971; and Oleff v. Hodapp, 1935, 129 Ohio St. 432, 98 A.L.R. 764, 195 N.E. 838; 32 A.L.R.2d 1099; Smith v. Greenburg, 1950, 121 Colo. 417, 218 P.2d 514; Budwit v. Herr, 339 Mich. 265, 63 N.W.2d 841.

Some question arises as to the nature of the holding in reference to item (d), the bank account. Plaintiff produced a banker who testified he opened the account for these parties on October 26, 1954, and prepared the signature card and ledger sheet; that Mrs. Lord did all of the talking about it even though Mr. Lord stood by and listened; that Mrs. Lord said she wanted to put the money in the bank so Mr. Lord could not get it without her knowing it or without her signature; that she referred to it as "my money"; that the bank used the same card for joint and common accounts; that the Lord transaction was unusual and that he explained to her that if he opened an account requiring both signatures neither could draw money without the signature

of the other; and she said that was the way she wanted it. The ledger sheet used the word "and" between the two signatures and used no words indicating a joint tenancy account. It was marked "Both signatures required". The signature card reads in part as follows: "(1) That this account is to be carried by such bank as a commercial account * * * (2) That all funds now to the credit of or which may hereafter be placed to the credit of account are and shall be the property of the undersigned as joint tenants to be withdrawn as follows: * * *. Both signatures required." In this connection the banker testified he asked Mrs. Lord if she wanted the account in joint tenancy; that he told her in that case what would happen to the money in the event of the death of one party and said it was unusual to open a joint tenancy account requiring both signatures; that she said she did not know what joint tenancy meant but she wanted it so arranged that both would have to sign for withdrawals.

Defendant Lord testified in reference to another bank account in Los Gatos opened by them in both names that he "didn't know anything about joint tenancy or joint accounts or anything like that"; that "it was both names" and he knew he did not have the privilege of withdrawing money from it without both signatures; that she could not do so either; and that the account in the Santa Ana bank was opened under the same arrangement.

[1] It is conceded that the telephone stock (e) was held in joint tenancy. Appellant contends that the taking of title in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as common property but instead as joint tenancy with all the characteristics of such an estate, citing Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003; and Schindler v. Schindler, 126 Cal.App.2d 597, 272 P.2d 566.

[2] While this is the general rule it has long been held that the character of property thus held may be changed by executed oral agreement between the parties. Hotle v. Miller, 51 Cal.2d 541, 334 P.2d 849; Woods v. Security-First National Bank, 46 Cal.2d 697, 299 P.2d 657; Jue v. San Tong Jue, 163 Cal.App.2d 231, 329 P.2d 560. It has likewise been held that to create a joint tenancy interest it is necessary to comply with section 683 of the Civil Code. At common law, estates in joint tenancy were favored over tenancies in common, and it was necessary to add restrictive words to limit the grantees' estate to that of tenancy in common. This rule has been abrogated by statute in this state. The intention to create a joint tenancy must now appear expressly in the instrument. Without such a declaration there is no compliance with the statute and no joint tenancy results. 13 Cal.Jur.2d 287, 296; Sec. 686, Civ.Code; Reiss v. Reiss, 45 Cal.App.2d 740, 747, 114 P.2d 718. Section 852 of the Financial Code does not term the making of the deposit in a bank conclusive evidence of the intention of the depositors to vest title to the deposit in the survivor. This section superseded section 852 of the Banking Code in 1951, which section had superseded section 15a of the Bank Act. Paterson v. Comastri, 39 Cal.2d 66, 70, 244 P.2d 902, 905. Parol evidence is competent to show the depositor's intention and equitable rights to the money. See Paterson v. Comastri, supra, where it is said that any presumption of joint tenancy "may be overcome by proof that the owner-depositor, when making the deposit, had no intention to create a true joint tenancy." See also Comastri v. Burke, 137 Cal.App.2d 430, 435, 290 P.2d 663; American Trust Co. v. Fitzmaurice, 131 Cal.App.2d 382, 387, 280 P.2d 545; In re Estate of Dean, 68 Cal. App.2d 86, 97, 155 P.2d 901; Anderson v. Broadwell, 119 Cal.App. 150, 6 P.2d 267.

[3] In view of the evidence and circumstances related, the trial court was not bound to accept the testimony of Mr. Lord that his wife Regina said she was making a gift of a portion of her separate property to Lord, or that they thereafter agreed to hold their property "fifty-fifty". Harlow v. United Title Guaranty Co., 145 Cal.

App.2d 672, 675, 303 P.2d 16. In Hill v. Thomas, 135 Cal.App.2d 672, 681, 288 P.2d 157, the court held that the uncorroborated testimony as to an oral declaration of a deceased person is the weakest form of evidence and is open to suspicion; but where admissible, it may be weighed by the trier of facts the same as other evidence and may be disregarded where shown to be unconvincing or insubstantial, or because of the witness' interest in the outcome of the case and close relationship. See also Khoury v. Barham, 85 Cal.App.2d 202, 211, 192 P.2d 823. It may be further observed that even Lord's testimony, set forth in his deposition, indicates that he was at least in doubt as to the intended nature of the joint tenancy bank account.

Although it might well appear that a joint tenancy account was never intended we conclude, under the reasoning hereinafter expressed in respect to the claimed destruction of the joint tenancy holding pertaining to item (e), the telephone stock, it will be unnecessary to determine this issue.

Appellant urges in substance this proposition, that the logic of the strict common-law rule must be applied to any apparent joint tenancy title; that therefore defendant is the sole owner of any property so held at the instant he killed the other joint tenant, and argues against the weight and trend of authority. It seems to us he is opposed by modern views. The decisive fact in the case at bar is the voluntary, unlawful, and felonious killing of one joint tenant by the other as distinguished from an unintentional killing. It appears that defendant stabbed his wife with a butcher knife in the abdomen and throat, causing her immediate death in an argument over the deceased wife's refusal to join with him in signing a check drawn on the joint tenancy account here involved. The controlling facts cannot possibly be disregarded in a just determination of this case. Conversely, there would seem to be no justification whatsoever for disposing of this case as though Regina Lord had died of natural causes, for no amount of lucubration can dissolve the crucial distinction in circumstances. The general subject of acquisition of property by one who has feloniously killed the owner is exhaustively treated in Scott on Trusts, 2d Ed. [1956] Vol. IV, Chap. 13, Constructive Trusts, and particularly at Sections 492, 493 and 494. There is a conflict of authority, in the absence of any statute, as to acquisition of property by testate or intestate succession where the decedent is killed by a legatee or heir, but most jurisdictions apply the constructive trust theory that where a murderer attempts to acquire title to property by virtue of his crime and to keep it he takes the property but holds it upon a constructive trust. In Scott on Trusts, supra, p. 3181, it is said:

> "Where the Statute of Wills and the statute of distributions make no provision as to the effect of murder of the decedent by the legatee or heir, the property passes under the will or by intestacy to him. It is then that the equitable principle as to unjust enrichment becomes applicable. That principle is as applicable where the title to property is acquired by murder as it is where the title is acquired by fraud, duress or undue influence. By imposing a constructive trust upon the murderer, the court is not making an exception to the provisions of the statutes, but is merely compelling the murderer to surrender the profits of his crime and thus preventing his unjust enrichment."

[4, 5] More than half of the states have a statute similar to California Probate Code section 258. This section was added in 1905 as Civil Code section 1409. It disinherited one who had been convicted of murder. The Supreme Court refused to extend the section to manslaughter. In re Estate of Kirby, 162 Cal. 91, 94, 121 P. 370, 371, 39 L.R.A.,N.S., 1088, it is said: "The statute having made the distinction between murder and manslaughter, the courts cannot ignore it * * *."

Also cited by appellant is Budwit v. Herr, 339 Mich. 265, 63 N.W.2d 841; and Smith v. Greenburg, 1950, 121 Colo. 417, 218 P. 2d 514. See also In re Estate of Lysholm, 79 Cal.App.2d 467, 179 P.2d 833; and In re Estate of Daniels, 1953, 120 Cal.App. 2d 284, 260 P.2d 991. Probate Code Section 258 was amended in 1955, and disinherison was extended to one convicted of voluntary manslaughter. This amendment clearly establishes that the legislature does not favor the policy of giving property benefits to murderers or persons convicted of voluntary manslaughter. Section 2224 of the Civil Code reads as follows:

"One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Section 3517 of the Civil Code provides: "No one can take advantage of his own wrong."

The application of these sections was not discussed in Re Estate of Kirby, supra. In re Estate of Lysholm, supra, involved an involuntary manslaughter case. It does not involve the same kind of moral turpitude present in a voluntary killing. In re Estate of Daniels, (not considered by the Supreme Court, and decided before the amendment to section 258 of the Probate Code in 1955), did refer to section 3517 of the Civil Code, and in disposing of this contention said, 120 Cal.App.2d at page 293, 260 P.2d at page 996: "Whether this accords with natural right and justice is a question upon which we cannot enter. The right of inheritance in this state does not depend upon the ideas of court or counsel as to justice and natural right." In relation to insurance the overwhelming weight of authority and the California rule is that the killer will be precluded from receiving and keeping the proceeds of the policy; and that a constructive trust is imposed. Beck v. West Coast Life Insurance Co., 38 Cal.2d 643, 645, 241 P.2d 544, 26 A.L.R.2d 979; Scott on Trusts, Sec. 494, et seq., p. 3208; New York Mutual Life Ins. Co. v. Armstrong, 117 U.S. 591, 600, 6 S.Ct. 877, 881, 29 L.Ed. 997.

In the Beck case, supra, the court said [38 Cal.2d 643, 241 P.2d 546]:

"'(W)here the defendant has by his own wrong obtained the legal title to property, a trust as to such property will be imposed upon him in favor of the party injured. This principle is a familiar one, and is based upon the maxim, which has been carried into our Code (Civ.Code, section 3517), that no one may profit by his own wrong.'"

In the New York Mutual Life Insurance Company case it was said at page 600 of 117 U.S., at page 881 of 6 S.Ct.:

"It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of the party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired."

A careful examination of the authorities of this state fails to reveal a reported decision upon the precise question before the court. While section 258 of the Probate Code has no direct application, section 2224 should be directly applicable. If not, the question then is, in the absence of statute, does one who feloniously kills his spouse, and thus survives such spouse, thereupon become the sole owner of joint tenancy property? It is difficult to conjure any real distinction here between a tenancy by the entireties, and a joint tenancy, or the rationale of the cases that deal with one common-law form or the other. It would seem that at least to the extent to which the interest of the surviving joint tenant is enlarged, the killer should be compelled to hold under a constructive trust, whether drawn from a statute or general equitable

principles. Vesey v. Vesey, 237 Minn. 295, 54 N.W.2d 385, 32 A.L.R.2d 1090; National City Bank of Evansville v. Bledsoe, Ind. 1957, 144 N.E.2d 710; 3 Scott on Trusts, Sec. 493, 493.2; 3 Bogert, Trust and Trustees [1946], Sec. 478, pp. 56, 57; Cardozo, The Nature of the Judicial Process (Yale Univ.Press, 1921), pp. 40, 43.

In Vesey v. Vesey, supra, it is said at page 389 of 54 N.W.2d:

> "* * * Because the problem of preventing one from acquiring various types of property by feloniously causing the death of another are complex, it would be desirable to have all questions, rather than only those relating to estates of decedents and insurance proceeds, governed by legislation. But, until the legislature acts, this court can, by imposing a constructive trust, prevent the repugnant result that one joint owner of a bank account may take the whole account by right of survivorship after feloniously causing the death of the other joint owner."

In National City Bank of Evansville v. Bledsoe, supra, 144 N.E.2d at page 714, it is said:

> "Is there any valid reason why the well-settled equitable principle that 'equity will not permit a person to profit by his own wrong at the expense of another,' should not be applicable to an estate by entireties terminated by murder? There is no doubt the murderer in reality has profited from illegally causing the death of the victim spouse, as he has become the sole and exclusive owner of the fee, which he could thereupon alienate or dispose of as he alone saw fit. * * * And while according to the strict common law fiction, the murderer may not have profited or benefitted, on the theory that he was, during the marriage, the owner per tout of the property, equity looks to the substance and not the form, and should not condone by a common law fiction the fact that the wrongdoer has actually benefitted by his own wrongful conduct."

The courts have invented ingenious theories to support a constructive trust. Some courts erect a conclusive presumption that decedent would have outlived the killer. Neiman v. Hurff, 11 N.J. 55, 93 A.2d 345, 348. If this is to be applied in the instant case, Regina Lord was 65 years of age and Joseph 69 at the time of her death, and under that theory the probability would be that Regina would have outlived her husband and come into the entire joint tenancy property had he not taken her life. That the killer is the trustee of the victim's one-half interest appears to the be the rule most frequently adopted. Opposed to defendant's position are all of the states that have so far passed on the question and adopted a constructive trust principle to prevent the killer from profiting from his crime, namely, Delaware, Florida, Illinois, Indiana, Kentucky, Minnesota, Missouri, New Jersey, New York, North Carolina and Wisconsin, and the following eminent authorities: Restatement; Legal Scholars, Ames, Bogert and Scott, and Mr. Justice Cardozo; Ashwood v. Patterson, Fla.1951, 49 So.2d 848; Bradley v. Fox, 1955, 7 Ill.2d 106, 129 N.E.2d 699; National City Bank of Evansville v. Bledsoe, Ind.1957, 144 N.E. 2d 710; Cowan v. Pleasant, Ky.1954, 263 S.W.2d 494.

The action here interposed is an equity case. It was said in Humboldt Savings Bank v. McCleverty, 161 Cal. 285, 292, 119 P. 82, 85:

> "* * * It has always been the pride of courts of equity that they will so mould and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication." (Citing authorities.)

To the same effect is Neiman v. Hurff, 11 N.J. 55, 93 A.2d 345, 347, where it is said:

"To permit the murderer to retain title to the property acquired by his crime as permitted in some states is abhorrent to even the most rudimentary sense of justice. It violates the policy of the common law that no one shall be allowed to profit by his own wrong 'nullus commondum capere protest de injuria sua propria'; * * *." (Citing cases.) See Ames, Lectures on Legal History [1913], 310, at 321, entitled "Can a Murderer Acquire Title by his Crime and Keep it?"

In Bradley v. Fox, supra, considering a similar question involving a joint tenancy deed, the court concluded, 129 N.E.2d at page 706:

"In so construing the rights of the parties to deny a murderer the fruits of his crime, this court is functioning, not as a 'theological institution,' as suggested in the Ohio case cited by defendants, but as a tribunal dedicated to the adjudication of law, for effecting justice is not a novel role for the courts, nor one transcending the sphere of other institutions."

In the instant case the trial court concluded that the joint tenancy in the stock was destroyed and terminated by the act of killing the decedent. The court converted the joint tenancy into a tenancy in common. As readily the court could have found the joint tenancy was preserved and that the defendant was a constructive trustee, and that half or all of the property passed thereby to plaintiff. The court, however, adopted a practical solution fairest to the plaintiff and to the defendant. This court does not believe that it should countenance the addition of homicide as the approved method of terminating a joint tenancy without affecting the results found by the trial court.

It will be remembered that defendant's contention was that his wife, after making the property settlement agreement later told him if he would return to her she would make a gift of some of her property to him so they would hold their property "fifty-fifty" and that she later did make such a gift and division. Of course the decedent herself was unable to personally rebut that testimony. Over objections of defendant, plaintiff produced witnesses who testified that in December, 1955, after the placing of the stock in joint tenancy, Mrs. Lord told them she was worried because she had dividend checks coming from that stock and she had not received them and she had an idea defendant had taken them. The witness testified that when the Lords sold their home she wanted to keep her money separate from his but defendant would not agree, and about four months before she was killed Mrs. Lord told her they had agreed on a divorce but Mr. Lord wanted half of the property and she wanted all of her property which was more than half. The argument is that this conversation was hearsay and self-serving, not being in the presence of defendant, and that the hidden intention of one party, not disclosed by the other, was not admissible, citing Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; and Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906.

[6, 7] It is the general rule that evidence of intention or mental state of a person at a particular time, when material to an issue under trial, is admissible. In re Estate of Carson, 184 Cal. 437, 194 P. 5, 17 A.L.R. 239. The trial court was entitled to draw from this evidence an inference that there never was an oral agreement to divide the property fifty-fifty, as claimed by the defendant and that Mrs. Lord never intended to make a gift of it to him. Pailhe v. Pailhe, 113 Cal.App.2d 53, 63, 247 P.2d 838, and cases cited; American Trust Co. v. Fitzmaurice, 131 Cal.App.2d 382, 386, 280 P.2d 545; Donlon v. Donlon, 140 Cal.App.2d 428, 295 P.2d 51; Schindler v. Schindler, 126 Cal.App.2d 597, 602, 272 P.2d 566.

[8, 9] No prejudicial error appears in the reception of evidence and no miscarriage of justice has resulted. We conclude that the trial court applied the sound equitable principles that a man should not

profit from his own crime and that no common-law fiction ought to impair the judgment.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.



168 Cal.App.2d 486

Lupe E. FERGUSON et al., Plaintiffs and Appellants,

v.

Walter Francis ROGERS, Western Auto Transport, et al., Defendants and Respondents.

Civ. 5927.

District Court of Appeal, Fourth District, California.

March 6, 1959.

Rehearing Denied March 30, 1959.

Hearing Denied April 29, 1959.

Action by husband and wife for personal injuries sustained in an automobile collision where by post-accident property settlement agreement the husband relinquished all interest in the wife's claim for damages. From a judgment of the Superior Court of San Bernardino County, Edward P. Fogg, J., and an order denying a motion for new trial, the wife appeals. The District Court of Appeal, Shepard, J., held that the settlement agreement was ineffective to avoid imputing the husband's negligence to the passenger-wife.

Judgment affirmed.

1. Negligence ⇐93(2)

The rule that a husband driver's contributory negligence is imputed to the injured wife-passenger cannot be avoided by a voluntary relinquishment of the negligent husband's interest to the wife. West's Ann.Civ.Code, §§ 163.5, 171c.

2. Husband and Wife ⇐247

The statute providing that all damages, special and general, awarded a married person in a civil action for personal injuries are the separate property of such married person does not manifest the legislative intent to affect the rule applicable to any cases prior to its enactment. West's Ann.Civ.Code, §§ 163.5, 171c; St. 1957, c. 2334, § 3.

3. Statutes ⇐212.1

It is presumed that the Legislature knew of an appellate court decision respecting imputation of negligence between spouses in accident cases when it enacted statute involved. West's Ann.Civ.Code, § 163.5; St.1957, c. 2334, § 3.

4. Constitutional Law ⇐70(1)

The court should leave to the Legislature changes in long established rules.

5. Negligence ⇐93(2)

Where spouses sought to recover for injuries sustained in an automobile collision and by postaccident property settlement agreement the husband relinquished all interest in the wife's claim for damages and agreed that any recovery thereon should be the sole and separate property of the wife, the settlement agreement was ineffective to avoid imputing the husband's negligence to the passenger-wife. West's Ann.Civ.Code, §§ 163.5, 171c.

Tony Geram, Fontana, for appellants.

King & Mussell, San Bernardino, for respondents.

SHEPARD, Justice.

Plaintiff and her husband sued defendants to recover damages for personal injuries alleged to have been suffered by each of them as the result of a collision between the auto which he was driving and in which she was riding, and a vehicle being operated by defendants on 27 January 1956. Negligence and contributory negligence were pleaded. There was sufficient evidence from which the jury could have found that either or both of the drivers were negligent.

By a postaccident property settlement agreement plaintiff-appellant's husband relinquished all interest in her claim for damages and agreed that any recovery thereon would be the sole and separate property of appellant wife. The trial court sustained an objection to appellant's attempt to place this postaccident property settlement agreement in evidence.

The plaintiff-appellant's proffered instruction that the wife was not bound by the contributory negligence of the husband was refused by the trial court and instead thereof an instruction was given to the general effect that the negligence, if any, of her husband must be imputed to this plaintiff-appellant. The jury returned a verdict against both plaintiffs. The husband did not appeal. Appellant herein appeals from the judgment entered pursuant to said verdict, and from the order denying the motion for a new trial.

Appellant contends that the trial court erred in sustaining defendant's objection to the postaccident settlement agreement, in refusing to give appellant's proposed instruction that appellant was not bound by her husband's contributory negligence, and in the giving of the instruction that the husband's negligence, if any, is imputed to this appellant. Appellant does not criticize the form of the instruction, but rests her appeal squarely on the proposition that because of the legislative trend shown by the amendments of Section 171c and new Section 163.5 of our Civil Code, the court should change the rule regarding imputation of spouse driver contributory negligence to spouse passenger.

[1] The facts in the case at bar are similar to those in Kesler v. Pabst, 43 Cal. 2d 254, 257(2), 273 P.2d 257, 261, where the Supreme Court in holding that a husband driver's contributory negligence is imputable to an injured wife-passenger in order to prevent unjust enrichment, says of a post accident property settlement: "Accordingly, the objective of preventing unjust enrichment cannot be accomplished by a voluntary relinquishment of the negligent husband's interest to his wife."

In Flores v. Brown, 39 Cal.2d 622, 248 P.2d 922, an exception to this rule was applied because the spouse who might be unjustly enriched died and, therefore, there was an involuntary surrender of any possibility of unjust enrichment. In Bruton v. Villoria, 138 Cal.App.2d 642, 292 P.2d 638, another exception to the rule was applied due to the fact that the plaintiff was a resident of the Province of Ontario, Canada, and that under the law of Ontario the husband has no interest in money recovered by the wife in a personal injury action. Therefore, the rule of unjust enrichment could not apply.

[2] Appellant argues that Kesler v. Pabst, supra, left undecided the question of whether or not the change in Civil Code, Section 171c in 1951 would have changed the rule of imputation of negligence from one spouse to the other in accident cases, and that we should now make the change due to the fact that the legislature in 1957, more than a year after the happening of the accident in the case at bar, made a change in the basic reason for the rule by the enactment of Civil Code, Section 163.5, which provides as follows:

> "All damages, special and general, awarded a married person in a civil action for personal injuries, are the separate property of such married person."

We think the rule announced in Kesler v. Pabst, supra, is still the law as to any accident that happened prior to the 1957 enactment of said Civil Code, Section 163.5. By their own specific terms both the 1951 and 1957 amendments to Civil Code, Section 171c, provide that said section does not change the community character of the property therein dealt with. Sections 1 and 2 of Chapter 2334 of Statutes of California, 1957, deal respectively with the enactment of said Section 163.5 and the amendment of said Section 171c.

Section 3 of said Chapter 2334 reads as follows:

"Sec. 3. Sections 1 and 2 of this act do not apply to actions pending or to causes of action existing on the effective date of this act. As to such actions and causes of action, Section 171c as it existed prior to the effective date of this act shall be applicable."

Thus, it is clear that the legislature did not intend by said Section 163.5 to affect the rule applicable to any cases arising prior to its enactment.

[3] Nemeth v. Hair, 146 Cal.App.2d 405, 304 P.2d 129, reiterates the rule as announced in Zaragosa v. Craven, 33 Cal. 2d 315, 202 P.2d 73, 6 A.L.R.2d 461, and Kesler v. Pabst, supra, respecting imputation of negligence between spouses in accident cases. A hearing in this case was denied by our Supreme Court 28 December 1956. It is reasonable to assume that the legislature knew of that decision when it enacted said Section 3 of said Chapter 2334.

[4] The reason why this court ought to leave to the legislature changes in long established rules of this kind were clearly and succinctly stated by our Supreme Court in a very recent case:

"Another difficulty is that judicial, as distinguished from statutory, recognition of the wife's cause of action would operate retroactively and might work hardship upon persons who, in reliance upon the common law rule, have made settlement with the husband, believing that the wife could not sue.

"In our view the Legislature rather than the courts can best deal with these problems." Deshotel v. Atchison, T. & S. F. Ry. Co., 50 Cal.2d 664, 668, 328 P.2d 449, 451.

[5] It is unnecessary for us to comment on the future effect of said Civil Code, Section 163.5 on imputation of contributory negligence between spouses in causes arising after its enactment, and we do not do so.

In our opinion, the trial court was correct in the rulings complained of. The motion for new trial was properly denied. The order not being appealable the attempted appeal therefrom is dismissed. 3 Cal.Jur.2d 500, Sec. 62.

Judgment affirmed.

GRIFFIN, P. J., and STONE, J. pro tem., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR and PETERS, JJ., dissenting.



168 Cal.App.2d 666

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Andrew Emmette POPE, Defendant and Appellant.

Cr. 3560.

District Court of Appeal, First District, Division 1, California.

March 13, 1959.

Rehearing Denied April 10, 1959.

Hearing Denied May 6, 1959.

Prosecution of prisoner for having unlawful possession of knife while inmate of state prison. The Superior Court, County of Monterey, Anthony Brazil, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Peters, P. J., held that evidence was sufficient to sustain conviction and even if it were a fact that prisoners had been often disciplined intramurally for the offense charged, it would not make prosecution of defendant a denial of equal protection of the laws.

Affirmed.

1. Convicts ⇐5

Evidence was sufficient to sustain conviction of unlawful possession of knife while defendant was inmate of state prison. West's Ann.Pen.Code, § 4502.

2. Convicts ⇐5

Under statute prohibiting possession of deadly weapon by inmate of state prison, knowledge on part of accused that the prohibited weapon was in his possession is essential. West's Ann.Pen.Code, § 4502.

3. Constitutional Law ⇐250

Even if it were fact that prisoners in state prison found in possession of deadly weapons were often disciplined intramurally for violation of statute, prosecution of prisoner for unlawful possession of a knife while inmate of state prison would not constitute denial of equal protection of the laws. West's Ann.Pen.Code, § 4502.

David Henry Gill, Pacific Grove, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was convicted of a violation of section 4502 of the Penal Code in that, while an inmate of a state prison, he was in the unlawful possession of a knife.

There can be no doubt that on the date in question, March 20, 1958, defendant was in possession of a knife. The knife was found in his cell. Defendant makes no contention to the contrary. It is his contention that there is no substantial evidence that he had the requisite knowledge of the fact that the knife was in his cell; in fact, he contends that the evidence is to the contrary. An examination of the record shows that, on this basic issue, the evidence was in conflict.

The defendant admitted three prior felony convictions, including the one for which he was serving time in Soledad Prison in March of 1958. The judgment here appealed from provides that the sentence shall run consecutively with the sentence defendant was serving when the offense here involved was committed.

[1] On March 20, 1958, the prison officials conducted a routine search of the prisoners and their cells at Soledad. A correctional officer, Jones by name, searched defendant and his cell. Defendant was the sole occupant of that cell. Jones testified that there was a stack of papers laying on defendant's bunk, and that inside these papers he discovered the knife. At the very instant of discovery, and before Jones had examined the balance of the papers, defendant stated: "You found all there is to find." The next day, on March 21, 1958, a discipline committee hearing was held at the prison. One Burnett, an associate warden, read a report of the discovery of the knife to defendant and asked him how he pleaded. Defendant replied that his plea was "not guilty." When Burnett asked defendant if he had ever seen the knife before "[h]e said that he had seen it in his cell, that one of the fellows had passed it to him to admire the good workmanship on this knife * * * while he was looking at this knife in his cell, he said someone came by, some unidentified inmate and said, 'The goon squad is coming. Give it back.'" The witness also testified that defendant then stated that he told this unidentified inmate "'To hell with you,' or words to that effect, and threw the knife on his bed." The knife was actually hidden in the newspapers.

It is true that the version of the incident given by defendant and his fellow prisoner witnesses at the trial differed materially from that of the witnesses for the prosecution. One prisoner, Munroe by name, testified that during the serving of breakfast on the morning in question, he handed to defendant a bunch of newspapers that another unidentified inmate had given him to deliver to defendant, and that defendant placed the papers on his bed without looking at them. A minute or so later the prison officials arrived to make the search that revealed the knife. This same witness testified that after defendant's clothing was searched, defendant did not remain in or in front of his cell, but went up to another tier of cells. This was corroborated by another prisoner witness. Another prisoner testified that on the morning of the

search he had sent a bundle of newspapers to defendant via Munroe, and that he had secured these newspapers from various places, including "from a fellow downstairs."

Defendant's testimony was to the effect that he had been handed some newspapers which he had just placed on his bunk when the search was made. After his clothing had been searched he went upstairs and did not know that the knife was discovered until one of the officers called him downstairs. He specifically denied making either of the admissions about the knife testified to by the officers.

There was substantial evidence from several prison officials to the effect that, after defendant was personally searched, he did not go upstairs but, at all pertinent times, remained directly in front of his cell. Other prison officials testified that, although prisoner Munroe was in the view of the witnesses at all times, they did not see him carrying any newspapers.

[2] There can be no doubt that one of the elements of the crime defined by section 4502 of the Penal Code is knowledge on the part of the accused that the prohibited weapon was in his possession. People v. Gory, 28 Cal.2d 450, 170 P.2d 433; People v. Patterson, 102 Cal.App.2d 675, 228 P.2d 51. Defendant and his witnesses testified to facts which, if believed, would have supported a finding that defendant did not have knowledge that the knife was in the newspapers. Much of this testimony was contradicted by the prosecution's witnesses. Moreover, there was the evidence of Jones and of Burnett to the effect that defendant twice directly admitted that he knew that the knife was in his cell prior to the search. This evidence supports the implied finding in question.

It should be pointed out that the trial judge, the Hon. Anthony Brazil, was very careful in his instructions to point out to the jury that knowledge was an essential element of the crime.

[3] The defendant also makes an argument to the effect that he was denied equal protection of the law. The argument is that "commonly the offense of which Appellant was charged is handled as an administrative matter at the prison without the filing of criminal charges" and that the filing of a criminal charge against defendant in this "isolated case makes the application of section 4502 of the California Penal Code unequal in its application and arbitrary." App.Op.Br. p. 4.

Even if it be assumed that this court could take judicial notice of the fact, if it be a fact, that prisoners are often disciplined intramurally for the offense here charged, a somewhat doubtful assumption (see generally Weitzenkorn v. Lesser, 40 Cal.2d 778, at page 787, 256 P.2d 947, at page 954), it would be of no avail to defendant. As was said in People v. Oreck, 74 Cal.App.2d 215, 222, 168 P.2d 186, 191: "It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not." See also People v. Hess, 104 Cal.App.2d 642, 234 P.2d 65; People v. Gordon, 105 Cal.App.2d 711, 234 P.2d 287. The fact that prison officials may, without criminal prosecution, sometimes impose punishment for such offenses is not, as defendant contends, an invasion of the judicial powers of the courts, but is simply a necessary and indispensable exercise of the disciplinary powers which prison officials necessarily have and must have to operate a state prison.

It should also be mentioned that some time ago counsel for defendant filed a petition for a writ of error coram vobis in this case. This petition proffered some claimed newly discovered evidence in the form of an affidavit which, if believed, might support defendant's claim of innocence. This court, without opinion, denied the application for the writ. The Supreme Court denied a hearing. Although defendant does not rely on this claimed newly discovered evidence on this appeal, we think it appropriate to note that the proffered evidence, even if admitted, would merely have been cumulative of testimony already in the record. In view of the con-

flict in the evidence, the affidavit would not warrant or require a reversal.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; PETERS, J., not participating.



168 Cal.App.2d 570

Fred L. MARTIN et al., Petitioners, Plaintiffs and Respondents,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, et al., Respondents, Defendants and Appellants.

Civ. 17925.

District Court of Appeal, First District, Division 2, California.

March 11, 1959.

Rehearing Denied April 10, 1959.

Hearing Denied May 6, 1959.

City employees brought action against the City and County of San Francisco and others for judgment and decree of mandamus, declaratory relief, and compensation. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgment adverse to the City and County of San Francisco and others, and they appealed. The District Court of Appeal, Kaufman, P. J., held that city charter provision making it mandatory on city to pay its employees at same rate of pay as is paid in private industry to same groups and crafts in accordance with collective bargaining agreements does not entitle city employees to receive amount paid by private employers into health and welfare fund for private employees, since private employees are not receiving payments made by private employers, but are receiving the protection, which such payments would buy, and it is the money equivalent of such protection to which city employees are entitled.

Judgment reversed with directions.

1. Municipal Corporations ⇐220(9)

City charter provision making it mandatory on city to pay its employees at same rate as is paid in private industry to same groups and crafts in accordance with collective bargaining agreements, does not entitle city employees to receive amount paid by private employers into health and welfare fund, since private employees are not receiving such payments, but are receiving protection, which such payments will buy, and it is the money equivalent of such protection to which city employees are entitled. St.1937, p. 2782, § 172.1 and subds. 4, 6e as amended; St.1947, p. 3266, § 151.3 as amended.

2. Municipal Corporations ⇐220(9)

Under city charter provision making it mandatory on city to pay its employees at same rate of pay as is paid in private industry to same groups and crafts in accordance with collective bargaining agreements, measure of recovery by city employees because of payments by private employers into health and welfare fund, should be amount deducted from their pay by city for payments to city's health service system, adjusted upward or downward to compensate for difference of like protection in the two systems, plus additional amount, which will reasonably compensate for broader coverage, if any, afforded by private system, and if coverage given by city system is broader in any respect, city should have credit for value thereof, and amount should in no event exceed monthly payments made by private employers to health and welfare plan. St.1937, p. 2782, § 172.1 and subds. 4, 6e as amended; St. 1947, p. 3266, § 151.3 as amended.

3. Municipal Corporations ⇐220(9)

Where city charter provision made it mandatory on city to pay its employees at same rate of pay as is paid in private industry to same groups and crafts in accordance with collective bargaining agreements, and under collective bargaining agreements private employers paid money into health and welfare fund, but city deducted from salaries of its employees fixed sums for its health service, but thereafter

provision for contribution by city to health service system fund was added to charter, city was entitled to credit allowance for such contribution in determining amount of city employees' recovery because of amount deducted from their pay for city's health service system. St.1937, p. 2782, § 172.1 and subds. 4, 6e as amended; St.1947, p. 3266, § 151.3 as amended; St.1958, c. 11, § 172.1.11.

Dion R. Holm, City Atty., Bernard J. Ward, Deputy City Atty., San Francisco, for appellants.

Lamson, Jordan & Walsh, Paul S. Jordan, Stanley Walsh, San Francisco, amicus curiae on behalf of appellants.

Marks & Pedersen, Milton Marks, Jr., Frank C. S. Pedersen, San Francisco, for respondents.

KAUFMAN, Presiding Justice.

The plaintiffs are members of Automotive Machinists Lodge No. 1305, and are employed by the City and County of San Francisco in the civil service positions of automotive machinists and mechanics. They sought and obtained a judgment and decree of mandamus, declaratory relief and for compensation against the defendants, City and County of San Francisco, and the members and secretary of the City and County civil service commission, that they were entitled to a certain rate of pay, pursuant to section 151.3 of the Charter of the City and County of San Francisco, St. 1947, p. 3266 as amended. This charter provision makes it mandatory upon the city to pay its employees at the same rate of pay as is paid in private industry to the same groups and crafts in accordance with collective bargaining agreements.

This controversy arose on the following facts: For a period of over three years before the filing of this action, the collective bargaining agreements covering automotive machinists in private industry in San Francisco, provided that in addition to a fixed sum payable weekly to the employee, the employer would pay fixed sums in trust to certain trustees, in accordance with a trust agreement executed by representatives of the employers and the representatives of the employees. The trust agreement provided that with the money so paid, the trustees would purchase health and welfare plans and insurance policies to protect the employees and their dependents. The amount paid to the trust fund for such protection by the employer was a fixed sum for each month of work performed by the employee. At this same time, the city was not paying comparable sums for the protection of its employees and their dependents. The city was paying the same fixed weekly sum to each employee and deducting therefrom a fixed sum for its own Health Service, under section 172.1 of the Charter of the City and County of San Francisco, St.1937, p. 2782 as amended. Section 172.1 was enacted before section 151.3 and provides in its terms that deductions "shall not be deemed to be a reduction of compensation under any provision of this charter." Section 172.1, subd. 4. The deduction under section 172.1 is a compulsory one in that an employee must participate in the city plan unless he can show that he already has such coverage under another plan. The city plan covers only the protection of the city employee; dependents may be included on a voluntary basis, and without cost to the city. § 172.1, subd. 6e.

The court below found that the monthly payments to Health and Welfare Plan made by private employers under collective bargaining agreements were a part of the rate of pay, and that therefore, the defendants had deprived plaintiffs of the rate of pay to which they were entitled under section 151.3 of the Charter, and concluded that the defendants pay to the plaintiffs:

1) For the three years, preceding February 7, 1956, the date of the filing of this action, such amounts as were paid during this period of time by the private employers under the collective bargaining agreements, to a Health & Welfare Plan on behalf of their employees;

2) Such amounts as were established from February 7, 1956 to the present, for

payments by the private employers under the collective bargaining agreements (as a fixed sum for each month of work performed by the employee) to a Health and Welfare Plan on behalf of the employees;

3) Such amounts as may thereafter be established by collective bargaining agreements for such payments by the employer to a Health & Welfare Plan on behalf of the employees.

Plaintiffs now argue that the above result is correct as they were not receiving the same rate of pay as the automotive machinists in private industry in violation of the provisions of section 151.3 of the Charter of the City and County of San Francisco. Defendants argue that the judgment and decrees must be reversed as there was no violation of section 151.3, as the amounts paid for Health and Welfare protection were not a part of the same "rate of pay" required by the charter provision, and that deductions made under other charter provisions could not be considered in interpreting section 151.3. The Municipal Conference of San Francisco, amici curiae on behalf of appellants, argues that even if affirmed, the judgment must be modified because a recent amendment to section 172.1 of the Charter of the City and County of San Francisco, requires the City and County, after July 1, 1958, to contribute varying amounts toward the cost of maintaining the Health Service System, such contributions to equal those made by City and County employees on and after July 1, 1960.

While the precise question here presented has never been determined, this court (Divisions I and II) has had several opportunities to construe the applicable provisions of section 151.3 of the City and County Charter. As these cases (and not the numerous other authorities cited by both sides) must be the basis for our decision here, and both sides rely on them extensively, we find it necessary to review them in detail. The applicable provision of section 151.3 is as follows:

"Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco, and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as the compensation for such groups and crafts engaged in the city and county service."

The first case construing section 151.3, Adams v. Wolff, 84 Cal.App.2d 435, 190 P. 2d 665, was brought against the city and county by members of the same local here involved, under similar circumstances. Two issues were raised and resolved in favor of the employees: first, the constitutionality of section 151.3 and second, the refusal of the city to pay its automotive machinists and mechanics, the same rate of pay established by collective bargaining agreements with all private employees of automobile machinists and mechanics with respect to premium pay for night shifts and pay for certain designated holidays.

In answering an argument that section 151.3 was unconstitutional in covering matters of general state concern in giving public employees the right to bargain collectively, this court (Division I) said at page 443, of 84 Cal.App.2d at page 671, of 190 P.2d: "By that section the people have set up a standard for determining rates of pay that will insure these public employees a wage scale commensurate with wages received by workers in the same field in private industry."

On the second issue, which is more pertinent here, the court said at pages 444 and 445 of 84 Cal.App.2d, at page 671 of 190 P.2d:

"The last main contention of defendants is a matter of interpretation. It will be remembered that the matters in dispute re-

late to holiday pay and premium pay on the night shifts. Section 151.3 requires the 'rate of pay' to be fixed in the manner there set forth. It is contended that this relates only to the 'basic' rate of pay, and that holiday and premium pay on night shifts does not relate to the 'basic' rate of pay but relates to 'working conditions,' and it is urged that the fixing of working conditions is beyond the scope of § 151.3. It is probably true that § 151.3 relates only to the 'basic' rate of pay and does not relate to 'working conditions.' But that in no way assists defendants. It is quite apparent that it was the intent of § 151.3 to give to the public employees of the type here involved the same take home pay received by private employees in the same industry. That means that when the public employees work on a night shift, or where a work week is interrupted by a holiday they are to receive the same pay that private employees would receive for work similarly performed. It is quite obvious that night shift pay and pay for holidays is a part of the 'basic' rate of pay, and is as much a part of the wage structure as the hourly wage itself. If evidence were necessary on such an obvious matter it was supplied by Norman Beals, * * * who so testified. The 'basic' 'rate of pay' is the take home pay of the employee. The charter provision guarantees that the take home pay of public employees shall be the same as private employees. That obviously includes holiday and premium pay for night work."

Defendants here rely on the above language to argue that payments made by the private employer to a Health and Welfare Fund on behalf of the employee, in addition to the regular weekly rate paid, are not a part of the basic rate of pay or take home pay, but are a part of "working conditions". This argument would have some merit if under the particular circumstances of this case, the city employees were receiving the same basic rate of pay as the private industry employees. However, it is admitted here by all concerned, that the private employee receives a fixed sum, plus a fixed contribution on his behalf to a Health and Welfare Fund, while the city employee receives the same initial fixed sum minus the deduction for the compulsory city health plan.

The second case, Adams v. City and County of San Francisco, 94 Cal.App.2d 586, 211 P.2d 368, 212 P.2d 272, was also brought against the city by Automotive Machinists, Lodge No. 1305 under similar circumstances. In that case the collective bargaining agreements made no provision for compensation for sick or disability leaves and provided for five working days of paid vacation for employees with one year of service, and ten days after the completion of three years of service. Section 151 of the City and County Charter provided a vacation of two calendar weeks annually with pay for all employees who had one year of service. In reversing the portion of the decree which required the city to grant its employees the longer vacation period provided by section 151, irrespective of the collective bargaining agreements of private employers, this court interpreted Adams v. Wolff, supra, at page 592 of 94 Cal.App.2d at page 372 of 211 P.2d, as follows:

"In brief, the 'rate of pay' is the 'take home pay' of those on the list of employees in good standing eligible for active duty. Section 151.3 does not purport to control or supervise the administrative functions of the government with respect to all matters pertaining to civil service employees. The new section is confined to 'rate of pay' measured by hourly wage and indicates that 'investigation and survey' were not abrogated but are subordinate to local collective bargaining agreements fixing the rate of pay recognized in the local industrial area in and around San Francisco. Pay for an unworked holiday is part of the basic rate of pay. Adams v. Wolff, supra. The number of holidays is designated in the private collective bargaining agreement. With equal right and authority may the same agreement control the number of vacation days. The period of vacation, if any, set forth in a private bargaining

agreement is the period that the public employees must accept, for the reason that it is part of the basis upon which 'rate of pay' is computed. Plaintiffs are bound by the provisions found in section 151.3 until or unless that section is repealed or modified." * * *

"Section 151.3 is a charter provision, an enactment by the people amending in part the basic organic law of the city. The holding in Adams v. Wolff, supra, that section 151.3 was intended to equalize take home pay and that holiday pay is a part of the basic rate of pay must be considered controlling, and forces a determination that vacation pay directly and with certainty affects the hourly, the weekly, the monthly or the yearly wage. This conclusion is fortified by the fact that in section 151 of the charter an 'allowance for annual vacation' is specifically mentioned as being a factor to be considered in ascertaining the 'salary' or 'rate of pay' to be paid to employees. This factor is entitled to some weight in ascertaining what was intended by the 'rate of pay' provisions of section 151.3, and leads to the conclusion that vacation allowances are included within the meaning of that concept." 94 Cal.App.2d at page 594, 211 P.2d at page 373.

In affirming the portion of the decree which required that the city grant sick leave and disability leave, irrespective of the collective bargaining agreements, the court said at page 597, of 94 Cal.App.2d at page 379 of 211 P.2d, sick leave or disability pay is "* * * compensation paid to an employee in furtherance of 'working conditions' inuring to the benefit of both employer and employee, but does not fall within the classification of 'rate of pay'", and upheld the employees' right thereto on the basis of section 153 of the charter of the City and County of San Francisco, rule 32 of the civil service commission, and part 1, section 301 of the Municipal Code.

Defendants here argue that the payments made to the Welfare Fund are like sick leave and disability pay, not a part of the "rate of pay" under section 151.3 but paid in furtherance of working conditions.

Defendants also argue that the ruling in the second Adams case was based on the court's reasoning that overtime, holiday and vacation pay are for definite periods and easily ascertainable and therefore easily a part of the "rate of pay", while sick leave and disability payments are contingent and not vested—and therefore not easily ascertainable. While it is true that the benefits received by employees from the Health and Welfare Trust Fund are contingent in nature like sick leave and disability pay, the payments made to the Fund by the employer are also fixed sums for a definite period and easily ascertainable. This is the crux of the problem. The proper classification of the payments made by the employers under the collective bargaining agreements, not the benefits received by the employee.

The next case, Randall v. Wolff, 95 Cal. App.2d 795, 214 P.2d 58, which need not detain us long here, held that the city and county civil service commission had violated section 151.3, when it fixed the rate of pay of certain municipal employees in accordance with its classification of the work done instead of in accordance with the work performed and the rate of pay given for similar work in private employment.

The most recent case is Sheehan v. City and County of San Francisco, 124 Cal.App. 2d 769, 269 P.2d 678, decided by this court in 1954. This action too was brought against the city by Automotive Machinists Lodge No. 1305, under similar circumstances as the instant case. The collective bargaining agreement in question provided that Admission Day be treated as a paid holiday. During the three years in question, the city had prevented the plaintiffs from working on that day, and had then made a deduction from the weekly wage for that day on the theory that the city could observe any holiday not mentioned in the collective bargaining agreement and need not pay for those days. The court in affirming a judgment in favor of the plaintiffs concluded that the deductions were unauthorized as there was nothing in the collec-

tive bargaining agreements permitting a deduction when the employer refused to permit the employee to work and because under the collective bargaining agreements the employees were employed by the week and their wages fixed for that period. In reaching this conclusion the court commented as follows at page 773, of 124 Cal.App. 2d at page 681 of 269 P.2d:

"In another and later case, Adams v. City & County of San Francisco, 94 Cal. App.2d 586, 211 P.2d 368, 212 P.2d 272, this section of the charter was again considered and again it was interpreted to mean that the 'rate of pay' was synonymous with 'take home pay.' This latter phrase, of course, does not mean the amount of money such employees get home with on payday. There may be deductions for income tax, social security, retirement, attachments and executions against their salaries which would affect the actual amount of money they, respectively, received to take home. It does mean the amount the employees are entitled to receive from their employers to take home as between themselves, the employer and employee, and before any deductions as required by third parties, are made. The section means that if the private employee under his bargaining agreement is entitled to receive before deductions the sum, for example, of $84.50 for a week's work, the city employee, performing the same services, is likewise entitled to receive the same amount for his week's work. The section and the foregoing decisions seem to be so clear on the point, no further discussion thereof appears to be appropriate."

[1, 2] Under the above definition it is clear that in the instant case the plaintiffs were not receiving the same "take home pay" as their counterparts in private industry, because of the compulsory deduction by the employer for the city's health plan. It does not follow, however, that plaintiffs are entitled to receive the amount which was or is paid by private employers into the health and welfare fund. The private employees are not receiving the payments made by their employers. They are receiving the protection which these payments will buy. It is the money equivalent of this protection to which plaintiffs are entitled. If the city's health service system provides a part of this protection at less cost than the private health and welfare fund, the city is entitled to the benefit of that saving. The measure of plaintiffs' recovery should be the amount deducted from their pay for payments to the city's health service system, adjusted upward or downward to compensate for the amount of the difference in cost of like protection in the two systems, plus an additional amount which will reasonably compensate for the broader coverage (i. e., dependents' protection and employees' or dependents' life insurance), if any, afforded by the private system. Similarly, if the coverage given by the city system is broader in any respect, the city should have credit for the value thereof. This amount should in no event exceed the monthly payments made by the private employers to the health and welfare plan.

[3] Section 172.1.11, added to the charter in 1958, St.1958, c. 11, provides for contribution by the city to the Health Service System Fund commencing July 1, 1958. The judgment should also be modified to allow credit to the city for such contributions commencing July 1, 1958, in the increasing amounts of such contributions provided for by that amendment.

Judgment reversed with directions to the trial court to take further evidence to determine the proper amounts to be awarded to plaintiffs in the light of this opinion.

DOOLING and DRAPER, JJ., concur.

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Arthur Lee WILLIAMS, Defendant and Appellant.

Cr. 6227.

District Court of Appeal, Second District, Division 3, California.

March 12, 1959.

Rehearing Denied April 10, 1959.

Hearing Denied May 6, 1959.

Defendant was convicted in Superior Court, San Luis Obispo County, Ray B. Lyon, J., of selling heroin, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that where defendant had been granted two continuances in order to locate informant through whom narcotics inspector made contact with the defendant, and authorities had exercised due diligence in endeavoring to serve bench warrant on the informant, in absence of affirmative showing as to informant's whereabouts and that informant's testimony could have been attained within reasonable time, denial of third continuance in order to locate informant was not abuse of discretion.

Affirmed.

1. Criminal Law ⇐614(1)

In prosecution for selling heroin and offering to sell marijuana, where defendant had been granted two continuances in order to locate informant through whom narcotics inspector had made contact with the defendant, and authorities had exercised due diligence in endeavoring to serve bench warrant on the informant, in absence of affirmative showing as to informant's whereabouts and that informant's testimony could have been obtained within reasonable time, denial of third continuance in order to locate informant was not abuse of discretion. West's Ann.Pen.Code, § 1050.

2. Criminal Law ⇐1170(2)

In prosecution for selling heroin and offering to sell marijuana, where minister of gospel had been allowed to testify that informant told defendant's wife that narcotics inspector had given heroin to a woman who gave it to informant and that informant gave it to defendant who sold it to the inspector, defendant suffered no material disadvantage or prejudice by court's ruling excluding recorded statement allegedly containing admission by informant that informant furnished defendant with the heroin.

3. Criminal Law ⇐739(1)

In prosecution for selling heroin wherein defendant claimed that he had been entrapped into committing offense by informant, acting under inspector's direction, by furnishing defendant with the heroin which defendant sold to the inspector, question of entrapment was for jury.

Umann & Marks, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a jury trial upon an information charging him with selling heroin and offering to sell marijuana, Arthur Lee Williams was convicted of the former offense and was sentenced to state prison. He appeals from the judgment.

It is not contended on the appeal that the evidence was insufficient to support the verdict. Williams admitted selling the contraband to a state narcotics inspector. His defense was that he was entrapped into committing the offense by one Altee Maney, an informant acting under the inspector's direction. Appellant caused Maney to be served with a subpoena to attend the trial; Maney did not appear; a bench warrant was issued; appellant obtained two postponements of the trial date in order to locate Maney; September 11, 1957, the matter was again called for trial; appellant sought a further postponement to locate Maney as the latter's whereabouts were unknown; the court denied his motion. The contentions on the appeal are that Williams should have been granted another

continuance and that the court erred in excluding from the evidence a tape-recorded statement allegedly made by Maney one month after the sale of the heroin. We have concluded that the contentions are not sustainable and that the appeal is without merit.

On April 25, 1957, Inspectors Lennon and Ojeda of the State Bureau of Narcotics Enforcement arrived in San Luis Obispo to conduct an undercover investigation of narcotics activities. The officers were introduced to Altee Maney by a district attorney's investigator who told them that Maney was an informer; they knew Maney as "Butch" and did not learn his true name until it was disclosed at appellant's preliminary hearing.

The following evening, Inspector Ojeda went with Maney to the Morocco Club, a bar frequented by members of the Negro race. Maney was to indicate the patrons who were engaged in the traffic of narcotics. While the inspector was sitting at a table, appellant approached and introduced himself. The next night, April 27th, Ojeda returned to the premises. He drove onto the parking lot just as a car containing Williams and Maney was leaving; the two men hailed Ojeda, who parked and walked over to their car. After a short conversation Williams asked the inspector if he wanted to buy some narcotics; Ojeda replied that he did. The two men drove away, promising to return later in the evening. Ojeda entered the establishment. Several hours later, he saw Williams and Maney standing at the bar. Appellant motioned to Ojeda to join them. Ojeda then arranged to buy two bindles of heroin from Williams for $15; Maney did not participate in the negotiations. The inspector gave the money to appellant, who left the premises and returned in a few minutes. Williams led Ojeda to the men's room and handed him two bindles containing a substance that was proved to be heroin. The inspector asked Williams if he could obtain any marijuana and the latter replied that he thought he could obtain some marijuana cigarettes.

On April 29th, Inspector Ojeda, Williams and Maney drove to Santa Maria in search of narcotics; their efforts were unsuccessful. On May 10th, Ojeda met appellant at the Morocco Club and gave him $5 to buy marijuana; appellant left, promising to return with the narcotics, but he did not do so.

Inspectors Lennon and Ojeda testified that they did not furnish any narcotics to Maney and that as far as they knew Maney did not furnish any narcotics to appellant.

Williams testified in his own defense that he had known Altee Maney for seven or eight years. He saw Ojeda in Maney's company at the Morocco Club on April 26th but was not introduced to him. At the club the following evening, Maney told appellant that he needed money and wished to sell some narcotics but he did not want Ojeda to know that the narcotics belonged to him. Maney offered to give Williams half of the profit if he would sell the heroin to Ojeda and appellant agreed. After handing Williams the narcotics, Maney approached Ojeda and told him that appellant knew where he could get some heroin but that it would cost him extra for appellant's trouble. Ojeda consented and handed $15 to the informer, who gave it to appellant. Williams left the club. Upon his return, he gave Ojeda the heroin which Maney had previously handed him. Williams admitted driving to Santa Maria with Ojeda and Maney; he explained that they were looking for marijuana and that he went along for the ride. He also admitted taking $5 from Ojeda to buy marijuana; he lost the money playing dice and had no idea where he could obtain the contraband.

Jacob Charles Hawkins, a minister of the gospel, testified, over the People's objections, that he was present at a conversation between Altee Maney and appellant's wife on June 22nd at the Morocco Club. In reply to Mrs. Williams' questions about the source of the heroin which her husband had sold to Ojeda, Maney stated that the inspector had given the narcotics to one Annie Lee; that she had given them to him (Maney); and that he (Maney) had given them to appellant.

[1] There is no merit to Williams' contention that the court abused its discretion in denying him a third continuance in order to locate Altee Maney. It was established by the testimony of sheriff's deputies called by appellant that the authorities had exercised due diligence in endeavoring to serve the bench warrant on the absent witness. Maney was traced to Los Angeles but the Los Angeles Police Department was unable to locate him. The matter was one within the sound discretion of the trial court. Pen.Code, § 1050; People v. Markos, 146 Cal.App.2d 82, 86, 303 P.2d 363. In the absence of an affirmative showing as to Maney's whereabouts and that his testimony could have been obtained within a reasonable time, it was not an abuse of discretion to deny a continuance. People v. Wade, 118 Cal. 672, 50 P. 841; People v. Collins, 195 Cal. 325, 333, 233 P. 97.

[2] There is likewise no merit to appellant's contention that the court committed reversible error in excluding Maney's tape-recorded statement. The statement was elicited by appellant's counsel the day following the conversation in the Morocco Club which was related by the witness Hawkins; it allegedly contained an admission that Maney had furnished appellant with the heroin he sold to Inspector Ojeda. The district attorney objected to the introduction of the recording on the ground that it was hearsay; the court sustained his objection. Appellant's counsel then offered to prove the contents of the recording for the purpose of establishing that Maney was acting as a government agent, that he had instigated the transaction and that the defense of entrapment was a valid one. The offer of proof was rejected by the court.

If there was a relationship between Maney and Inspector Ojeda, as appellant contends, it had already terminated when the former's statement was recorded. It is sufficient to say of this point that in view of Hawkins' undisputed testimony as to a similar statement by the informer it cannot be said that Williams suffered any material disadvantage or prejudice by reason of the challenged ruling.

[3] The question of entrapment was a close one. If the facts were as testified to by appellant the offense of entrapment would have been established; but it was not established as a matter of law. The factual issue was fairly tried and resolved against appellant under two adequate instructions given by the court at his request.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



Ada E. DAVIS, Helen Davis, Morris Davis and Ida Mae Wrey, Plaintiffs and Appellants,

v.

R. R. KENDRICK, Kenneth Freelan, Does I, II, III, IV, V and VI, Defendants.

Robert R. Kendrick, Respondent.*

Civ. 23364.

District Court of Appeal, Second District, Division 2, California.

March 18, 1959.

Hearing Granted May 13, 1959.

Action for wrongful death resulting from assault and battery allegedly committed by Los Angeles police officer and another. The Superior Court, Los Angeles County, Kenneth N. Chantry, J., granted summary judgment in favor of defendant police officer, and plaintiffs appealed. The District Court of Appeal, Herndon, J., held that police officer, engaged in performance of his regularly assigned duties as such, was an officer of city within meaning of Los Angeles city charter provisions making the filing of claim or demand for money or damages a prerequisite to suit thereon against city or any officer thereof.

Judgment affirmed.

* Opinion vacated 341 P.2d 673.

1. Municipal Corporations ⇐741(1)

Los Angeles police officer, engaged in performance of his regularly assigned duties as such, was an "officer" of city within meaning of city charter provisions, making the filing of claim or demand for money or damages a prerequisite to suit thereon against city or any officer thereof.

See publication Words and Phrases, for other judicial constructions and definitions of "Officer".

2. Municipal Corporations ⇐189(1)

Action for wrongful death, resulting from assault and battery allegedly committed by Los Angeles police officer, engaged in performance of his regularly assigned duties as such, and another, was barred as against police officer by failure to file claim or demand with city clerk, as required by city charter.

Simmons & Simmons, Herbert W. Simmons, Jr., Los Angeles, for appellants.

Roger Arnebergh, City Atty., William B. Burge, Deputy City Atty., Los Angeles, for respondent.

HERNDON, Justice.

Plaintiffs appeal from a judgment entered on the granting of defendant Kendrick's motion for summary judgment. Plaintiffs sought by their amended complaint to recover damages for a wrongful death, alleging that the death of their decedent resulted from an assault and battery committed by defendants Kendrick and Freelan. Defendant Kendrick moved for summary judgment supported by affidavits stating the following uncontradicted facts: (1) that at the time the assault was allegedly committed, Kendrick was a uniformed police officer of the city of Los Angeles, and a peace officer of the State of California, engaged in the performance of his regularly assigned duties as a police officer. (2) That plaintiffs filed no claim or demand with the City Clerk of the city of Los Angeles.

[1, 2] The motion for summary judgment was made upon the grounds that the action was barred by sections 363[1] and 376[2] of the Charter of the city of Los Angeles. The parties agree that the determinative question of law is whether a police officer is an "officer" within the

1. "Sec. 363. Every claim for money or damages against the city, or any officer, board or department thereof, except as provided in the preceding section, shall be filed with the City Clerk, who shall thereupon present the same to the board, officer or employee authorized by this charter to incur or pay the expenditure or alleged indebtedness or liability represented thereby. In all cases such claim shall be approved or rejected in writing and the date thereof given. Failure to act upon any claim or demand within ninety (90) days from the date the same is filed with the City Clerk shall be deemed to be a rejection thereof; provided, however, that the filing of any such claim with the City Clerk as above provided, or its presentation to the board, officer or employee authorized by this charter to incur or pay the expenditure or alleged indebtedness or liability represented thereby, shall constitute a compliance with the provisions of Section 376 as to the presentation of a claim prior to suit or action thereon."

2. "Sec. 376. No suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city, until a demand for the same has been presented, as herein provided, and rejected in whole or in part. If rejected in part, suit may be brought to recover the whole. Except in those cases where a shorter period of time is otherwise provided by law, all claims for damages against the city must be presented within six (6) months after the occurrence from which the damages arose, and all other claims or demands shall be presented within six (6) months after the last item of the account or claim accrued. Nor shall suit be brought against said city, or any board, or officer thereof, upon any claim or demand that has been in whole approved and audited as provided herein; provided, that nothing herein contained shall be construed so as to deprive the holder of any demand of his right to resort to writ of mandamus or other proceeding against the Council, or any board or officer of said city, to compel it or him to act upon such claim or demand, or to pay the same when so audited."

meaning of that term as it is used in sections 363 and 376. Appellants concede that if this question is answered in the affirmative, the judgment must be affirmed. We conclude that it must be so answered.

It has been said that the term "officer" implies "* * * an authority to exercise some portion of the sovereign power of the state, either in making, executing or administering the laws" and that while a policeman may not be an officer in every sense of the term "* * * in the discharge of his duties [he] does stand in a relationship to the governing authority differing greatly from that of a mere employee or agent, and that relationship for many purposes is indistinguishable from and may be classified as that of a public officer." Noble v. City of Palo Alto, 89 Cal.App. 47, 52, 264 P. 529, 531. In Logan v. Shields, 190 Cal. 661, 665, 214 P. 45, 46, the Supreme Court in deciding the status of a traffic officer employed by the county of San Mateo declared: "It clearly follows that as the duty of the petitioner herein was to regulate traffic upon the public streets of the county of San Mateo, he was to that extent exercising a part of the sovereign power of the state, and for that reason was a public officer, as distinguished from a mere employee, such as a street sweeper or laborers upon the highway." Other decisions in which police officers have been classified as public officers are City of Oakland v. Lyckberg, 95 Cal.App. 71, 73, 272 P. 606; Brown v. Boyd, 33 Cal.App.2d 416, 422, 91 P.2d 926; Michel v. Smith, 188 Cal. 199, 201, 205 P. 113, and Estrada v. Indemnity Ins. Co., 158 Cal.App.2d 129, 133–135, 322 P.2d 294.

In Slavin v. City of Glendale, 97 Cal. App.2d 407, 411, 217 P.2d 984, the plaintiff sought to recover damages from certain individuals who were police officers of the city of Glendale for an alleged assault and battery. The Charter of the city of Glendale contained provisions essentially the same as those of the Los Angeles Charter here involved. In affirming a judgment in favor of the defendant police officers, Division One of this court declared: "The basic fact which must be recognized is that plaintiff's cause of action, however stated, was one for assault and battery committed by police officers of the city of Glendale. Plaintiff did not and could not allege that the required claim had been filed as required by the law, either within the 90-day period or at any other time." The decision in Klimper v. City of Glendale, 99 Cal.App.2d 446, 222 P.2d 49, makes a holding to the same effect.

Appellants place their entire reliance upon the decision in Mason v. City of Los Angeles, 130 Cal.App. 224, 20 P.2d 84. The question presented in that case was whether a fireman was a "public officer" of the city within the meaning of charter provisions governing the right of a public officer to receive his salary after becoming incompetent to perform the duties of his office. The decision is not controlling here because the problem there presented was resolved in the context of charter provisions entirely different from those involved in the instant case. Moreover, it is obvious that the duties of a fireman are very different from those of a police officer. It is unnecessary for us here to express any opinion as to whether or not a fireman is an officer of the city within the meaning of the charter provisions here involved.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.

168 Cal.App.2d 370

Lessie Anne KABZENELL, a minor, by Erwin Kabzenell, her Guardian ad litem, et al., Plaintiffs,

v.

Robert R. STEVENS, etc., et al., Defendants and Respondents,

Lessie Anne Kabzenell, a minor, by Erwin Kabzenell, her Guardian ad litem, Appellant.

Civ. 23080.

District Court of Appeal, Second District, Division 2, California.

March 5, 1959.

Rehearing Denied March 31, 1959.

Hearing Denied April 29, 1959.

Action for injuries to a bus passenger whose finger was cut off when outside mirror of bus was shattered when it struck a tree root when bus was rounding curve on mountain road and turned to right to avoid collision with rapidly approaching truck which was partly on bus driver's lane. From a judgment of the Superior Court, Los Angeles County, Mildred L. Lillie, J., in favor of defendants, the plaintiff appealed. The District Court of Appeal, Fox, P. J., held, inter alia, that the question whether the bus driver's alleged negligence in failing to sound horn as required by statute was a proximate cause of plaintiff's injuries was for jury.

Affirmed.

1. Trial ⇐261

Where language employed in requested instructions had been disapproved by the Supreme Court, trial court properly refused to give such instructions.

2. Appeal and Error ⇐216(2)
Carriers ⇐321(21)

In action for injuries to bus passenger whose finger was cut off when outside mirror of bus in rounding curve on mountain road struck an overhanging tree root, instruction that conduct which was in violation of statute constituted negligence and if jury found that bus driver violated statute presumption that he was negligent could be overcome by other evidence showing that under all circumstances conduct was such as might reasonably have been expected from a person of ordinary prudence was proper, and failure of court to amplify such instruction on its own motion could not constitute prejudicial error. West's Ann.Vehicle Code, § 597.

3. Appeal and Error ⇐699(4), 703

Where record did not show that plaintiff requested giving of certain instructions, that they were not given or that other instructions embracing same subject matter were not given, plaintiff could not complain since refusal to give an instruction will not be reviewed by an appellate court unless record sets forth the requested instruction.

4. Appeal and Error ⇐699(4), 907(1)

The presumption established by Rule on Appeal that a settled statement contains all matters material to review was not available to plaintiff to place requested instructions in issue before the appellate court where condensed statement and engrossed settled statement purported to cover only a portion of oral proceedings and matter of questioned instructions was not covered, and as there was no indication that plaintiff specifically informed anyone that instructions would be raised on appeal as ground for reversal, prior to filing of her opening brief, plaintiff was precluded from so arguing on appeal. West's Ann.Rules on Appeal, rules 7(a), 52.

5. Carriers ⇐316(1)

In action for injuries to bus passenger whose finger was cut off when outside mirror of bus was shattered when bus in rounding curve on mountain road struck a tree root, even if it were conceded that defendants were negligent, it was incumbent on plaintiff to show that such negligence was a cause in fact of injuries sustained.

6. Negligence ⇐136(25)

The question whether defendant's negligence was cause of plaintiff's injury ordinarily is a question of fact for jury.

7. Carriers ⇐320(30)

In action for injuries to bus passenger whose finger was cut off when outside mir-

ror was shattered when it struck a tree root when bus was rounding curve on mountain road and turned to right to avoid rapidly approaching truck which was partly in bus driver's lane, whether bus driver's alleged negligence in failing to sound horn as required by statute was a proximate cause of plaintiff's injuries was for jury. West's Ann.Vehicle Code, § 597.

8. Appeal and Error ⇐901

The duty rests upon an appellant who asserts insufficiency of the evidence to demonstrate that fact.

Richard B. Bardwil, Hollywood, for appellant.

Dryden, Harrington, Horgan & Swartz, Vernon G. Foster, Los Angeles, for respondents.

FOX, Presiding Justice.

Judgment was entered in favor of defendants at the conclusion of a jury trial in which plaintiff sought to recover damages for personal injuries. She appeals from the judgment.

The parties, in their engrossed settled statement, stipulate to the following facts: "That the accident occurred on August 6, 1954, at about 2:00 p. m., on the Blue Jay Road at Lake Arrowhead, in San Bernardino County, California. That [defendant] Stevens was driving the bus as an employee of the defendant church in the course and scope of his employment; that the minor plaintiff was a passenger on said bus. That when the bus was going around a curve to the right on said mountain road, the outside mirror on the right side of the bus struck something on the side of the road and shattered said mirror."

As a result of the above, plaintiff lost a finger from her right hand. She contends that Stevens was driving at an excessive rate of speed; that in going around the curve in said road Stevens did not blow his horn, scraped the side of the mountain with the bus, and no other vehicle was coming in the opposite direction.

The defendants denied that Stevens acted negligently or that he drove at an excessive speed, and attribute plaintiff's injury to an unavoidable accident "in that the bus operated by Stevens was forced over to the far right side of said roadway by a speeding truck coming in the opposite direction which suddenly and unexpectedly came around the curve partly on the wrong side of the road, and that Stevens maneuvered the bus to the right, striking the right side view mirror against an overhanging tree root, in order to avoid a collision with said truck."

The plaintiff testified that at the time of the accident she was attending Arrowpines Camp, owned and operated by the defendant church. That she, along with some fifteen other boys and girls and Mrs. Beverly Jacobus, an adult counsellor, boarded defendant's bus at the Horseback Riding Stables, and that Stevens drove towards Arrowhead Village on Blue Jay Road. She further testified that said Blue Jay Road was a curvy, mountain road; that she was sitting in the front seat on the right hand side of the bus; that the counsellor, Mrs. Jacobus and a girl named Jill Erickson, sat on the seat behind her; that Stevens was driving about 30 to 40 miles per hour; that between the stables and point of impact, she had to hold on to the bus rails at certain times because of the speed of the bus and the curves; that after leaving the stables and driving about one-half mile down Blue Jay Road toward the village, there was a sharp curve to the right, and suddenly she felt a crash and heard Mrs. Jacobus scream; that she looked down at her hand and saw one of her fingers missing and her hand bleeding; that the driver Stevens did not sound his horn at any time before approaching said curve; that at the curve and point of impact, she saw no other vehicle approaching in the opposite direction, nor did she see any parked cars at or near said curve; that at the point of impact Stevens was driving about 30 miles per hour; that she did not look at the speedometer.

There was testimony by Mrs. Jacobus and Jill Erickson that Stevens was driving in

excess of 30 miles per hour. Mrs. Jacobus further testified that Stevens did not sound his horn upon approaching the blind curve. She also testified, along with Jill Erickson and Jane Jacobus, that no other vehicle was approaching from the opposite direction.

Based on defendants' exhibits, Mr. Jones took measurements and found the point of impact to be about 1.1 miles from the stables; that at said point of impact there is a sharp curve to the right; that there is a gravel shoulder on the right side of the roadway about 1½ feet in width; that upon approaching said curve, visibility of the roadway is less than 100 feet; that on the right hand side of the road at the point of impact there were tree-roots about six feet eight inches above the ground which protruded over the right gravel shoulder some six inches.

The defendant Stevens testified that said mountain road was curvy and winding; that at no time did he go over 20 miles per hour; that as he approached the point of impact he slowed down to 10 miles per hour; that there is a sharp curve to the right at the point of impact; that as he approached that point he suddenly saw a truck rapidly approaching from the opposite direction; that said truck was one-half on his side of the road and was about the size of a beer stake truck; that he did not see the truck until it was on top of him; that because of the oncoming truck he was forced to make a quick turn to the right onto the shoulder, at which time he heard a crash; that he pulled the bus over to the right and looked back and saw the plaintiff's hand bleeding and that one of her fingers had been cut off; that the only reason to cut to the right onto the shoulder was because of the oncoming truck; that he did not recall sounding his horn at or near the curve where the accident took place; that he could not see around the curve at the point of impact.

Robert Snowdy testified that the gravel shoulder on the right at the point of impact, based on defendant's theory, is three feet; that there are tree-roots at the point of impact approximately six feet four inches above the surface of the highway and that said roots protruded over the right-hand gravel shoulder about six inches.

At plaintiff's request, the jury was instructed on Vehicle Code section 597, as follows: "The driver of a motor vehicle traveling through defiles or canyons or upon mountain highways shall hold such motor vehicle under control and as near the right hand edge of the highway as is reasonably possible and upon approaching any curve where the view is obstructed within a distance of two hundred feet along the highway shall give audible warning with the horn of such motor vehicle."

The jury was further instructed, at plaintiff's request, that "conduct which is in violation of section 597 of the Vehicle Code just read to you constitutes, in itself, negligence. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence."

As grounds for reversal, plaintiff argues prejudicial error was committed by the trial court's failure to instruct on and define for the jury what constitutes legal justification and excuse for a violation of section 597 of the Vehicle Code. Specifically, the court refused to give the following instructions which plaintiff requested: "In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise" and "to prove that a violation of a statute, such as that charged in this case, was excusable and justifiable so as to overcome the presumption of negligence, the evidence must support a finding that the violation resulted from causes or things beyond the control of the person charged with the violation."

[1] In Alarid v. Vanier, 50 Cal.2d 617, 624, 327 P.2d 897, our Supreme Court disapproved the language employed in the above refused instructions. Therefore, the trial court quite properly refused to give these instructions.

[2] In the Alarid case, 50 Cal.2d at page 624, 327 P.2d at page 900, the court stated that "the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." As previously noted, the jury was instructed in this regard as follows: "Conduct which is in violation of section 597 of the Vehicle Code just read to you constitutes, in itself, negligence. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence." We are of the opinion that this instruction, for all practical purposes, substantially embodied the foregoing test from the Alarid case. The failure, therefore, of the trial court to amplify this instruction on its own motion cannot be said to have constituted prejudicial error. When told to test the defendants' conduct by the standard of a reasonably prudent man under similar circumstances it is reasonable to presume that the jury would consider whether or not Stevens desired to comply with the law in evaluating the reasonableness of his conduct, even though not specifically directed to do so.

[3] Next plaintiff complains of the trial court's refusal to instruct on Vehicle Code sections 694(a) and 511(a) (3). The record before this court does not show that plaintiff requested the giving of these instructions, nor does it show that they were not given, or that other instructions embracing the same subject matter were not given. Under such circumstances, plaintiff may not complain for it is well settled that "[t]he refusing of an instruction will not be reviewed by an appellate court unless the record sets forth the requested instruction." Thomas v. Laguna, 113 Cal. App.2d 657, 660, 248 P.2d 929. In Alexander v. McDonald, 86 Cal.App.2d 670, 671, 195 P.2d 24, 25, this court stated that "[b]efore alleged error in the refusal to give an instruction will be reviewed on appeal, the record must show, (1) a proper request for such instruction, and (2) the ruling of the trial court refusing to give the requested instruction. (Citations.) In the absence of such a record it will be presumed on appeal that the requested instruction was given." See also Blair v. Williams, 109 Cal.App.2d 516, 519, 240 P.2d 1043.

[4] It should also be noted that the presumption established by rule 52 of Rules on Appeal that a settled statement contains all matters material to review is not available to plaintiff to place the questioned instructions in issue before this court. Rule 7(a) provides in part that "[i]f the condensed statement purports to cover only a portion of the oral proceedings, the appellant shall state the points to be raised by him on appeal, and in such event shall be precluded from presenting any grounds for reversal not embraced within the points stated by him, * * * The appellant in his condensed statement * * may incorporate any instructions given or refused which such party deems material." Quite obviously, the condensed statement and the engrossed settled statement purport to cover only a portion of the oral proceedings for the matter of the questioned instructions is not covered and, as there is no indication that plaintiff specifically informed anyone that the instructions would be raised on appeal as grounds for reversal, prior to the filing of her opening brief, she is precluded from so arguing now.

[5] Lastly, plaintiff argues that the verdict was wholly unsupported and without

substantial evidence and against law. Plaintiff emphasizes the fact that defendants showed no excuse or justification for Stevens' failure to sound his horn. Granting, arguendo, that defendants were negligent, it is nevertheless incumbent on plaintiff to show that defendants' negligence was a cause in fact of the injuries suffered by plaintiff. Union Investment Co. v. San Francisco Gas etc. Co., 168 Cal. 58, 62–63, 141 P. 807; Hill v. Matthews Paint Co., 149 Cal.App.2d 714, 723, 308 P.2d 865.

[6] Therefore, proof of justification or excuse would not be crucial unless it was first determined that defendants' negligence was actually a cause of plaintiff's injury. Plaintiff correctly concedes this is ordinarily a question of fact for the jury, but argues that "reasonable men could have drawn but one conclusion from the failure of Stevens to sound his horn as required by law, to wit," plaintiff would not have been injured.

[7,8] Plaintiff states that "[h]ad the driver sounded his horn as required by law, warning would have been given to vehicles approaching the mountain curve in the opposite direction, and in all probability the truck would not have continued on the wrong side of the road or at least would have been warned of approaching vehicles in the opposite direction at the mountain curve where the mishap happened." The jury, however, could have reasonably concluded that due to the parked cars on the shoulder to the right of the truck it would not have been possible for it to pull over any further. Stevens testified that the truck was "rapidly approaching" the bus from the opposite direction. From this testimony the jury might reasonably conclude that even if the bus's horn had been sounded, the truck driver, due to the speed he was traveling, would not have been able to stop the truck in time to avoid forcing Stevens off the road.

The fact that the verdict was rendered in favor of the defendants does not necessarily mean the jury believed defendant's failure to sound his horn was justified or excused, but rather that they believed the cause of the accident was not occasioned by Stevens' failure to sound the bus's horn, and such conclusion is warranted by the record presented to this court. If plaintiff desired to question the sufficiency of the evidence to support this conclusion, the duty was upon her to demonstrate the insufficiency thereof. Consolidated Loan Co. v. Harman, 150 Cal.App.2d 488, 494, 310 P.2d 450; New v. New, 148 Cal.App.2d 372, 383, 306 P.2d 987. This she has failed to do. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.



168 Cal.App.2d 351

George SCHAFFER and Blanche Schaffer, Plaintiffs and Respondents,

v.

CLAREMONT COUNTRY CLUB, a corporation, Defendant and Appellant.

Civ. 17786.

District Court of Appeal, First District, Division 2, California.

March 5, 1959.

Rehearing Denied April 3, 1959.

See 337 P.2d 139.

Hearing Denied April 29, 1959.

Action by parents against country club, which had acquired rock quarry property and used excavation created by quarrying operations as reservoir for water to irrigate its golf course, for wrongful death of son who fell into the reservoir and drowned. The Superior Court, County of Alameda, Chris B. Fox, J., rendered judgment for the parents and the club appealed. The District Court of Appeal, Dooling, J., held that giving instruction that if the club violated statutory provision requiring owner in fee simple to cover, or fence securely,

abandoned excavation dangerous to minors under 12 years of age, presumption of negligence arose, was prejudicial error.

Reversed.

1. Appeal and Error ⇐1064(1)
Negligence ⇐139(7)

In action by parents against country club, which had acquired rock quarry property and used excavation created by quarrying operations as reservoir for water to irrigate its golf course, for wrongful death of son who fell into the reservoir and drowned, giving of instruction that if the club violated statutory provision requiring owner in fee simple to cover, or fence securely, abandoned excavation dangerous to minors under 12 years of age, presumption of negligence arose, was prejudicial error. West's Ann.Health & Safety Code, § 24400.

2. Negligence ⇐51

Where country club acquired rock quarry property and used excavation created by quarrying operations as reservoir for water to irrigate its golf course and child fell into reservoir and drowned, reservoir was not "abandoned pit" or "abandoned excavation" within statute requiring owner in fee simple to cover or fence securely abandoned pits or excavations dangerous to minors under age of 12 years. West's Ann.Health & Safety Code, § 24400.

See publication Words and Phrases, for other judicial constructions and definitions of "Abandoned Excavation" and "Abandoned Pit".

3. Negligence ⇐134(8)

In action by parents against country club on attractive nuisance doctrine for wrongful death of son as result of his falling into reservoir and drowning when shale bank on which he was standing gave way, evidence was sufficient to support finding that utility to country club of maintenance of condition of fencing around reservoir was slight as compared to risk to young children involved therein.

4. Negligence ⇐39

Open body of water in and of itself does not bring case within attractive nuisance doctrine.

5. Negligence ⇐136(29)

In action by parents against country club on attractive nuisance doctrine for wrongful death of son as result of his falling into reservoir and drowning when shale bank on which he was standing gave way, question whether danger in standing on bank of shale or crumbly rock should be apparent to any child eight years of age, was for jury.

Donahue, Richards & Gallagher, Oakland, for appellant.

Boccardo, Blum, Lull, Niland & Teerlink, San Jose, for respondents.

DOOLING, Justice.

This is an appeal from the judgment entered upon a jury verdict for plaintiffs in an action for the wrongful death of their son.

The evidence shows that on March 31, 1955, respondents' eight year old son, Gary, with two companions went to an area known as "Bilger Quarry" near his home. Bilger Quarry had been operated in the past as a rock quarry and after the property was acquired by appellant in the 1930's, the quarrying operations ceased. Thereafter the excavation created by the quarrying operation was used by appellant as a reservoir for water to irrigate its adjoining golf course. The reservoir was approximately 500 to 600 feet in length and 300 feet in width, and the depth of the water at its deepest was about 70 feet. The banks or sides of the reservoir were in some places steep and rose 60 to 70 feet above the water level. In the area where the accident occurred the cliff was composed of "crumbly" rock or shale.

At the time appellant acquired the reservoir a wire mesh fence approximately 6 feet in height topped by barbed wire strands was constructed, surrounding the area.

The evidence was conflicting as to the state of repair of this fence on March 31, 1955, but there was evidence that the fence sagged in places and that there were holes in and under it. Signs stating "no trespassing" were posted in the area by appellant.

Employees of appellant and residents of the area adjacent to the reservoir had on numerous occasions seen children swimming in the reservoir or playing in the area. Gary's father had cautioned him not to play in this area.

Gary and two companions had entered appellant's property on the day before the accident. The next day they returned and Gary climbed or jumped over a sagging portion of the fence while his friends crawled under. They went to the cliff and Gary with his dog climbed down the cliff and returned to the top. The boys noticed what appeared to be a raft floating in the water and in an effort to reach the raft they threw down a rope which caught on a rock. As Gary attempted to climb down to free this rope the shale or rock gave way and he fell into the reservoir and drowned. His body was recovered in 70 feet of water lodged beneath some brush.

Appellant's demurrer to the complaint was overruled. Motions for judgment on the pleading, summary judgment, nonsuit, directed verdict and judgment notwithstanding the verdict were denied. A motion for a new trial was denied contingent upon respondents' consent to a reduction of the judgment from $30,000 to $20,000.

[1] On appeal it is contended that the trial court committed error in denying the various motions because 1. the attractive nuisance doctrine was inapplicable as a matter of law and 2. section 24400 of the Health and Safety Code was inapplicable as a matter of law and therefore the doctrine of negligence per se did not apply.

Section 24400, Health and Safety Code provides, so far as here material:

"Every person owning land in fee simple * * * who knowingly permits the existence on the premises of any abandoned mining shaft, pit, well, septic tank, cesspool, or other abandoned excavation dangerous * * * to minors under the age of twelve years, who fails to cover or fence securely any such dangerous abandoned excavation and keep it so protected, is guilty of a misdemeanor."

The trial court read this section to the jury, instructed that if a party violated this section a presumption arises that he was negligent, and left it to the determination of the jury as a question of fact whether "the Bilger Reservoir was an abandoned pit or excavation."

[2] Appellant argues that under the undisputed facts of this case it was established as a matter of law that its reservoir, although located in an excavation which was the result of quarrying operations long since abandoned, was not an abandoned pit or excavation within the meaning of the statute. We have concluded that appellant's contention in this respect is correct.

The evidence establishes without contradiction that the excavation is, and for many years has been, continuously used as a reservoir from which appellant regularly takes water by means of a pump installed therein for use in the irrigation of its golf course. For whatever reason the Legislature in enacting section 24400 expressly limited its application to *abandoned* excavations. An excavation which is being put to a continuously useful purpose can by no stretch of the imagination be regarded as an abandoned excavation.

Respondents refer to it as an abandoned quarry. It has, it is true, been abandoned as a quarry, but it has not thereby become an abandoned excavation. As an excavation it is being continuously used as a reservoir and it is no more abandoned than any other artificial excavation which is similarly used.

If it had been originally excavated for the purpose of using it as a reservoir we assume that nobody would claim so long as it continued to be put to that use that it was an abandoned excavation. The fortuitous circumstance that it was orig-

inally excavated in quarrying operations cannot change the effect of its present use as a reservoir. To hold otherwise would mean that if there were two identical excavations both used as reservoirs in identical fashion, one of which was originally excavated for use as a reservoir and the other originally excavated in quarrying operations, section 24400 would apply to the one and not to the other. So stated the facts carry their own refutation. The only case construing the section supports the conclusion that an excavation being regularly put to a reasonable use is not abandoned within the meaning of this section. Flick v. Ducey & Attwood Rock Co., 70 Cal.App.2d 70, 75–76, 160 P.2d 569. It was therefore error prejudicial to appellant to so instruct the jury that it might bring in a verdict against appellant on the theory of a violation of section 24400, Health and Safety Code.

The case was also given to the jury under instructions embodying the so-called attractive nuisance doctrine. Appellant argues that the facts of this case are not sufficient as a matter of law to make that doctrine applicable.

In two recent decisions of our Supreme Court the court has expressly adopted the statement of the attractive nuisance doctrine in section 339, Restatement of Torts as correctly expressing the elements necessary to satisfy the rule in this State. Courtell v. McEachen, 51 Cal.2d 448, 334 P.2d 870; Reynolds v. Willson, 51 Cal.2d 94, 331 P.2d 48. That section of the Restatement reads:

"A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

"(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

"(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

"(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

"(d) the utility to the possessor of maintaining the condition is slight as compared to the risk of young children involved therein."

[3] It is not disputed that conditions (a) and (b) of this section are satisfied by the evidence. There is evidence that over a long period of time to the knowledge of employees and officers of appellant children were seen playing in and around its reservoir and even on occasions swimming therein. There is also testimony from some of these agents of appellant that they realized that the place was a very dangerous one to children who might trespass thereon. Appellant had constructed a fence about the entire area for the purpose of keeping out trespassing children and no claim is made that the cost of the construction and maintenance of this fence was not "slight as compared to the risk to young children involved therein." The evidence is therefore sufficient to satisfy condition (d). It was the plaintiffs' theory that the appellant had negligently permitted this fence to fall into disrepair so that children could enter through or over it and the evidence is sufficient to support a finding against appellant on this issue.

[4] The crux of the case depends upon the question whether there was sufficient evidence to satisfy condition (c) of the Restatement. It must be conceded that an open body of water in and of itself is not sufficient to bring a case within the attractive nuisance doctrine. Reynolds v. Willson, supra, 51 Cal.2d at page 100, 331

P.2d at page 52. In Reynolds the court said after stating this rule: "The manner of its maintenance and use may, however, be such as to impose the duty of ordinary care on the possessor toward children of tender years notwithstanding they may technically occupy the position of trespassers at the time."

In Reynolds condition (c) of section 339, Restatement of Torts was found to be satisfied by the fact that the bottom of the pool in which the child was injured had become slippery by an accumulation of algae, dead leaves and other decomposed material. 51 Cal.2d at page 99, 331 P.2d at page 50. The bank from which the child fell was an "artificial" and not a "natural" one. It had been created by the quarrying operations of the previous owner. The evidence is that this bank was composed of shale or crumbly rock. One of the divers who was endeavoring to recover the drowned boy's body testified: "The cliff face itself was made up of what we referred to at the time as rock and shale. It would not be shale in the normal sense but rock that was very crumbly. We weighed nothing in the water, yet we were unable to exert the slightest pressure upon it, it would fall away and ultimately, because of the raining rocks, we were forced to suspend our operations because the rocks were raining down upon us in the water."

The dead boy's companion testified as to his fall from the bank into the water: "Well, then he tried to go down and stand on the shale. Then it gave away * *. He fell in."

[5] Appellant argues that the danger in standing on a bank of shale or crumbly rock should be apparent to any child of the decedent's age. We are satisfied that this presented a question of fact and not of law. In Courtell v. McEachen, supra, the court said at page 458 of 51 Cal.2d at page 875 of 334 P.2d, quoting from Restatement of Torts, section 339, comment (b):

"The duty of the possessor of land under section 339 extends to dangerous conditions 'which, though observable by adults, are likely not to be observed by children or which contain risks the full extent of which an adult would realize but which are beyond the imperfect realization of children.'" Whether the danger from a cliff composed of crumbly rock would be realized by a boy of eight presents a question of fact properly to be resolved by the jury.

We can find no logical distinction between the artificial pool which had become slippery by an accumulation of algae, leaves and other decomposed material involved in the Reynolds case and an artificial bank above a pool which was likely to give way, because it was composed of crumbly rock, and precipitate a child into the pool below. We think there is a clear difference between an artificial sand-pile such as discussed in Knight v. Kaiser Co., 48 Cal. 2d 778, 312 P.2d 1089, and an artificial bank composed of rock which is subject, because of its friable nature, to crumble and break away when subjected to the weight of a child's body. The rock bank may readily present an appearance of firmness and solidity to a child which he must know that a pile of sand by its very nature does not possess. The fact that the bank was artificially created satisfies the definition of section 339, Restatement of Torts: "other artificial condition which he maintains upon the land."

Many cases are cited in the briefs but each case depends upon its own facts and a discussion of the host of California cases in which the doctrine of attractive nuisance has been considered seems pointless in view of the substantial factual differences between those cases and the one here presented.

Judgment reversed for the error first herein discussed.

KAUFMAN, P. J., and DRAPER, J., concur.

168 Cal.App.2d 417

PEOPLE of the State of California, Respondent,

v.

Neil D. GALLAGHER, Appellant.

Cr. 3557.

District Court of Appeal, First District, Division 1, California.

March 6, 1959.

Prosecution for illegal possession of a narcotic. The Superior Court, City and County of San Francisco, Raymond J. Arata, J., entered judgment of conviction and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Peters, J., held that circumstantial evidence, consisting in part of testimony that a fluorescent powder, visible only under ultra-violet light, had been sprayed on certain tablets of morphine sulphate and on the bottle in which they were contained, and that after it was discovered that a certain number of the tablets were missing after defendant had been alone in a room containing the tablets, traces of such powder were found on or about defendant's person, sustained conviction.

Judgment and order affirmed.

1. Criminal Law ⇐745

Fact that a jury might have drawn an inference of innocence from the evidence did not render their verdict erroneous where they discarded that inference and found in favor of guilt.

2. Criminal Law ⇐1159(2)

Where evidence supported inference that defendant was in unlawful possession of narcotics, fact that the evidence might have also supported a contrary finding was not sufficient to entitle defendant to a reversal of his conviction. West's Ann. Health & Safety Code, § 11500.

3. Poisons ⇐9

It is not essential to a conviction for violation of statute dealing with unlawful possession of narcotics that the narcotics be found on the person of the accused.

4. Poisons ⇐9

Fact of unlawful possession of narcotics, as well as other facts essential to prove a conviction under statute proscribing such possession, may be proved by circumstantial evidence. West's Ann.Health & Safety Code, § 11500.

5. Poisons ⇐9

In prosecution for unlawful possession of narcotics, circumstantial evidence consisting in part of testimony that a fluorescent powder, visible only under ultra-violet light, had been sprayed on certain tablets of morphine sulphate and on the bottle in which they were contained, and that after it was discovered that a certain number of the tablets were missing after defendant had been alone in a room containing the tablets, traces of such powder were found on or about defendant's person, sustained conviction.

6. Criminal Law ⇐369(2)

In prosecution for unlawful possession of narcotics, where evidence that on certain dates narcotics were missing from a pharmacy was introduced to explain why pharmacists commenced taking a daily inventory, and evidence as to the number of morphine tablets in a bottle on a certain date was introduced to show how conclusion was reached that a number of the tablets were removed at a certain time, even if such evidence also tended to show that defendant had committed crimes on such dates, it was nevertheless admissible, since it was essential to prove the prosecution's case.

7. Criminal Law ⇐369(2)

If proffered evidence tends logically and naturally to establish any fact that is part of the prosecution's case, it is admissible, even though it may also embrace evidence of another crime.

8. Criminal Law ⇐369(1)

Evidence of the commission of other offenses is never admissible merely to show that the accused has a criminal disposition or propensity or predilection toward crime.

9. Criminal Law ⇐365(1), 370, 371(1, 12), 372(1)

Evidence of other crimes may be admitted when it tends directly to establish the crime charged by proving a material fact, where it is part of the res gestae, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme.

10. Criminal Law ⇐372(1)

In prosecution for unlawful possession of narcotics, evidence that defendant committed a similar offense on a previous occasion was admissible in view of fact such crime was committed under almost identical circumstances as the charged offense. West's Ann.Health & Safety Code, § 11500.

11. Criminal Law ⇐795(1)

Rule that where a defendant may be convicted of a necessarily included offense, it is prejudicial error not to so instruct the jury, applies only to necessarily included offenses, where the accused could be guilty of the charged offense, or of the included offense, but not of both, but such rule does not apply to situations where the two offenses involved are separate and distinct.

12. Criminal Law ⇐795(1)

Petty theft did not constitute an included offense in charge of unlawful possession of narcotics, in view of fact that petty theft involves an element not involved in unlawful possession of narcotics, that is, the intent to steal, and therefore trial court did not err in refusing to give a proffered instruction on petty theft as a necessarily included lesser offense in trial of defendant on a charge of unlawful possession of narcotics. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 1159.

13. Criminal Law ⇐407(1)

An accused's responses to accusatory statements normally are not admissible, although, if such responses constitute admissions, then, as such, they may be admissible.

14. Criminal Law ⇐407(1)

While accusatory statements, if denied, may not be admitted, if the accused remains silent in the face of accusatory statements, or if he equivocates or lies about them, such may constitute an admission and become admissible.

15. Criminal Law ⇐407(1)

In prosecution for unlawful possession of narcotics, where defendant denied some accusations of a police officer as to his having taken narcotics, remained silent as to other accusations, and deliberately lied about presence of another person in store from which the narcotics were taken, trial court did not err in admitting the entire conversation between the police officer and defendant. West's Ann.Health & Safety Code, § 11500.

Arthur D. Klang, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., Jack Berman, Deputy Dist. Atty., San Francisco, for respondent.

PETERS, Presiding Justice.

The defendant, a doctor, was convicted by a jury of illegal possession of a narcotic. From the judgment entered on that verdict and from the order denying his motion for a new trial, defendant appeals.

Appellant attacks the sufficiency of the evidence, and likewise contends that the court erroneously denied his motion to set aside the information on the ground that the evidence at the preliminary examination was insufficient to hold him to answer. The evidence at the preliminary and at the trial, in its essentials, was the same. It was ample to sustain the verdict and to justify the court in denying the motion.

The record shows that William Hebrank operates a pharmacy in San Francisco.

The prescription room in that pharmacy is at the rear of the drug store. Hebrank keeps his narcotics in two drawers in that room. These drawers are locked at night but remain open during store hours. The pharmacy is customarily open six days a week from 10 a. m. to 9 p. m. In the morning hours and until 2 p. m. Hebrank is the only attendant in the pharmacy.

At all times here pertinent appellant, with his wife and small child, was living approximately across the street from the pharmacy in an upstairs apartment where he also had his office. Sometime in November, 1957, appellant introduced himself to Hebrank as a physician. Hebrank and the appellant became friendly, and appellant began coming to the pharmacy every morning shortly after 10 a. m. and visiting Hebrank for a half an hour to an hour and a half. Customarily Hebrank entertained the appellant in the prescription room. Occasionally Hebrank would leave the appellant alone in the prescription room while he, Hebrank, did some shopping in nearby stores.

Hebrank normally inventoried his narcotics every 30 days. On the regular inventory of November 30, 1957, he discovered that some of the narcotics were missing and unaccounted for. He reported his loss to the State Narcotics Department. That department sent Inspector Gazzola to investigate. Under Gazzola's directions Hebrank replenished his normal supply of narcotics. Thereafter, Hebrank made a daily inventory. He sold no narcotics between December 1st and December 11, 1957. Among his narcotics was a bottle containing 100 tablets of ½ grain Morphine Sulphate. In making his inventory on the afternoon of December 6, 1957, he discovered that there were 30 tablets missing from this bottle. Appellant had been in the pharmacy that morning and had been left alone in the prescription room while Hebrank did some shopping. This loss was reported to Gazzola. The inspector, on December 11, 1957, sprayed fluorescent powder, of a type invisible except under ultra-violet ray light, on the 70 tablets remaining in the bottle, and on the bottle itself. This he did without touching the tablets or bottle with his hands. On the morning of December 12, 1957, shortly after 10 a. m., Gazzola and Hebrank, again without touching the tablets or bottle with their hands, counted the tablets and found there were still 70 in the bottle. Then Gazzola and another officer stationed themselves across the street from the pharmacy where they could see the entrance but could not see the prescription room. Shortly thereafter the appellant made his regular morning visit and sat down in the prescription room. Hebrank then left appellant there while he went to purchase some coffee in a nearby store. He was gone from three to seven minutes. During that time appellant was alone in the pharmacy. When Hebrank returned appellant was seated in the prescription room. Hebrank then made some coffee which he and appellant shared. Then appellant left the premises.

Inspector Gazzola reentered the pharmacy and he and Hebrank, again without touching the tablets or the container with their hands, counted the half grain Morphine tablets. The count revealed that there were but 53 tablets remaining, that is, 17 had been removed since the count earlier that morning.

Gazzola and the other officer then proceeded across the street to appellant's residence. They rang the bell and the door was opened by the wife of appellant. Upon telling her that they had a personal matter to discuss with appellant, Mrs. Gallagher led the way upstairs towards appellant's apartment. When they reached the upper hall Gazzola saw appellant run from his bedroom and enter a bathroom on the other side of the hall. Gazzola and the officer tried to intercept appellant but appellant got into the bathroom and locked the door. The two officers were unable to force the door. While they were trying to do so Gazzola heard the toilet flush twice. Then the ap-

pellant unlocked the door and came out into the hall.[1]

The officers placed appellant under arrest. A cursory search of his pants pockets and a patting of his shirt pockets failed to disclose any narcotics. Then appellant was taken across the street to the pharmacy, where he was questioned by Gazzola. Appellant denied knowing anything about the missing tablets. Gazzola then tested the appellant's person and clothing with the ultra-violet ray device. The appellant's hands produced a positive reaction, that is, glowed a lemon color, tending to indicate that the appellant had come into contact with the fluorescent powder that had been sprayed on the tablets and container. A positive reaction was also obtained from inside appellant's shirt pocket; later, traces of the fluorescent powder were found in the bathroom of appellant's house on the toilet and on the floor around the base of the toilet. When Gazzola explained the fluorescent device to appellant, and what it apparently showed, appellant made no comment.

Appellant did not take the stand. His counsel, however, sought to show on the cross-examination of Gazzola that the traces of the powder might have come from the inspector's hands when he searched the appellant, but this was refuted by testimony that neither the inspector nor Hebrank had touched the tablets or the container.

One of the most seriously contested portions of the trial involved the introduction of evidence, over the vigorous objections of appellant, that in 1953 appellant had committed a similar offense in Ione, California. The prosecution was permitted to prove that in September, 1953, appellant had come into possession of narcotics under circumstances almost identical to those involved in the instant case. Appellant had been arrested in connection with that offense and admitted to the police that he had committed the charged offense, and returned to the police the narcotics involved.

On this evidence the jury found defendant guilty of the charged offense.

[1, 2] The evidence clearly supports the conviction. Appellant argues that while the evidence supports the inference of guilt, it also could support an inference of innocence. In reliance on the rule that circumstantial evidence must not only be consistent with guilt but inconsistent with innocence, it is argued that the verdict of guilty has deprived him of the "presumption of innocence." The contention is, of course, unsound. The fact, if it be assumed to be a fact, that the jury could have drawn the inference of innocence from the evidence, does not render the verdict erroneous where the jury has discarded that inference, and found in favor of guilt. If the evidence supports the inference that appellant was in unlawful possession of narcotics, and it certainly does that, the fact that such evidence might support a contrary finding is not sufficient to entitle the appellant to a reversal. People v. Bassett, 68 Cal.App.2d 241, 156 P.2d 457; People v. Blinks, 158 Cal.App.2d 264, 322 P.2d 466; People v. Ross, 149 Cal.App.2d 287, 308 P.2d 37; People v. Dragoo, 121 Cal.App.2d 322, 263 P.2d 90; People v. Torres, 98 Cal.App.2d 189, 219 P.2d 480.

[3, 4] Appellant makes much of the fact that no narcotics were discovered in his possession. Such is not an essential fact to sustain a conviction of a violation of section 11500 of the Health and Safety Code. People v. Belli, 127 Cal.App. 269, 15 P.2d 809; People v. Blinks, 158 Cal.App.2d 264, 322 P.2d 466; People v. McDaniel, 154 Cal.App.2d 475, 316 P.2d 660; People v. Brickman, 119 Cal.App.2d 253, 259 P.2d 917; People v. Newman, 127 Cal.App.2d 430, 273 P.2d 917; People v. Noland, 61 Cal.App.2d 364, 143 P.2d 86. It is not essential that the narcotics be found on the person of the accused. People v. Sinclair, 129 Cal.App. 320, 19 P.2d 23; People v.

1. Appellant's wife contradicted this evidence. She testified that appellant was already in the bathroom when the officers arrived at the house.

Johnston, 73 Cal.App.2d 488, 166 P.2d 633; People v. Lunbeck, 146 Cal.App.2d 539, 303 P.2d 1082. The fact of unlawful possession, as well as the other facts essential to prove a conviction under section 11500, may be proved by circumstantial evidence. People v. Batwin, 120 Cal.App.2d 825, 262 P.2d 88; People v. Robarge, 151 Cal.App.2d 660, 312 P.2d 70; People v. Rollins, 161 Cal.App.2d 560, 326 P.2d 938.

[5] It is obvious that the circumstantial evidence here produced overwhelmingly supports the inference that appellant was in unlawful possession of a narcotic. Before he arrived at the pharmacy there were 70 Morphine tablets in the bottle. After he had been left alone in the prescription room for three to seven minutes, there were only 53 tablets in the bottle. No one else was in the pharmacy during that three to seven minutes. The fluorescent powder on his hands and clothing demonstrated, almost to a certainty, that appellant had come into contact with the tablets and the container. The fluorescent powder in and about the toilet, and the evidence about the flushing of that facility, certainly supports the inference that when appellant saw the officers he got rid of the incriminating evidence by flushing it down the drain. Far from being weak or inconclusive, the evidence is well nigh conclusive. Inspector Gazzola is to be congratulated on a carefully planned and well executed job of police work.

[6, 7] The next contentions of appellant are that several errors were committed in admitting evidence of other crimes. Appellant urges that it was error to admit, over his objections, evidence tending to show that narcotics were missing from the pharmacy on November 30, 1957, and December 6, 1957, and that appellant had visited the premises on those dates. This evidence was not introduced to show that appellant had taken the narcotics missing on those dates. The evidence that on November 30, 1957, narcotics were missing was obviously introduced to explain why, after that date, Hebrank took a daily inventory. The December 6, 1957, evidence was introduced to establish the number of Morphine tablets that remained in the bottle on that date and the number that were in the bottle on the day of the charged crime, that is, December 12, 1957. The reason for the daily inventories and number of tablets in the bottle were essential elements in the prosecution's case. Thus, even if this evidence also tended to show that appellant had committed crimes on those dates, it was nevertheless admissible. It is elementary that if proffered evidence tends logically and naturally to establish any fact that is part of the prosecution's case, it is admissible, even though it may also embrace evidence of another crime. People v. Lyon, 135 Cal.App.2d 558, 288 P.2d 57.

Appellant strenuously objects to the evidence that in 1953 he had committed a similar offense in Ione. This crime was committed under almost identical circumstances as the charged offense. The *modus operandi* in both cases was identical.

[8] It is, of course, the general rule that a defendant should not be tried for any other offense than the one charged. People v. Albertson, 23 Cal.2d 550, 145 P.2d 7; People v. McCullough, 158 Cal.App.2d 310, 322 P.2d 289. We agree that evidence of the commission of other offenses is never admissible merely to show that the accused has a criminal disposition or propensity or predilection toward crime. People v. Musumeci, 133 Cal.App. 2d 354, 284 P.2d 168.

[9] But the prohibition is not absolute. The exceptions to the rule are as well settled as the rule itself. "Evidence of other crimes may be admitted when it tends directly to establish the crime charged by proving a material fact, where it is part of the res gestae, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme." People v. Albertson, 23 Cal.2d 550, 576, 145 P.2d 7, 20; see also People v. Dabb, 32 Cal.2d 491, 500, 197 P.2d 1; People v. Sykes, 44 Cal. 2d 166, 170, 280 P.2d 769.

[10] In the present case the evidence was admissible under the common plan or scheme exception. The Ione offense took place under almost identical circumstances with those of the crime charged to appellant. Because of the similarity in the pattern or scheme employed in both offenses the prior offense was admissible under the rule announced in People v. Peete, 28 Cal.2d 306, 169 P.2d 924. In that case defendant had been convicted in 1921 of murder. In 1944 she was again charged with murder. The first murder involved an unusual pattern or scheme by which the defendant sought to secure the victim's wealth by killing the victim, hiding the body and then forging the victim's name to various documents. The 1944 charged crime was committed under almost identical circumstances. The court, in holding such evidence admissible, stated (28 Cal.2d at page 317, 169 P.2d at page 931): "When a defendant's conduct in connection with the previous crime bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design." See also People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569; People v. Gosden, 6 Cal.2d 14, 56 P.2d 211; People v. King, 4 Cal.App.2d 727, 41 P.2d 593; People v. Lyon, 135 Cal.App. 2d 558, 288 P.2d 57.

This rule, allowing evidence of other crimes where unusual and significant details of such crimes are so similar to the crime charged as to indicate a scheme or pattern upon the part of the defendant, is clearly applicable to the instant case. In both the Ione and the charged offense, the appellant had struck up a friendly relationship with a pharmacist; the latter had left the appellant alone in the store for short periods of time; narcotics were then discovered missing from the pharmacy. The appellant admitted to the police that he had committed the Ione offense.

In contending that such evidence was not admissible appellant places his main reliance on People v. McCullough, 158 Cal. App.2d 310, 322 P.2d 289, decided by this court in March of 1958. In that case the defendant was charged with the sale of narcotics on November 28, 1956. An officer testified that on the day in question he was dressed in civilian dress and was seated in his automobile with a named informer when defendant came up to the automobile; that the informer asked defendant if he had "anything"; that defendant replied that he had, but that the informer would have to get out of the car to get it; that the informer got out of the car and walked along the sidewalk; that the officer saw the informer hand the defendant a marked bill, and saw the defendant hand the informer two white packets containing narcotics.

Over objection, the prosecution was permitted to introduce evidence of another transaction that occurred on November 8, 1956. An officer was permitted to testify that on that day he saw defendant and a named informer in possession of marked bills enter an automobile in which another person was seated; that the informer got into the front seat with the driver, and appellant got into the back seat, alone; that the car was driven a short distance; that the informer got out and gave the police officer two packets containing heroin; that the informer no longer had the marked bills. The officers did not see the informer hand the money to the accused, nor did they see the accused hand anything to the informer.

This court properly held that evidence of the transaction of November 8, 1956, had been erroneously admitted. The court pointed out that there was no evidence that the accused had committed a criminal act that day. The court stated (158 Cal.App. 2d at page 313, 322 P.2d at page 290): "No one testified that anything passed from the informer to appellant, or from appellant to the informer. The automobile did not belong to appellant. There were three men in that car, the informer, appellant and Hamilton. Who gave the informer the

heroin or took his money does not directly or indirectly appear."

The court also held that there was no evidence of a common plan or scheme. At page 314 of 158 Cal.App.2d, at page 291 of 322 P.2d it was stated: "It did not show a common scheme or plan, except in the most general sense, because the methods of operation as to the charged offense and as to the November 8th transaction were quite different."

Obviously, the rule of this case is not here applicable. For reasons already stated, the challenged evidence was admissible.

[11, 12] The next contention of appellant is that the trial court erroneously refused to give a proffered instruction on petty theft, as a necessarily included lesser offense. At the trial appellant offered to prove that the narcotics involved were of a value not to exceed $20, pointing out to the court that he intended to offer an instruction on petty theft as an included offense. The offer of proof was denied and the court refused to give the proffered instruction. Of course, under section 1159 of the Penal Code, a defendant may be convicted of a necessarily included offense, and it is prejudicial error not to so instruct the jury. People v. Carmen, 36 Cal.2d 768, 228 P.2d 281; People v. Burns, 88 Cal.App.2d 867, 200 P.2d 134. Thus, in a murder case, where the evidence of the defendant tended to show that the charged offense was manslaughter, it was held to be prejudicial error not to instruct on manslaughter. People v. Carmen, 36 Cal.2d 768, 228 P.2d 281. But this rule only applies to necessarily included offenses, where the accused could be guilty of the charged offense, or of the included offense, but not of both. It does not apply to situations where the two offenses involved are separate and distinct. It is obvious that petty theft involves an element not at all involved in an unlawful possession of narcotics charge, i. e., the intent to steal. That intent, that element, is completely unrelated to the unlawful possession of narcotics charge. It is conceivable that a person could be convicted of both offenses, and that a conviction of one would not be a bar to a conviction of the other. This is not true of a necessarily included offense. See People v. Clenney, 165 Cal.App.2d 241, 331 P.2d 696; In re Hess, 45 Cal.2d 171, 288 P.2d 5; People v. Marshall, 48 Cal.2d 394, 309 P.2d 456. Appellant would define as a necessarily included offense any other offense shown by the evidence. Thus, when at oral argument, his counsel was asked if the evidence showed that a bank robber parked in a red zone, and then robbed the bank, speeding away at an unlawful speed, would the offenses of speeding and unlawful parking be a necessarily included offense in the charge of bank robbery, he answered that they would. It is obvious that these lesser crimes are not included offenses because they involve elements not involved in the charged offense. So it is with petty theft and unlawful possession of narcotics. The so-called lesser offense involves elements not involved in the charged offense, and so is not a necessarily included offense.

The contention is also made that the court erred in allowing in evidence, over objection, appellant's responses to accusatory statements. The arresting officer was permitted to testify that after arresting appellant he asked him what he had done with the narcotic tablets. Appellant denied taking them and denied being an addict. Appellant then stated in response to pertinent questions that while Hebrank was out of the store there was another customer present who came back to the prescription room. This was palpably false and contrary to all the other evidence in the case. When asked if he would submit to a visual examination for hypodermic marks appellant remained silent. The questioning officer then made the ultra-violet ray test on appellant's person and clothing and explained what the tests disclosed and what the inferences from these disclosures were. Appellant kept silent, and finally stated that he did not know anything about it.

[13] Of course, an accused's responses to accusatory statements are normally not

admissible. People v. Staker, 154 Cal.App. 2d 773, 316 P.2d 725; People v. Teshara, 134 Cal. 542, 66 P. 798. But if such response constitutes an admission, then, as such, it may be admissible. The proper rule was thus stated in People v. Davis, 43 Cal.2d 661, 670, 276 P.2d 801, 805:

"If the accused person expressly admits the truth of the accusatory statement, both the statement and answer may be admitted. If the accused person expressly denies the accusatory statement, there is no admission. If the accused makes an evasive or equivocal reply which is not directly responsive to the accusatory statement, or remains silent, it has been held that under certain circumstances both the accusatory statement and the response are admissible. In any event, when the accusatory statement is admitted, it is not admitted as proof of the facts asserted in the statement. Such statements are admitted only to show the reaction of the accused. 4 Wigmore on Evidence (3d ed. 1940), §§ 1071, 1072, pp. 70–89.

"When the response to an accusatory statement consists of evasion, equivocation or silence, 'It is for the court in the first instance to determine whether the import of the statements is such that it would furnish a foundation for proof of conduct, and it is then for the jury to decide whether the accused was aware the statements were made, whether, under all the circumstances shown, they called for a disclaimer, whether the accused did reply to them, and whether, if he did not do so, such failure showed criminal intent or consciousness of guilt.' "

[14, 15] Thus while accusatory statements, if denied, may not be admitted, if the accused remains silent in the face of accusatory statements, or if he equivocates or lies about them, such may constitute an admission and become admissible. That is this case. While appellant denied some of the accusations, there was incriminating silence as to others, and there was deliberate lying about the presence of another customer. In such circumstances the trial court did not commit error in admitting the entire conversation. People v. Megladdery, 40 Cal.App.2d 748, 106 P.2d 84; People v. Goldstein, 136 Cal.App.2d 778, 289 P.2d 581. As was held in People v. Wayne, 41 Cal.2d 814, 264 P.2d 547, where a defendant's denial of guilt is coupled with an explanation which the jury can reasonably find is false, the accusation and denial and explanation may be admitted as tending to prove consciousness of guilt.

The other contentions of error are of a minor character. Even if some error occurred in connection with some of the situations, such error could not possibly have been prejudicial.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



168 Cal.App.2d 452

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Benny Santiago RODRIGUEZ, Defendant and Appellant.

Cr. 6375.

District Court of Appeal, Second District, Division 1, California.

March 6, 1959.

Rehearing Denied March 24, 1959.

Hearing Denied April 29, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, Walter R. Evans, J., for illegal possession of heroin, and he appealed. The District Court of Appeal, Lillie, J., held that when search disclosed merchandise officers believed to have been stolen and revealed nar-

cotics, officers were not only permitted, but it was their official duty, to take defendant into custody; and held that even though it was receipt of information that defendant was trading narcotics for stolen property that had brought officers to defendant's house, nondisclosure of identity of informant and failure to strike evidence concerning information given by him were, in view of fact that defendant had given his free and voluntary consent to search, harmless and constituted no ground for reversal.

Affirmed.

1. Searches and Seizures ⇐7(27)

In prosecution for illegal possession of heroin, evidence would support finding that defendant had given his consent to search of his house and premises which culminated in discovery of narcotics. West's Ann. Health & Safety Code, § 11500.

2. Searches and Seizures ⇐7(28)

Mere fact that defendant was under arrest at time, or even in handcuffs, cannot per se make his consent to search involuntary.

3. Arrest ⇐63(4)
Criminal Law ⇐1168(4), 1170½(1)

When search disclosed merchandise officers believed to have been stolen and revealed narcotics, officers were not only permitted, but it was their official duty, to take defendant into custody; and even though it was receipt of information that defendant was trading narcotics for stolen property that had brought officers to defendant's house, nondisclosure of identity of informant and failure to strike evidence concerning information given by him were, in view of fact that defendant had given his free and voluntary consent to search, harmless and constituted no ground for reversal of conviction for illegal possession of heroin. West's Ann.Pen.Code, § 836.

4. Criminal Law ⇐260(11)

In passing upon sufficiency of evidence to sustain conviction, reviewing court was bound to view evidence in light most favorable to People, to assume in favor of conviction every fact which trial court could reasonably have deduced from evidence, and to refrain from drawing contrary inferences.

5. Criminal Law ⇐1159(2)

It is not function of reviewing court to reweigh evidence.

6. Poisons ⇐9

Conviction for illegal possession of heroin was sustained by evidence. West's Ann.Health & Safety Code, § 11500.

7. Criminal Law ⇐736(2)

Whether confession is free and voluntary is preliminary question addressed to trial court.

8. Criminal Law ⇐1158(4)

Where evidence on issue as to voluntariness of confession was in conflict, resolution of dispute contrary to defendant's story was not subject to attack on appeal.

9. Criminal Law ⇐938(2)

Since defendant had obviously intended, by his testimony that his brother had lived on premises prior to the latter's arrest for sale of narcotics, to imply that heroin found on premises was defendant's brother's and that the latter had buried it on the premises without defendant's knowledge, it was unlikely that defendant's brother's testimony that he had in fact buried heroin on premises was the kind of "newly discovered" evidence contemplated by Penal Code section, and it was not an abuse of discretion for trial court, in prosecution for illegal possession of heroin, to deny new trial motion predicated upon such allegedly "newly discovered" evidence. West's Ann.Pen.Code, § 1181, subd. 8.

10. Criminal Law ⇐944

In exercising its discretion, on motion for new trial on ground of newly discovered evidence, court was not bound to accept the "newly discovered" testimony of defendant's brother as true, even if it was uncontradicted. West's Ann.Pen.Code, § 1181.

11. Poisons ⇐4

Even if defendant's brother, who formerly occupied premises, had buried bottles containing narcotics, defendant could have found them and appropriated them as his own without removing them from their place of concealment, and could thus be guilty of illegal "possession" of heroin. West's Ann.Health & Safety Code, § 11500.

See publication Words and Phrases, for other judicial constructions and definitions of "Possession".

David C. Marcus, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

LILLIE, Justice.

Upon submission of the matter to the court on the transcript of the preliminary hearing, defendant was convicted of possession of heroin in violation of Section 11500, Health & Safety Code. His motion for a new trial was denied and he was sentenced to the state prison. This appeal is from the judgment of conviction and order denying motion for new trial.

Appellant contends that the trial court erred in refusing to require the officer to disclose the name of the informant; that the evidence was insufficient to sustain the judgment and that it was error to deny his motion for a new trial.

We deem to be without merit appellant's first contention that the court's refusal to permit the defense to ascertain the informer's name invalidated the arrest, search and seizure.

It is conceded the officers had no warrant of arrest or search when they went to defendant's home. Officer Van Court testified that, about one and one-half hours after receiving information from a reliable informant that defendant, about whom he had received information for the past year and against whom he had testified four or five months earlier, had in his possession a quantity of stolen property for which he had traded heroin, which narcotic he kept buried in his backyard, he and four others officers, several from burglary detail, went to defendant's home where they observed defendant in front of his house. Van Court walked up to him and told him "he was under arrest again for the same thing," and said "I heard that you are taking more, trading more stolen property for junk." Then he "asked him (defendant) if it would be all right to look around," referring to the house to which defendant motioned, and specifically naming the shed and backyard. Defendant replied: "Look around and you won't find anything." The officers then proceeded to search the house, wherein Van Court found various items, including wrist watches. Thereafter he went out to the backyard and found a hole in which it appeared something recently had been buried. While checking under a board on which a washing machine rested, approximately 10 or 15 feet from Officer Ruble, the latter called his attention to a blue bottle containing 123 capsules of heroin, partially covered in a six-inch hole. In the yard the earth was dry, there was "possibly a weed or two; no plants" but right over where the bottle had been buried was one little wilted plant.

The defense asked the officer the name of the informant, to which question the court sustained an objection and then denied a motion to strike his testimony relative to the information transmitted by the informant.

Defendant testified he was standing outside when the officers arrived. One called him by his first name and told him they were going to have to go through his house. He asked if they had a search warrant and the officer replied "No," he didn't need one. They then started searching the house and yard, which yielded the bottle in question.

It is appellant's position that if the officer's testimony relative to the information transmitted to him by the informer had been properly stricken for the court's failure to permit disclosure of his name on the authority of Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39, there would remain in the record no showing of reason-

able cause to justify the arrest and search as incident thereto.

As stated by the court in People v. Burke, 47 Cal.2d 45, at page 49, 301 P.2d 241, at page 243: "(I)t was not necessary here, however, for the People to show that the search and seizure were reasonable as incident to a proper arrest, for they showed that defendant freely consented to the search of his apartment which disclosed the evidence which defendant has since claimed was illegally obtained. It was not unreasonable for the officers, without any show of force or coercion, to call upon the suspected defendant at his home, or to ask him questions, or to accept defendant's statement, 'No, go ahead,' in answer to the inquiry, 'You don't mind then if we search your apartment do you?'"

The evidence before us discloses that the officers went to defendant's house, not only on information of the informant that defendant had narcotics buried in his backyard and was trading them for stolen property, but on Van Court's knowledge of defendant and his activities for a period of a year, and his experience from testifying against defendant four or five months previous, when tried as the result of an arrest by narcotics officers. It is also clear that no force or coercion was used in calling on defendant at his home. It does not appear, therefore, to have been unreasonable for Van Court to call upon defendant, ask him questions, or accept his statement they could "look around" although they would find nothing.

[1, 2] While defendant gave a different version of what occurred, the most his testimony created was a factual conflict which the trial court, in the discharge of its duties to weigh the evidence, decide the veracity of witnesses and determine factual disputes, impliedly resolved against him. The evidence in the record before us concerning the search of defendant's house and premises amply supports any determination that defendant gave his consent thereto (People v. Smith, 141 Cal.App.2d 399, 296 P.2d 913; People v. Hood, 149 Cal. App.2d 836, 309 P.2d 135; People v. Cherrie, 162 Cal.App.2d 143, 327 P.2d 909, and that it was freely and voluntarily given. There is no showing in the record that any force or persuasion of any kind was used by the officers to gain defendant's consent to search house, shed and backyard. The mere fact that he was under arrest at the time, or even in handcuffs, cannot per se make such consent involuntary (People v. Burke, 47 Cal.2d 45, 301 P.2d 241; People v. Michael, 45 Cal.2d 751, 290 P.2d 852; People v. White, 159 Cal.App.2d 586, 324 P.2d 296; People v. Guy, 145 Cal.App.2d 481, 302 P.2d 657).

[3] Returning briefly to Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39, in the instant case the only relevance of the testimony concerning the information provided by the informant is on the issue of probable cause to arrest defendant and search the premises. However, since defendant gave his free and voluntary consent to search his house, which disclosed merchandise the officers believed to be stolen, and his backyard which revealed narcotics, it is clear that not only were the officers permitted, but it was their official duty, to take defendant into custody (Section 836, Penal Code, People v. Melody, 164 Cal.App. 2d 728, 331 P.2d 72. As applied to the evidence in the case at bar, nondisclosure of the identity of the informant and failure to strike the evidence concerning the information given by him are harmless, and constitute no ground for reversal since there is in the record, without reference to that information, ample evidence of probable cause for defendant's arrest and subsequent commitment based upon the narcotic found on defendant's premises through a lawful search.

Appellant refers briefly to People v. McShann, 50 Cal.2d 802, 330 P.2d 33, but has made no showing that the informant would have been a material witness on the issue of guilt. Indeed, in view of the defense that he knew nothing of the heroin found on his premises, suggesting by his testimony that his brother, then serving a state prison sentence for sale and possession of

narcotics, had buried the same before his arrest; his brother's recent assertion, upon defendant's motion for a new trial, that before his arrest he buried nine bottles containing heroin on the same premises, which defendant now wishes to interpose as a defense on a new trial; to say nothing of defendant's confession that the heroin was his and it was he who buried the bottle; it would be difficult for appellant now to claim that the informant, who neither participated in the commission of the offense nor was present at the time of arrest, could have been a material witness on the issue of guilt. Nor is there any showing in the record that defendant planned or wanted to call the informant as a witness, tried or was unable to locate him, or in what manner he could or would have testified on the issue of guilt. On this issue, we do not perceive how the failure to divulge the identity of the informant could have been prejudicial to defendant. People v. Lazzara, 131 Cal.App.2d 663, 281 P.2d 4.

[4] Concerning appellant's second point that the evidence was insufficient to sustain the judgment of conviction, in accord with recognized rules on appeal, we are bound to view the evidence in the light most favorable to respondent, as we must assume in favor of the conviction every fact which the trial court could reasonably have deduced from the evidence and refrain from drawing contrary inferences. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

In the house in which defendant resided with his wife, mother and children, Van Court found various articles of merchandise, and in his backyard, partially covered by dirt in a six-inch hole, a blue bottle containing 123 capsules, some of which were later examined and found to contain heroin. When confronted with "his stash," defendant denied he knew anything about it. Later, the same day, at the office of the Valley Detective Division, his entire conversation with Van Court and Sgts. Mullens and Ruble was tape recorded, during which he confessed the heroin found in the bottle belonged to him and was what remained of a purchase of 200 capsules from a peddler in Monte Villa one week before, which he buried in his backyard.

The defendant, on the other hand, testified that Van Court took him out into the yard where he was asked about the bottle. He replied he knew nothing about it and denied several times it belonged to him. The officers then took him and his wife to the station. There defendant was questioned by the officers and asked whose "stuff" it was. He replied he did not know, but after a couple hours' conversation, he confessed the heroin was his, which was not true, because he sought to protect his wife, mother and children. He testified he had never before seen the bottle and that his brother who had previously lived on the premises had been arrested and convicted for the sale and possession of narcotics and was serving time in the state prison therefor.

Defendant's wife testified she was pregnant at the time and was arrested for placing something in her brassiere, kept in the police car two and one-half hours while the officers made several investigations, taken to the station, searched and later released. Defendant's sister testified defendant's mother was not very well and had been in a state hospital.

[5, 6] Adhering to the rule that it is not the function of this court to reweigh the evidence, but to view it most favorably to respondent (People v. Daugherty, 40 Cal. 2d 876, 256 P.2d 911), we are satisfied that there is more than ample substantial evidence to support the judgment of conviction. As to the elements of the offense, Officer Carter testified the substance contained in 20 of the 123 capsules found in the bottle was heroin. The circumstances under which Van Court found the bottle disclosed a deliberate concealment in the earth. That the house and yard in which the bottle was found buried were under his dominion and control, and that he occupied the premises as head of the household, is borne out by defendant's testimony that he was residing on the premises when arrested, and had been living there for about two

years with his wife, mother and two children. As to defendant's knowledge of the presence of the narcotics on the premises, although defendant originally denied knowledge of the contraband, he later confessed to officers it belonged to him.

Defendant did not deny having made the statements constituting the confession, as they were fully recorded and the tape played to the court, but claimed that they were not true, he having been coerced into making them. He claims that his mother was ill, recently released from Camarillo, that his pregnant wife was arrested and held in custody at the station; that he continuously denied knowledge of the narcotics, but upon arrival at the station was told the heroin belonged to someone and, unless he confessed his mother would be taken into custody, his wife held and his children committed to the juvenile authorities; and that several hours after his confession his wife was released. Appellant argues his statements were not his voluntary acts, but were induced by the coercive tactics of law enforcement officers.

Concerning the detention of defendant's wife, Van Court testified one of the officers saw her place something in her brassiere and she was taken to the station to be searched. As to the confession, Van Court on direct examination testified that defendant freely and voluntarily gave the statements; on voir dire, before the confession was admitted into evidence, that neither he nor Sgts. Ruble, Mullens, nor anyone else in his presence, told defendant that his wife would be held and his mother arrested; and that he neither had nor heard any conversation concerning defendant's wife or mother at the station. Before the tape recording was played, Van Court again on voir dire testified that all three officers were present at the station with the defendant; that prior to the time the recording was started neither he, nor anyone else to his knowledge, had any conversation with defendant concerning his wife, mother or children; and that the entire conversation at the police station between defendant and the officers was on the tape.

[7, 8] Whether a confession is free and voluntary is a preliminary question addressed to the trial court. People v. Miller, 135 Cal. 69, 67 P. 12; People v. Siemsen, 153 Cal. 387, 95 P. 863. Here it appears to involve merely a factual conflict. The trial court, after weighing the evidence, determining the credibility of the witnesses and listening to the entire conversation on the tape, resolved the conflict against defendant and impliedly found that no coercive tactics were used to induce defendant to confess, and that his confession was freely and voluntarily given. Defendant's explanation as to the reason he made the statements was obviously rejected by it. Since the evidence was in conflict, the resolution of the dispute contrary to defendant's story is not subject to attack on appeal. People v. Tokich, 127 Cal.App.2d 639, 274 P.2d 226.

[9–11] Appellant's last contention relates to the denial of defendant's motion for new trial, which motion was based primarily upon newly discovered evidence.

"The granting or denial of a motion for a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court, People v. Beard, 46 Cal. 2d 278, 282, 294 P.2d 29. It is also well settled that such motions are looked upon with disfavor, People v. Yeager, 194 Cal. 452, 491, 229 P. 40; People v. Mandell, 48 Cal.App.2d 806, 818, 120 P.2d 921, and that an appellate court will not interfere except upon a clear showing of an abuse of discretion by the trial court. (Citations.)" People v. Greenwood, 47 Cal.2d 819, 821, 306 P.2d 427, 429.

Section 1181 subd. 8, Penal Code, provides that the court may grant a new trial upon defendant's application "(W)hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. * * *" Citing People v. McGarry, 42 Cal.2d 429, 267 P.2d

254, and People v. Sutton, 73 Cal. 243, 15 P. 86, the court in People v. Beard, 46 Cal. 2d 278, at page 281, 294 P.2d at page 29, pointed out that it must appear "First, that the evidence, and not merely its materiality be newly discovered; second, that the evidence is not cumulative merely; third, that it be such as to render a different result probable on retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at the trial; and, that these facts be shown by the best evidence of which the case admits."

In support of the motion, defendant's brother testified that on January 19, 1956, he was convicted of selling heroin; he had resided on defendant's premises and prior to his arrest had buried thereon nine various colored bottles of heroin capsules; he was released from prison April 25, 1958, and did not arrive home until the afternoon defendant's trial commenced; he did not tell defendant about the bottles until after the trial because he was afraid he would "get violated" as he had to go before his parole officer; after his release, he went to the premises and destroyed the bottles but found only three out of the nine.

It appears unlikely that this is the kind of "newly discovered" evidence contemplated under section 1181, Penal Code, for at the trial, in support of his defense that he knew nothing about the bottle, defendant testified that his brother had lived on the premises previous to the latter's arrest for the sale of narcotics and was at Chino. Obviously he intended the inference that the heroin in question was his brother's, and that the latter buried the bottle without defendant's knowledge. Accordingly, there would be nothing "newly discovered" about it. At the trial, the court either rejected the intended inference that the heroin belonged to defendant's brother who buried the bottle, or concluded that if his brother had buried it defendant knew of the fact. Also, defendant made no showing why, since he sought to use the inference as part of his defense, he had not attempted to obtain his brother's testimony for the trial.

In exercising its discretion, the court was not bound to accept the testimony of the brother as true even though it may have been uncontradicted (People v. Bobeda, 143 Cal.App.2d 496, 300 P.2d 97. Besides the brother's testimony, the court also had before it defendant's own confession that he had buried the bottle and the heroin was his, the preliminary transcript, all of the additional testimony taken at the trial, the brother's conviction of a felony, the consideration of any bias that might arise out of the "brother relationship," and the obvious fact the brother could not be prejudiced by admitting ownership of the narcotics even though they may not belong to him. Whatever factors the trial court considered, it is clear it was not impressed with the brother's testimony.

Even if the trial judge believed it, the question of whether it was the same heroin and whether defendant knew his brother buried it would still be at issue. Also the brother's testimony discloses that he buried nine bottles and remembered where he buried them, yet when paroled, he was unable to find but three. In addition, the fact that the brother buried the bottles in the backyard would not preclude a finding that defendant who lived there found them and appropriated them as his own, even though he may have left them in their place of concealment; or that they were buried with defendant's knowledge; or that he, too, buried bottles of his own on the premises, either before or after his brother's arrest. We are satisfied that it would be highly improbable that a different result would be rendered upon a retrial of the cause. We find no abuse of the trial court's discretion in denying the motion for new trial.

For the foregoing reasons, the judgment and order and each of them is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; SCHAUER and PETERS, JJ., dissenting.

FIREMEN'S BENEVOLENT ASSOCIATION, Inc., Petitioner,

v.

CITY COUNCIL OF THE CITY OF SANTA ANA, etc., Respondents and Appellants.

Civ. 5953.

District Court of Appeal, Fourth District, California.

March 18, 1959.

Rehearing Denied April 15, 1959.

Hearing Denied May 13, 1959.

Petition for writ of mandate to compel city council to amend contract with state employees' retirement system to include benefits provided by West's Ann.Gov.Code, §§ 21264, 21337. The Superior Court of Santa Ana, Robert Gardner, J., rendered judgment granting a peremptory writ of mandate, and the city appealed. The District Court of Appeal, Shepard, J., held that under provisions in sections 21264 and 21337, making such sections inapplicable to any contracting agency or employees thereof unless and until agency should elect to be subject to provisions of such sections, city council had option to adopt benefits of such sections but was not required to do so, notwithstanding city charter provision.

Judgment reversed.

1. Mandamus ⇐72

Mandamus will not issue to control the performance of a discretionary act by an administrative or legislative body.

2. Pensions ⇐1

Pension provisions of statute are to be liberally construed in order to carry out their beneficent purposes, but where language of statute itself is sufficiently clear and free from obscurity to reasonably remove all doubt as to its meaning, there is no reason to attempt to apply rules of statutory construction commonly needed for interpreting statutory ambiguities.

3. Statutes ⇐259

A statutory enactment may ordinarily provide that it will take effect upon the happening of some future event, which may be the decision of a local governing board.

4. Statutes ⇐51

Where a legislative body adopts a whole section or system of laws on a given subject provided by another legislative authority, generally, future amendments thereto are also adopted.

5. Statutes ⇐199

The terms "elect" and "election", when used in a statute, mean to make a choice between two alternatives.

See publication Words and Phrases, for other judicial constructions and definitions of "Elect" and "Election".

6. Officers ⇐94

Use of the words "elect" and "election" in statute relating to retirement plan ordinarily means that retirement plan or the particular provision which is spoken of may or may not be adopted within the sound judgment and discretion of governing board required to exercise an election.

7. Municipal Corporations ⇐220(9)

Under provisions in sections of State Employees' Retirement Law, providing additional benefits to surviving dependents of deceased employees, that such sections should not apply to any contracting agency or employees thereof unless and until agency should "elect" to be subject to provisions of such sections, city council had option to adopt benefits of such sections but was not required to do so, notwithstanding city charter provision directing council to comply with all provisions of state retirement law, as then enacted, or as it might thereafter be amended. West's Ann.Gov.Code, §§ 20000–21500, 20019, 20457, 20458, 20461.5, 20492, 20607–20607.6, 20654.6, 20931, 20952–20952.6, 21251.3, 21252.6, 21261.5, 21264, 21337, 21367.51.

John K. Colwell, City Atty. (Orange County), Ronald H. Bevins, Deputy City Atty., Santa Ana, for appellants.

Robert G. Cockins, Santa Monica, amicus curiae.

Jacobs, Jacobs, Hayden & Nelson, Santa Ana, for respondent.

SHEPARD, Justice.

This is an appeal from a judgment granting a peremptory writ of mandate directing the city council of the respondent City of Santa Ana (hereinafter called city) to forthwith amend the city's contract with the Board of Administration of State Employees' Retirement System (hereinafter called State), so as to adopt for the employees of city (hereinafter called employees) all of the benefits provided by Government Code sections 21264 and 21337.

The contract by which city effectuated the joinder of its retirement system with that of State came into being in 1947. City adopted a charter effective April 14, 1953. Government Code, sections 21264 and 21337 became effective after said date and provide certain benefits to certain surviving dependents of an employee who dies after becoming eligible for retirement or after retirement, which benefits are above and beyond those provided elsewhere in the act. The last paragraph of section 21264 reads as follows:

> "This section shall not apply to any contracting agency nor to the employees of any contracting agency unless and until the agency elects to be subject to the provisions of this section by amendment to its contract made in the manner prescribed for approval of contracts, except that an election among the employees is not required, or, in the case of contracts made after the date this section takes effect, by express provision in such contract making the contracting agency subject to the provisions of this section."

The last paragraph of section 21337 uses almost identical words.

Section 1400 of Article XIV of the charter adopted by city authorizes city and its council and officers to do any act necessary to enable city to continue as a contracting participant in the State Retirement System. The second paragraph of said section reads as follows:

> "The City Council is directed to comply with all the provisions of the State Employees' Retirement Law, as now enacted, or as it may hereafter be amended, including the levy of all necessary taxes."

June 25, 1957, petitioner requested the city council of city to amend its contract with State to include for employees the benefits of said sections 21264 and 21337. January 3, 1958, petitioner filed its petition in superior court asking for a writ of mandate to compel the city council of city to amend its contract with State to include said benefits of sections 21264 and 21337. After trial on the alternative writ, a judgment was rendered for the issuance of a peremptory writ of mandate compelling said city council to forthwith amend city's contract so as to make city subject to the provisions of said sections 21264 and 21337. City appeals from said judgment.

It is the contention of petitioner that said second paragraph of section 1400 of city's charter is a mandatory directive to city's council requiring it to incorporate into city's contract with State the benefits created by sections 21264 and 21337. Petitioner cites in support thereof certain general rules of statutory construction, first, that the word "direct" means "to point to; guide; order; command; instruct" (Black's Law Dictionary, p. 546), and is of the opinion that the word "direct", as used in the above quoted section 1400, is mandatory. Next, petitioner says that in ascertaining legislative intent it is the general rule to so construe the act as to give effect to all parts thereof. Weber v. County of Santa Barbara, 15 Cal.2d 82, 98 P.2d 492; County of Los Angeles v. Frisbie, 19 Cal.2d 634, 122 P.2d 526. Further, petitioner contends that pension statutes are liberally construed in favor of the pensioner. Terry v. City of Berkeley, 41 Cal.2d 698, 263 P.2d 833; Gibson v. City of San Diego, 25 Cal.2d 930, 156 P.2d 737.

[1, 2] Appellant contends that said section 1400 is at the most only a direction to the council of city to adopt by contract those provisions of State system which make up the basic body of that system without options, and that it is not a direction to adopt, willy-nilly, each and all of those provisions of the act that have been made by the act optional to city. City cites in support of its position certain general principles of law: 1. That mandamus will not issue to control the performance by an administrative or legislative body of a discretionary act. Wilson v. Board of Retirement, 156 Cal.App.2d 195, 213, 319 P.2d 426. 2. That while pension provisions are to be liberally construed in order to carry out their beneficent purposes nevertheless "where the language itself of the statute is sufficiently clear or free from obscurity as to reasonably remove all doubt as to its meaning", there is no reason to attempt to apply those rules of statutory construction commonly needed for interpretation of statutory ambiguities. Klench v. Board of Pension Fund Com'rs of City of Stockton, 79 Cal. App. 171, 249 P. 46, 51.

[3, 4] There is no question that a statutory enactment may ordinarily provide that it will take effect on the happening of some future event (Ross v. Board of Retirement, 92 Cal.App.2d 188, 206 P.2d 903), nor is there any doubt that the decision of a local governing board may be one of such conditions. Ogle v. Eckel, 49 Cal. App.2d 599, 122 P.2d 67. It is also a general rule that, where a legislative body adopts a whole section or system of laws on a given subject provided by another legislative authority, the future amendments thereto are also adopted. Palermo v. Stockton Theatres, Inc., 32 Cal.2d 53, 59, 195 P.2d 1. Our courts have also approved of increased benefits provided for those already within a retirement system. Sweesy v. Los Angeles County Peace Officers' Retirement Board, 17 Cal.2d 356, 363, 110 P.2d 37. The question at hand has been carefully briefed by the parties as well as by amicus curiae, and they have apparently been unable to discover any decision in a court of last resort on a comparable situation to the one here at bar. Nor has this court's research produced any such authority.

A close examination of the State Employees' Retirement Law, which covers sections 20000 to 21500, Government Code, reveals that it contains a large number of optional provisions. Local employees are divided into four classifications, firemen, policemen, county peace officers, and miscellaneous. Upon a proposal to join the State System, each of these groups has the option to go in or stay out of the State System (Gov.Code, Secs. 20457–20458). If city elects to adopt any optional benefit for its employees it may do so without the vote of employees unless such change requires increased contributions from employees. In the latter instance, an employee vote is a prerequisite to adopting the new benefit. Gov.Code, Sec. 20461.5. If an employee class exclusion adversely affects the interest of the system, State may refuse it. Gov.Code, Sec. 20492. A local safety member includes firemen. Gov.Code, Sec. 20019. The normal contribution of safety members is provided in section 20607. Two optional normal rates of contribution on different retirement age bases are provided by sections 20607.5 and 20607.6. Sections 20654.6 and 20931 give certain employees the option to improve their beneficiary standing by making lump sum payments to the fund. Secs. 20952, 20952.5 and 20952.6 provide certain additional options on age of retirement. Section 21251.3 gives certain options for increase of benefits after retirement. Section 21252.6 contains certain options on age and service calculations. Section 21261.5 provides options for increase of certain current and prior service pensions. Section 21367.51 provides optionally for certain lump sum death benefits.

An examination of these and other sections shows that the wording of the clause making the section optional is in most instances identical or nearly identical with the wording used in the clause subject of

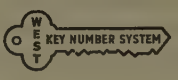
our present inquiry. It also appears that in some cases the benefits are alternative in form, that is, that if both sections were adopted there would be an inescapable conflict.

Each of the benefits which may from time to time be adopted in a pension system affect in some degree the financial drain on the fund from which all pensioners must draw to realize the economic security sought to be provided for them by the system. That security rests in the first instance in the pension fund itself and, secondly, in the sources from which that fund must draw its strength, to wit, the contributions of employees and the contributions of employers. Someone must keep a careful check on this problem at all times and in the case of State Employees Retirement Fund the act recognizes this problem by directing that the contributions may from time to time be adjusted as necessities of the fund require. Since neither the fund nor its sources are inexhaustible someone must exercise the sound judgment necessary to keep the whole system balanced. In part, the discretion or judgment has been entrusted to the retirement fund board, in part it has been entrusted to the local political subdivision's governing head, and in part it has been entrusted to the elective voice of the employees themselves.

[5–7] The terms "elect" and "election" mean to make a choice between two alternatives. Ordinarily, when a statute uses that terminology it means that the retirement plan or the particular provision which is spoken of may or may not be adopted within the sound judgment and discretion of the governing board required to exercise an election. Independent School District of Cedar Rapids v. Iowa Employment Security Commission, 237 Iowa 1301, 25 N.W.2d 491, 495. We see no reason to make any exception to the general rule. There is nothing ambiguous in the paragraph quoted from said sections 21264 and 21337. In our opinion, the intent of the legislature in appending to sections 21264 and 21337 of the Government Code the clause hereinabove quoted was to give to the governing board the choice or option of adopting the benefits of said sections or not adopting them. When the city council has exercised its discretion in that respect it is our opinion that it has complied with the provisions of said section 1400 above quoted.

The judgment is reversed.

GRIFFIN, P. J., and MUSSELL, J., concur.



168 Cal.App.2d 520

Jack H. TOWT, Plaintiff and Appellant,

v.

H. F. POPE, Defendant and Respondent.

Civ. 23081.

District Court of Appeal, Second District, Division 1, California.

March 9, 1959.

Action for injuries sustained by an employee who exhausted his compensation remedies against an employer, to recover against a vice president of a corporate employer for failure to enforce safety regulations. From a judgment of nonsuit in the Superior Court of Los Angeles County, A. A. Scott, J., the employee appeals. The District Court of Appeal, Lillie, J., held that the vice president was not individually liable to the employee as an "employer" under the Labor Code; that evidence of negligence and proximate cause was insufficient for the jury; and that questions to an expert witness were properly excluded as invading the jury's province.

Judgment affirmed.

1. Appeal and Error ⇐927(3), 989

Where defendant's motion for nonsuit was granted at the conclusion of plain-

tiff's case, the evidence in favor of plaintiff must be taken as true, disregarding that in conflict and drawing on the plaintiff's behalf every favorable inference and presumption fairly deducible and arising therefrom.

2. Master and Servant ⇐313

An employee who had exhausted his compensation remedies against the employer for injury in a steel plant was not entitled to maintain an action against a vice president of the employer individually on ground that he failed personally to instruct the employee with reference to safety measures in violation of certain nondelegable "duties" imposed upon him as an employer by the Labor Code, since the term "employer" under the Code does not include a person exercising only intermediate control, and neither the immediate direct control of a superintendent nor manager nor the ultimate control of employing corporation itself for whose benefit the work is done. West's Ann. Labor Code, §§ 3300 et seq., 6300 et seq., 6304, 6400–6404, 6500.

See publication Words and Phrases, for other judicial constructions and definitions of "Duties" and "Employer".

3. Corporations ⇐306

In the absence of active participation in an act of misfeasance, generally an officer of a corporation is not personally liable to a third person for nonfeasance.

4. Master and Servant ⇐300

The doctrine of respondeat superior is not applicable to the relationship between a supervisor and his subordinate employees.

5. Master and Servant ⇐313

An employee exhausting his compensation remedies against the employer for injuries sustained in industrial plant was not entitled to maintain an action against a vice president of the employer individually even if the officer were classed as a manager who himself committed no positive acts of negligence but whose subordinates failed to do certain acts, in view of the statute exempting superior employees from liability for the tortious acts of subordinates. West's Ann.Civ. Code, § 2351.

6. Master and Servant ⇐265(1)

In action by employee for injuries, the burden is upon the servant to prove the existence of every essential fact upon which he relies.

7. Evidence ⇐597

Substantial evidence is required to establish each affirmative allegation and a scintilla of evidence is not sufficient for that purpose.

8. Trial ⇐142

While all reasonable inferences are to be drawn from the evidence and all conflicts to be resolved in plaintiff's favor when granting defendant's motion for nonsuit, the inferences cannot be based upon speculation or conjectures but must be based on a fact legally proved. West's Ann.Code Civ.Proc. §§ 1958, 1960.

9. Master and Servant ⇐332(1)

In action by employee against vice president of corporate employer for injuries sustained by the employee in an industrial plant on ground that defendant negligently issued inadequate orders for the safety of employees while a crane was in operation moving large steel beams, evidence as to negligence and proximate cause was insufficient for the jury.

10. Negligence ⇐121(1, 5), 134(1, 11)

Plaintiff not only has the burden of establishing actionable negligence but that it operated as a proximate cause of his injury and such cannot rest on guess, conjecture, speculation or surmise but must be established by substantial evidence.

11. Evidence ⇐514(1)

An expert cannot generally be questioned as to whether certain methods are prudent or machinery or conditions safe as invading the province of the jury.

12. Evidence ⇐514(1)

In employee's action for injuries, question to expert whether it was safe practice to permit a fitter's inexperienced helper to hook chains around a load of

40 foot "I" beams was improper as invading the province of the jury and as to whether it was within the safe practices of the community to require an inexperienced man working in a steel fabricating plant to give signals to crane operators to lift and move loads.

13. Appeal and Error ⇐205

Appellant could not complain of a ruling concerning a question where there was nothing to show that the answer thereto would have been in his favor and he made no offer of proof.

Orville O. Clarke, Richard Schauer, Ben M. Shera, Los Angeles, for appellant.

Moss, Lyon & Dunn, Gerold C. Dunn, Henry F. Walker, Los Angeles, for respondent.

LILLIE, Justice.

Defendant was sued by plaintiff, an employee of Vinnell Co., a corporation, for damages arising out of an industrial injury in its steel plant. Pope, vice president of the corporation, was sued individually although Vinnell Co. was not joined as a party defendant, plaintiff having exhausted his remedies against it under the compensation provisions of the Labor Code. The matter was heard by a jury and, at the conclusion of plaintiff's case, defendant's motion for a judgment of nonsuit was granted. It is from this judgment plaintiff appeals.

[1] Taking all of the evidence in favor of appellant as true and disregarding that in conflict, and drawing on appellant's behalf every favorable inference and presumption fairly deducible and arising therefrom (Raber v. Tumin, 36 Cal.2d 654, 226 P.2d 574), the following is a fair summary of the pertinent facts.

Defendant Pope was a vice president in charge of the steel division of the Vinnell fabricating plant. Directly subordinate to him and in complete charge of the division was Rene Pfister, his superintendent, to whom he directly gave all orders and instructions. There is no evidence plaintiff ever saw defendant, had any dealings with him, or that he was present at the time of the accident.

Plaintiff started work in the steel division on July 12, 1954, on the swing shift as a "take-off" man on the "46" saw. He was told what to do but given no instructions relative to standing in the stacks, hooking loads of steel, using spreader bars, or giving hand signals. Later he did burring, drove drift pins and ran a punch press. A week or ten days before the accident, he was assigned to work as a helper with McHammer, an experienced mechanic fitter.

On the night of August 12, 1954, plaintiff and McHammer, fabricating and tack welding base plates on "I" beams, ran out of material. McHammer took him to the center of the bay where they found a stack of eight "I" beams, 40 feet long. The four on top were divided from the bottom four by 4″ X 4″ spacers. On top of the stack was a separate steel beam they had to first remove, and McHammer called over the bridge crane. There were two chains hanging from the hook of the crane and each chain ended in a hook. Plaintiff hooked his chain to the end of the beam, McHammer hooked his to the other end, and the crane lifted it away. When the crane returned, it moved over the stack and again let down the hook with the chains. McHammer attached his hook around the end of the top four "I" beams and plaintiff attached his around the opposite end. Plaintiff did not remember who gave the "up" hand signal to LaPlant, the crane operator, he or McHammer, but plaintiff started walking toward the end of the beams. He said he could have given the signal himself, and he could have done so before or as he was walking, but after walking ten or fifteen feet, the four bottom beams fell onto him, seriously injuring him. The top four plaintiff had hooked onto did not touch him, but the south end of the beams was held in mid-air by the chain hooked around it, attached to the crane;

the other end was down, the chain unhooked.

LaPlant, plaintiff's witness, testified that he *centered* the crane above the load and lowered the hook with the chains; that each man hooked his chain around opposite ends of the stack and when they finished hooking, both plaintiff and McHammer gave the standard hand signal to lift up, but that he looked down and shook his head "no"; that plaintiff looked at him, appeared angry and to be talking and again gave the "up" signal; that McHammer, an experienced mechanic fitter, who had previously directed his crane and who had been there all the time with plaintiff and knew his business, was also giving the "up" signal, so he commenced to take the slack out of the chains, moving as slowly as possible; that as he was tightening the chains preparatory to lifting the beams in the air, plaintiff's hook "must have come off" or the chain plaintiff "hooked either slipped or came unhooked" and the stack "creeled" eastward, and it appeared the top stack knocked over the bottom four beams onto plaintiff.

The evidence shows that the men on the night shift received no safety instructions relative to hooking steel or standing in the stacks while the crane was in operation; that although hooktenders worked in the shop on the day shift, none worked at night except in the yard; that if it was necessary to move stacks "everyone" hooked his own load of steel without trouble and no instructions were given that any particular man was to hook or tie loads of steel; that, although it was customary to take orders from mechanics, no instructions were given that any special worker was to give signals to crane operators; that those with no prior experience learned hand signals by watching others and everyone gave them when it was necessary; and that a copy of the Standard Crane Hand Signals in use by all crane men, printed by the Division of Industrial Safety, was posted on the plant bulletin board.

Except for defendant's testimony that he had nothing to do with plant safety, the only other evidence concerning it related to Pfister's responsibility to establish a safety program and carry it out, and what he did in that regard. Viewing the evidence in the light most favorable to appellant, we make no further comment except to say that defendant gave neither written or oral safety instructions, nor orders to anyone but Pfister, and that he knew of the hiring policy of Vinnell Co. to employ inexperienced men with no prior steel experience as helpers.

As to his experience, plaintiff testified he had been a pond engineer for a plywood company, but had operated an overhead bridge crane and learned crane hand signals. He also worked as an erection foreman for the Towt Wind Machine Co. Between July 12 and August 12, he did various jobs in the plant, including work as a helper to Bennett and then to McHammer. Immediately before the accident, plaintiff successfully hooked the chain on the one beam the crane moved away. He could not recall if he had ever seen any of the men hook or unhook loads, although he had often seen the overhead cranes lifting steel and moving it from place to place. He testified he had never hooked a load like this before, although he did know three different ways to fasten hooks on chains, describing them—"bring the chain down and around the load and bring the hook back up and hook it over the chain", "bring the chain down and around underneath the load and back up again, and (to) put the hook under the chain"; and the method he used on the load in question which he described in precisely the same manner as the customary and proper way outlined by his own expert witness Harris. Plaintiff described the method he used: "I brought the chain down around one side of the 'I' beams and brought it across and under the top four where there was a spacer separating it from the bottom four. I then brought the chain up on the other side. I took the hook on the end of the chain and hooked

it around the chain, itself." He did not recall if he fixed the hook over or under the chain on the load, but he further testified he attached the hook on the end of the chain "about the *center* of the web so that the hook was *centered* above the load." Harris described the proper method in the same way: "It is customary in tying loads for the man doing the tying to bring the chain down on one side of the load, around underneath it, and back up again. On this end of the chain there is a hook and when it is brought back up on the other side it is hooked back onto the chain, itself. In doing this, the man tries to hook the chain over the *center* of the load." Appellant's reliance upon his inexperience as having made it unsafe for him to act as hooktender, and for the crane operator to rely on his unauthorized hand signals, is misplaced in view of the uncontradicted evidence that plaintiff hooked the load in question properly. If a hooktender does this work, and the record is silent as to what a hooktender's functions and duties are, it is clear from plaintiff's own testimony that any lack of experience on his part had no connection with whether it was safe for him to act as a "hooktender" on the occasion of his injury, for he hooked the load in the proper and customary manner as it should have been done; and there is nothing in the record to show that it was anything plaintiff did or did not do that caused the hook to "come off" or the chain to slip or come unhooked. As to whether plaintiff's inexperience made it unsafe for the crane operator to rely on his "unauthorized" hand signal, it is clear that, although plaintiff may have given the "up" signal too, LaPlant did not lift the load in question until McHammer gave his signal. In any event, plaintiff himself testified that he knew the standard hand signals from having previously operated a crane.

At no time did plaintiff directly testify that he was inexperienced. Of interest is the fact that his own witness Bennett, a fitter, with whom he had worked as a helper, testified in response to plaintiff's own questions on direct examination, that he was a "good and experienced helper."

Appellant contends that (1) there is sufficient evidence in the record that defendant violated a duty of care he owed to plaintiff, (2) the issue of proximate cause should have gone to the jury and (3) the trial court erred in failing to permit his expert to answer several hypothetical questions.

Appellant, an employee of the same corporation employing defendant, seeks to establish in defendant, a supervisory co-employee, a personal duty to perform certain acts, and specifically charges that he failed to personally instruct him relative to safety, working in the stacks and hooking chains, and to provide him with a safe place of employment, in violation of certain nondelegable "duties" imposed upon him as an "employer," under the safety provisions of the Labor Code, Division V (relating to safe employment, safe places of employment and use of safe methods [Secs. 6400–6404, Labor Code]), safety orders issued by the Division of Industrial Safety (Division V, Part 1, Sec. 6500), and the common law.

At the outset, the record shows that Vinnell Co., the employing corporation, carried Workmen's Compensation Insurance; that plaintiff was entitled to its benefits, pursued his remedy against the corporation as his "employer" under the Workmen's Compensation provisions of Division IV, Labor Code, and received compensation from its carrier. Having exhausted his remedy against the corporation and being precluded from proceeding further against it (Labor Code, § 3601; Scott v. Industrial Accident Comm., 46 Cal.2d 76, 293 P.2d 18), plaintiff, seeking additional recovery for the same injury, now resorts to another part of the Labor Code (Division V) relating to safety to establish defendant, a vice president and employee of the employing corporation, as his "employer" and create in him a personal duty to perform the acts mentioned therein. Neither the record before us nor the law of this state supports such a position.

Section 6304, Division V, Part I, Labor Code, relating to safety, defines "employer" as having the same meaning as in Section 3300 under workmen's compensation, and shall also include "every person having direction, management, control, or custody of any employment, place of employment, or any employee." Appellant submits that based upon defendant's testimony he was in charge of the Vinnell steel division, he, a "supervisory co-employee" over plaintiff, a "subordinate employee" of the same corporation, became his "employer" under Division V and could not delegate any of his duties thereunder relating to workmen's safety. Maia v. Security Lumber & Concrete Co., 160 Cal.App.2d 16, 324 P.2d 657; Atherley v. MacDonald, Young and Nelson, Inc., 142 Cal.App.2d 575, 298 P.2d 700.

Defendant Pope, as any like officer in a large corporation, particularly one whose duties require him to be often absent from the plant, could not and did not personally supervise, or give any orders or instructions to, any employee of the 230 working in the steel division. He relied entirely upon his duly constituted plant superintendent, previously appointed by the president, to carry out all orders relative to supervision, work, equipment, safety, and place of employment. The following chain of command and responsibility at Vinnell Co. reveals the unrealistic position appellant assumes in attempting to hold defendant Pope personally liable. The Board of Directors was the top authority of the corporation. Directly subordinate to it was president Vinnell, under him McNamara the executive vice president, and then four vice presidents, one of whom was defendant Pope. Pope, vice president in charge of the engineering, purchasing and office departments, the heavy construction division and the steel division, was appointed by, and worked directly under, the president. Subordinate to Pope were two superintendents, one who ran the heavy construction division, and Pfister who was in complete charge of the steel division. Among the employees under Pfister were five foremen, all his personal appointees, under whom were three leadmen, and then the mechanic fitters, who each had a helper.

Pfister, the superintendent, had authority to hire and fire employees, place them in jobs and tell them what to do. He was responsible for and in charge of plant safety, for carrying out orders directly given by defendant, and instructing the workmen. At no time did Pope ever personally give orders or instructions to anyone else. Defendant was absent a good part of the time, his duties taking him away from California, all over and out of the United States.

[2] Obviously, the purpose of the safety provisions enacted in Division V is to provide protection for employees in their work, not to create an additional duty and corresponding personal liability in a supervisory co-employee of an employing corporation. If under the circumstances at bar Pope is to be classified as an "employer" of the kind contemplated by the Legislature in enacting the safety provisions in Division V, then every elective executive or appointive authority in any employing corporation might well be individually directly responsible to each of its thousands of employees, not for any positive act of negligence, but for every personal omission an employee might claim as a proximate cause of an industrial injury; and individually responsible for the failure of a subordinate down the chain of command to carry out the instructions given to his original agent. It would be virtually impossible for executive officials, presidents, vice presidents, and managing agents of large corporations to perform any of their regularly assigned duties if they were required to personally instruct each laborer as to work and safety. Of necessity, this must be left to the superintendent or foreman, and those immediately in control and management of the particular employee, his work and his place of employment. We do not believe under these circumstances the term "employer" under Section 6304 can be construed to include a person who exercises only *intermediate* control and neither the immediate direct con-

trol of a superintendent or manager, nor the ultimate control of the employing corporation itself, for whose benefit all of the work is done. A contrary construction would do violence to the very purpose and object of the safety provisions of Division V.

Appellant relies heavily on Atherley v. MacDonald, Young and Nelson, Inc., 142 Cal.App.2d 575, 298 P.2d 700 and Maia v. Security Lumber & Concrete Co., 160 Cal. App.2d 16, 324 P.2d 657, the former to show a dual control and agency relationship, which he believes to be similar to the one at bar; and both for the authority that defendant's duties under Division V, Labor Code, are nondelegable. We do not question that, if defendant is an "employer" under Section 6304, he is unable to delegate whatever statutory duties Division V imposes. However, these two cases neither require the finding that defendant is an "employer," nor establish liability against him as a superior co-employee. Atherley v. MacDonald, Young and Nelson, Inc., 142 Cal.App.2d 575, 298 P.2d 700, is not applicable to the factual situation at bar. A building owner and a contractor were sued by plaintiff, an electrical sub-contractor's employee, who was injured in a fall on an unfinished stairway in a building under construction, and both held liable because according to the evidence therein, particularly the agreement between the defendant owner and defendant contractor, both had "control" over the stairway. In Maia v. Security Lumber & Concrete Co., 160 Cal. App.2d 16, 324 P.2d 657, defendant corporation was sued by a business invitee for a positive act of negligence on the part of defendant's employee, who turned on a switch while plaintiff was inspecting a conveyor belt at defendant's manufacturing plant.

We find no authority for holding a person in defendant's position, who exercises neither immediate nor ultimate control over the workmen and their place of employment, an "employer" under Section 6304, Division V, Labor Code. In reality, if we were to hold defendant liable for failure to perform certain acts under Division V, we would, in effect, be establishing liability in a vice president of a corporation (an intermediate superior employee who is superior to his immediate sub-agent, the plant superintendent, but subordinate to the executive vice president, president, and board of directors) to a subordinate employee for nonfeasance. The record before us disclaims any positive or overt negligent act on the part of defendant. If he is guilty of negligence it must be based entirely upon his failure to perform a duty. Our attention has been directed to no authority for a cause of action by a subordinate employee against an intermediate co-employee guilty of no positive act of negligence.

[3] In the absence of active participation in an act of misfeasance, generally an officer of a corporation is not personally liable to a third person for nonfeasance. The court in Mears v. Crocker First Nat. Bank, 97 Cal.App.2d 482, 218 P.2d 91, involving an action in conversion, found a transfer officer and agent of a corporation not personally liable to a stockholder for a failure to transfer stock (nonfeasance) and held that although the failure might be wrongful and subject the corporation to liability, the officer and agent did not personally owe a duty to a third person and that section 2343, subd. 3, Civil Code, refers only to acts of misfeasance and not nonfeasance (97 Cal.App.2d 491, 218 P.2d 96). In Thomsen v. Culver City Motor Co., Inc., 4 Cal.App. 2d 639, 41 P.2d 597, an action for alleged conversion for selling certain automobiles to which plaintiff's assignor had been given bills of sale as security, plaintiff sued the corporation and two directors, one of whom was a vice president. The court found no liability on the part of the two directors who had no knowledge of, and did not participate in any wrongful act. Said the court, 4 Cal.App.2d at page 644, 41 P.2d at page 600: "While it is true, of course, that directors and officers of a corporation are liable equally with the corporation for its torts in which they participate, it is equal-

ly true that if they do not participate therein, and if they are guilty of no culpable negligence in allowing the commission of the wrongful acts, they are not liable."

The Federal courts have also recognized the distinction between misfeasance and nonfeasance in holding a superintendent, foreman, or supervisory employee not liable to a subordinate injured employee for failure to perform his master's duty of repair and inspection (Morefield v. Ozark Pipe Line Corporation, D.C., 27 F.2d 890; Plunkett v. Gulf Refining Co., D.C., 259 F. 968). In the Plunkett case, plaintiff, an employee thereof, sued the corporation and its superintendent. The latter failed to notify plaintiff of a false bottom on a tank of tar. In releasing the superintendent from liability for personal injuries to plaintiff, a subordinate employee, the court said, at page 971: "The most that the defendant Plunkett could be responsible for is for not telling the plaintiff of this false bottom and that it was likely to fall, and that is clearly nonfeasance. And it is well settled, I think, by the authorities, that for mere nonfeasance an employe of a corporation will not be liable to a third person for injuries received."

[4, 5] Although appellant on oral argument disclaimed the application of the doctrine of *respondeat superior*, we briefly mention it because of the basic relationship between the parties and our conclusion defendant is not an "employer" within the meaning of Division V. If, however, defendant is to be classed as a manager or supervisor, who himself committed no positive acts of negligence, but whose subordinate employees (Pfister and those responsible for carrying out his orders) have failed to do certain acts, under prevailing authority there is still no liability to plaintiff. Section 2351, Civil Code, and the cases interpreting the same clearly exempt superior employees from liability from the tortious acts of subordinates. Malloy v. Fong, 37 Cal.2d 356, 232 P.2d 241; Bowers v. Olch, 120 Cal.App.2d 108, 260 P.2d 997; Bond v. Pitzer, 163 Cal.App.2d 1, 328 P.2d 1009; 33 Cal.Jur.2d, Sec. 110, Master & Servant, page 541. The Supreme Court in Malloy v. Fong, 37 Cal.2d 356, at page 378, 232 P.2d 241, at page 254, said: "The doctrine of *respondeat superior* is not applicable to the relationship between a supervisor and his subordinate employees. The supervisor occupies an economic and legal position quite different from that of the employer. It is not the supervisor's work that is being performed, nor does he share in the profits which the employees' conduct is designed to produce. In the usual situation, furthermore, he, like his subordinates, is a wage earner, and he is seldom able to respond in damages to an appreciably greater extent than they. For these reasons, the law has shifted financial responsibility from the supervisor, who exercises immediate control, to the employer, who exercises ultimate control and for whose benefit the work is done. (Citation.) Section 2351 of the Civil Code codifies this principle and has been uniformly interpreted to exempt superior employees from vicarious liability * * * (Citations)."

No case cited by appellant deals directly with the primary issue here involved, although he has called our attention to various cases which, because of obvious factual dissimilarities, are not helpful; and extensive comment on the Restatement of the Law of Agency which cannot prevail over statutory provisions. We conclude that as a matter of law defendant personally owed no duty to plaintiff upon which he could predicate an action for negligence.

On the issue of negligence, we refer briefly to the four causes of action in the complaint which alleged substantially as follows: it is "extremely hazardous and dangerous" for employees to work near overhead cranes in operation; to affix hooks and chains to stacks of steel it is necessary for an employee to work in the stacks, and if he remains therein after hooking a load he is exposed to unreasonable risk and harm; crane operators should be directed not to lift steel while employees are in the stacks; the work of

stacking steel beams and plate is "highly involved and technical and requires special skills, training and knowledge," and that of affixing chains and hooks is "dangerous and hazardous" if improperly done; Vinnell Co., on the night shift, had no hooktender whose sole duty it is to stack steel beams and plate and affix chains and hooks, the work being done by employees without skill, knowledge or training, and reasonable care required hooktenders be employed; the lifting and moving of steel beams 40 feet long requires the use of a "spreader bar" to prevent beams from falling, and reasonable care required that they be used; and defendant negligently issued inadequate orders, or orders, that employees work between the stacks after hooking a load while the crane is in operation, that crane operators lift the stacks although employees were present therein, that plaintiff perform the duties of a hooktender, and that 40-foot steel beams be lifted without the use of a "spreader bar."

The record is devoid of any evidence that working near overhead cranes, under the circumstances described, is "extremely hazardous and dangerous," exposed an employee to "unreasonable risk and harm" or constituted a danger; nor could such be inferred from the mere fact that plaintiff was injured. We find nothing in the evidence to the effect that remaining between the stacks created "unreasonable risk and harm" or that crane operators should be directed not to lift steel plate while employees are in the stacks. Although LaPlant was instructed to be careful at all times, "to take it easy," and make no lift of steel over the men without their knowledge and without receiving hand signals from a leadman, this alone is insufficient to constitute evidence that generally crane operators should be directed not to lift steel while employees are in the stacks. The record is bare of evidence that the work of stacking beams is "highly involved and technical and requires special skills"—on the contrary, it shows that no special instructions were given relative to hooking steel, employees learned from observation, "everyone in the plant" hooked chains, "anyone who wanted to move a load hooked his own load," and "it was customary to let anyone" do the hooking. All learned hand signals by watching others and hooked chains and moved stacks of steel without incident. Absent in the evidence is any complaint concerning these practices, or any finding they were unsafe or in violation of safety orders by any inspector of the State Division of Industrial Safety. Plaintiff's expert Smith testified that, if a safety inspector after inspection makes no objection, the presumption is that the practices in the plant are safe. Nor is there any evidence concerning the functions of hooktenders, what they do, or that reasonable care requires they be employed. The fact they were employed on the day shift is alone not sufficient evidence to show they should have been on the night shift. Although there is testimony "it is customary in the industry to have hooktenders give the signal to the crane operators *if* they were employed," there is no showing they had to be, or should have been, employed. The only testimony relating to "spreader bars" is that given by defendant to the effect they are generally used in the steel industry in lifting steel plate and heavy loads, and were available to Vinnell and used when needed. The record is clear that defendant gave no orders, directions or instructions of any kind, written or oral, adequate or inadequate, to anyone but Pfister. There is no evidence that defendant ever personally ordered plaintiff, or any employee, to work anywhere under any circumstances at any time. This applies with equal force to any allegation that defendant ordered plaintiff or anyone else to perform the duties of a hooktender, or that he gave instructions to anyone relative to when "spreader bars" should be used.

[6–9] Applying the rules that the burden is on plaintiff to prove the existence of every essential fact upon which he re-

lies (McKellar v. Pendergast, 68 Cal.App. 2d 485, 489, 156 P.2d 950); "substantial evidence is required to establish each essential affirmative allegation," and "a scintilla of evidence is not sufficient for that purpose" (Oldenburg v. Sears, Roebuck & Co., 152 Cal.App.2d 733, 741, 314 P.2d 33, 36) and "(W)hile all reasonable inferences are to be drawn from the evidence and all conflicts to be resolved in plaintiffs' favor, nevertheless the inferences cannot be based upon speculation or conjectures, but must be based upon 'a fact legally proved'." (Secs. 1958, 1960, Code of Civil Procedure, Farmer v. Fairbanks, 71 Cal.App.2d 70, 80, 162 P.2d 26, 32), we are satisfied that plaintiff has not sustained his burden of establishing by evidence of sufficient substantiality that any act or omission of defendant constituted actionable negligence. In fact, the record reveals such a lack of evidence supporting plaintiff's allegations of negligence as would more than justify the trial court in taking the case from the jury.

[10] Our conclusion is the same on the issue of proximate cause. Plaintiff not only had the burden of establishing actionable negligence, but that it operated as a proximate cause of his injury. This cannot rest on guess, conjecture, speculation or surmise, and must be established by substantial evidence (Petersen v. Lewis, 2 Cal. 2d 569, 42 P.2d 311; Union Investment Co. v. San Francisco Gas & Electric Co., 168 Cal. 58, 141 P. 807; Puckhaber v. Southern Pac. Co., 132 Cal. 363, 64 P. 480; Delk v. Mobilhomes, Inc., 118 Cal.App.2d 529, 258 P.2d 75).

As to why the beams fell, the most the evidence establishes is that while the crane operator was tightening the chains preparatory to lifting the top stack in the air, plaintiff's hook "must have come off" or the chain plaintiff "hooked either slipped or came unhooked," the top stack knocking the bottom one onto plaintiff. The record likewise shows without contradiction and from plaintiff's own testimony that in hooking the load in question, plaintiff did so in precisely the exact manner his expert witness described was the customary and proper way a load should be hooked. In view of this evidence, and the lack of any proof as to why the hook came off or why the chain slipped or came unhooked, it is obvious no proximate cause could arise either from any failure to instruct plaintiff in hooking or because of his inexperience. For the same reason, any failure to provide hooktenders could not have been a proximate cause, even considering plaintiff's expert who testified it was not a common practice and did not conform to standards to permit an "inexperienced" man to hook beams. The record does not disclose a hooktender's duties, nor is there any proof that had one been present the accident would not have occurred, since plaintiff centered and properly hooked the load in question. The same applies with equal force to the giving of signals to the crane operator. Having operated an overhead bridge crane, plaintiff knew the standard signals, but of more importance is the uncontradicted testimony of LaPlant that although both gave the "up" signal, he did not lift the load in question until McHammer gave the signal the second time. He actually took the signal from a "qualified" employee. As to a "follow up on safety," there was no evidence that had defendant personally done so the injury would or could have been prevented.

The evidence does not reveal the cause of the fall of the lower stack on plaintiff except that the hook came off, or the chain slipped or came unhooked, none of which has been shown to have been proximately caused by any of the matters charged. We are satisfied there was not sufficient substantial evidence establishing proximate cause requiring the submission of the case to the jury.

Appellant's last point concerns the trial court's rulings on objections to four hypothetical questions, propounded to plaintiff's expert. To each question an objection was interposed by defendant and sustained. In no instance did plaintiff make an offer

of proof as to what answer the witness would have given.

[11, 12] The first question related to whether it was a safe practice to permit a fitter's inexperienced helper to hook chains around a load of 40 foot "I" beams. Among others, the objection was that the question invaded the province of the jury. An expert cannot, as a general rule, be questioned as to whether certain methods are prudent, or machinery or conditions safe, as invading the province of the trier of fact. Sappenfield v. Main St. & A. P. R. Co., 91 Cal. 48, 59, 27 P. 590; Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 P. 307.

The same applies to the question relating to whether it was within the safe practices of the community "to require and permit" an inexperienced man working in a steel fabricating plant to give signals to crane operators to lift and move loads. We also fail to see the materiality of the answer, assuming it to be in the negative, for there was no evidence plaintiff was required to give any signal, and although permitted to do so, he not only knew the standard hand signals but the crane operator would not, and did not, proceed to lift the load until a "qualified" mechanic also gave the "up" signal, which he followed.

[13] Concerning the question as to the custom in the Los Angeles area concerning a new employee reporting to work in connection with safety instructions; besides appearing to be completely outside the issues raised by the pleadings, appellant is in no position to complain of the ruling, for there is nothing in the record to show that the answer to the question would have been in his favor. He made no offer of proof and we have no way of determining whether the evidence would have been beneficial to him. (Hogan v. Miller, 153 Cal. App.2d 107, 314 P.2d 230; Ogden v. Title Ins. & Trust Co., 129 Cal.App.2d 26, 276 P.2d 146; Duff v. Schaefer Ambulance Service, Inc., 132 Cal.App.2d 655, 283 P. 2d 91), nor can we assume that the answer would have been favorable to him (MacDonnell v. California Lands, Inc., 15 Cal.2d 344, 101 P.2d 479).

Without repeating the matters heretofore discussed in connection with the other three questions, we find no error in the court's ruling sustaining the objection to the question whether the failure to use hooktenders on the night shift in a plant similar to Vinnell Co. conforms to the practice in the Los Angeles area.

For the foregoing reasons the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



168 Cal.App.2d 429

Goldie J. EDISON et al., Plaintiffs and Respondents,

v.

LEWIS MANUFACTURING CO., a co-partnership, et al., Defendants,

North & Judd Manufacturing Co., Appellant.

Civ. 23172.

District Court of Appeal, Second District, Division 1, California.

March 6, 1959.

Rehearing Denied April 2, 1959.

Hearing Denied April 29, 1959.

Action for death of oil derrickman as result of alleged defect in ring manufactured by defendant and incorporated into safety belt manufactured by another. The Superior Court of Los Angeles County, Samuel R. Blake, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, White, P. J., held that evidence had raised question for jury as to whether defendant had been free from actionable negligence in construction and testing of its rings.

Affirmed.

1. Judgment ⇐199(3.10)
Trial ⇐139(1)

Defendant's motions for directed verdict or for judgment notwithstanding verdict may be granted by trial court only when, disregarding conflicting evidence, giving to plaintiff's evidence all value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, result is a determination that there is no evidence of sufficient substantiality to support verdict in favor of plaintiff.

2. Negligence ⇐27

That ring manufactured by defendant was merely a component part of safety belt manufactured by another would not preclude defendant from being liable for death of oil derrickman as result of defect in ring.

3. Negligence ⇐136(18)

In action for death of oil derrickman as result of alleged defect in ring manufactured by defendant and incorporated into safety belt manufactured by another, evidence raised question for jury as to whether defendant had been free from actionable negligence in construction and testing of its rings.

4. Negligence ⇐127

Evidence of lack of prior accidents is not admissible to prove due care.

5. Negligence ⇐24

Ring manufacturer's knowledge of fact that rings were being incorporated into safety belts used for purpose of arresting a man's fall, and that they therefore might be subjected to "shock loads", made vigilance a duty.

6. Negligence ⇐136(26)

In action for death of oil derrickman as result of alleged defect in ring manufactured by defendant and incorporated into safety belt manufactured by another, evidence did not require finding as a matter of law that decedent had been contributorily negligent with regard to length of rope he used in his work.

Parker, Stansbury, Reese & McGee, and A. P. G. Steffes, Los Angeles, for appellant.

Miller, Jones & Tollefson, Philip F. Jones, San Fernando, for respondent.

WHITE, Presiding Justice.

This action was instituted by plaintiffs, the widow and minor children of Edward L. Edison to recover damages sustained by them and resulting from his death when he fell from an oil well derrick on December 15, 1953. Trial was had before a jury which returned a verdict in favor of plaintiffs and against defendant North & Judd Manufacturing Co., a corporation, for the sum of $79,000. From the judgment entered upon the verdict, and from the denial by the trial court of its motion for judgment in its favor notwithstanding the verdict, defendant North & Judd Manufacturing Co. prosecutes this appeal.

When the presentation of evidence had been concluded, said defendant moved the court for a directed verdict, which motion was denied.

There has been presented to this court a written stipulation limiting the issues to be determined on this appeal. In that regard, the stipulation reads as follows:

"1. Defendant-Appellant North & Judd Mfg. Co., will limit its appeal herein to a determination of whether the trial court erred in denying said defendant-appellant's motion for a directed verdict in favor of said defendant, and whether said court further erred in denying the motion of said defendant-appellant for a judgment in its favor notwithstanding the verdict of the jury.

"It Is Further Stipulated that said defendant-appellant expressly waived its right to a new trial herein at the time of the hearing of its motion therefor on September 30, 1957, and does now waive any claim or right to a reversal of the judgment and/or order appealed from herein, except a reversal with directions to enter judgment in favor of said defend-

ant-appellant. It is specifically understood that the defendant-appellant intends to show:

"*First*: That, considering all competent evidence, and all proper inferences and deductions therefrom, there is no substantial evidence in the record to prove any negligence on the part of said defendant-appellant, which proximately caused the death of Edward L. Edison; and

"*Secondly*: That, in any event, the deceased was contributorily negligent as a matter of law." No errors are urged, predicated upon the admission or rejection of evidence or in the giving or refusing of any instruction.

Insofar as material to the disposition of this appeal, the factual background surrounding this litigation may be epitomized as follows: On December 15, 1953, Edward L. Edison, 33 years of age, was employed by the firm of Kee & Simpson, in Ventura County, California, as an oil derrickman, a job which he had held for some time prior thereto. In this capacity, Edison on that date was working on an oil derrick at a point about 90 feet from the ground, and was wearing a safety belt furnished by his employer for his protection in the event that he should slip and fall. Attached to the back of this safety belt, there was a D-shaped metal ring which was manufactured by bending a short steel rod into shape and then welding the two ends together in the center of the ring's straight side. The straight side of this ring was enclosed by a close fitting metal sleeve or tube, and by the belting itself, so that it was not visible or subject to visual inspection. This ring was inserted into the back of the safety belt by the belt manufacturer for the purpose of securing a rope or line thereto, which is in turn anchored at its other end to the derrick on which the man is working. This is the manner in which the belt and ring were being used by Edison on the date mentioned.

The D-ring on the back of decedent's safety belt was manufactured by defendant North & Judd Mfg. Co. The safety belt worn by Mr. Edison at the time of his death was purchased by a Mr. Crabtree, the foreman for Kee & Simpson, Edison's employer, on June 13, 1952. The belt was purchased from Bethlehem Supply Company, according to the purchase records of Kee & Simpson. It was referred to as a "Weco-Lewis Derrickman's Safety Belt" in the purchase invoice. "Weco-Lewis" is one of the trade names for a derrickman's safety belt manufactured by a Mr. Charles T. Lewis, doing business as Lewis Manufacturing Company, in Oklahoma. Mr. Lewis bought all D-rings for his safety belts exclusively from defendant North & Judd Mfg. Co., and had been doing so throughout the years 1938 through 1953. These rings, including the one on Edison's belt, were stamped with a number "4041", the word "tested", and an anchor trademark. When received by Lewis the D-rings were enclosed in a metal roller or sleeve on the straight side. Lewis had originally used a D-ring without markings, but changed to the number 4041 ring in 1938 when he saw it pictured in defendant North & Judd's catalogue under the heading of "Safety Hardware", bearing the word "tested". In making the change to this ring, Lewis relied on the representation in defendant North & Judd Mfg. Company's catalogue that the ring was tested safety hardware. During the years 1951 through 1953 Lewis manufactured and sold about 3,000 belts per year, and never had belts in stock for more than 30 days from the date of their manufacture to date of shipment to purchasers. During this same period Lewis purchased the 4041 D-rings for his belts from defendant North & Judd in lots of between 500 and 1,000. He received shipments of such rings from North & Judd every month or two.

Lewis sold his belts to oil field supply companies, and according to his business records, Bethlehem Supply Company customarily ordered and was supplied such belts by Lewis under the designation "Weco-Lewis". According to the records of the Bethlehem Supply Company, its Los Angeles office transferred four "Weco-

Lewis" safety belts, without straps, to its Castaic store on March 29, 1952, one of which was the one sold to Kee & Simpson, decedent's employer, on June 13, 1952. These four were part of a shipment of twenty belts ordered from the Lewis Company and received on August 1, 1951, by the Los Angeles office of Bethlehem Supply.

Defendant North & Judd Manufacturing Company, through its agents, knew the use to which Lewis was putting its 4041 D-ring, at least since the year 1946, and the exact manner in which the D-ring and belts were being used. Its sales agent called on Lewis every 90 days following World War II, and always discussed the product manufactured by Lewis. In addition, at the request of defendant North & Judd Manufacturing Company's home office, Lewis furnished said defendant with his illustrated catalog, showing the manner in which the latter's D-rings were used in a Lewis derrickman's safety belt, and the purposes for which the belt was intended. During all the years prior to the accident defendant North & Judd Manufacturing Company represented its D-ring as being "thoroughly tested", never indicated any concern over the soundness of each D-ring it sold to Lewis for his known purpose, and never suggested that some other type of ring would be more suitable. However, after being informed by Lewis of the accident in which Edison was killed, said defendant subsequently wrote to Lewis and admitted that a portion of its welded hardware which passed its production tests was not reliable where shock loads were involved.

Defendant North & Judd Manufacturing Company, through its home office sales manager, knew of the use of its welded D-ring by other safety belt manufacturers as well as Lewis. Other than its use in safety belts and associated equipment, no other uses or intended uses for this D-ring are revealed by the record on appeal.

Defendant North & Judd Manufacturing Company's manufacturing, testing and inspection processes for its number 4041 D-ring were the same for the years 1950 through 1955. The first step of the manufacturing process consisted of cutting and forming the rings from large coils of ⅜-inch wire, composed of a low carbon steel. The rings were then cleaned and welded. The welding operation was performed by an electric welding machine in a process known as "butt-welding" or "resistance welding". This is a method by which the ends of the metal to be joined are welded together in an instant by the machine, through an intense electric current which heats the metal ends to a plastic state accompanied by great mechanical pressure, or "push-up".

Following the welding operation the rings were smoothed by tumbling in sand and water and then subjected to the defendant manufacturer's testing machine. This machine put a concentrated outward bending force against the inner edge of the ring at the weld, by means of a lever which slowly applied and then withdraw a 582-pound load at that point on the ring. Each of the 4041 D-rings marked "tested" were subjected to this loading test. Each ring was then placed in a form the same shape as the ring in order to determine that the ring had retained its original shape. At the same time each ring was visually inspected for visible fractures in the weld. The rings were then plated, stamped as heretofore described, and enclosed in a sheet metal roller on its straight side so that the weld was no longer visible. The procedure just described was the complete testing method used by defendant manufacturer, and no other tests were given to the product. Some of the rings welded by said defendant's machines failed to pass its testing procedure. The number of "rejects" varied from day to day. The foregoing evidentiary narrative presents the evidence in a light most favorable to plaintiffs, as we are required to do on appeal by defendant. However, appellant, while admitting that the "D" ring was manufactured by it nevertheless, contends that, "There is no evidence in the entire record which either

directly or indirectly shows that appellant or any of its officers, agents or employees or Lewis Manufacturing Co. or anyone connected with that company or any other person whatsoever had any knowledge, information or belief that any 'D' ring manufactured by appellant and sold to Lewis Manufacturing Co. since 1937 and prior to the accident, contained any defect whatsoever in the weld or otherwise. More specifically there is no evidence whatsoever in the entire record that the method of manufacture and testing used by appellant when it manufactured Exhibit 5 (the D-ring) was not according to sound and accepted engineering principles." Appellant North & Judd Manufacturing Company does not dispute the fact that knowledge was imputed to it, from information received by its salesman in Oklahoma of the fact that the "D" ring was being used in a safety belt manufactured and sold by Lewis Manufacturing Co. Appellant further insists that there is no evidence in the record that prior to the weld being broken the unwelded portion was visible in any way upon inspection. That all evidence was to the contrary and the defect, if it can be called a defect, was *latent.*

Under the foregoing stipulation the only issue to be determined on this appeal is whether the trial court erroneously denied appellant's motions for a directed verdict and for judgment notwithstanding the verdict.

[1] In the determination of this issue we are confronted with the well established rule that such motions may be granted by the trial court only when "disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff." Tremeroli v. Austin Trailer Equip. Co., 102 Cal.App.2d 464, 478, 227 P.2d 923, 932; Garcia v. San Gabriel Ready Mixt, 155 Cal.App.2d 568, 571–572, 318 P.2d 145.

By their complaint, respondents charged appellant with negligence in that the fatal fall of Mr. Edison was caused solely and proximately because the "D" shaped ring on the safety belt was "defectively and weakly constructed and manufactured" by appellant, and that said "D" ring was "* * * not capable of withstanding the strain of a fall by any person wearing the same", all of which it was alleged was "* * * known or should have been known * * *" by appellant at the time it manufactured the "D" ring and sold it to Lewis Manufacturing Co.

[2] Relying on the case of Stultz v. Benson Lumber Co., 6 Cal.2d 688, 690, 691, 59 P.2d 100, 102, appellant asserts that the manufacturer of a component part which is assembled or incorporated into a finished product is not liable for negligence. In other words, that the liability, if any, applies only to the manufacturer of the finished product (Lewis Manufacturing Co., herein), and not to "manufacturers of the component parts" (appellant herein). As we read the case just cited we are impressed that while the court discussed the question, it did not actually decide it. Appellant concedes that the decision which affirmed an order sustaining a demurrer without leave to amend was based on the ground that the alleged negligent conduct of the manufacturer of the "finished product" constituted an intervening cause. However, whatever may be said of the portective arm thrown around the manufacturer as a general rule, we are satisfied that the trend of judicial decisions has been to establish exceptions to this general rule and to extend these exceptions to include additional classes of cases not heretofore included.

That such is the rule in California was emphasized by our Supreme Court in the case of Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, at pages 231, 232, 34 P.2d 481, at page 482 wherein it is said: "The language of Mr. Justice Cardozo, while a

member of the New York Court of Appeals, in the case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1053, Ann.Cas.1916C, 440, L.R.A.1916F, 696, seems appropriate: 'We hold, then, that the principle of Thomas v. Winchester, [6 N.Y. 397, 57 Am.Dec. 455], is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. * * * In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.'

"The same learned justice, in his work entitled 'The Growth of the Law,' comments further upon this subject as follows (The Growth of the Law, 1924 Ed., p. 77): 'The development is merely a phase of the assault, now extending along the entire line, upon the ancient citadel of privity. In New York, there is a remedy in tort, regardless of privity, against the negligent manufacturer, where the subject of the manufacture is likely to be dangerous to life. MacPherson v. Buick Motor Co., 217 N.Y. 382 [111 N.E. 1050, Ann.Cas.1916C, 440, L.R.A.1916F, 696]. The things classified as dangerous have been steadily extended with a corresponding extension of the application of the remedy. They began with Thomas v. Winchester, 6 N.Y. 397 [57 Am.Dec. 455], and the sale of poisons. They have been widened until they include a scaffold (Devlin v. Smith, 89 N.Y. 470 [42 Am.Rep. 311]) or an automobile (MacPherson v. Buick Motor Co., supra), or even pies or cakes when nails and other foreign substances have supplied ingredients not mentioned in the recipes of cook books.' " See also O'Rourke v. Day & Night Water Heater Co., Ltd., 31 Cal. App.2d 364, 366, 88 P.2d 191. In Sherward v. Virtue, 20 Cal.2d 410, 414, 126 P.2d 345, 347, the court said: "The appropriate standard of care applicable to the facts of the present case is expressed in O'Rourke v. Day & Night Water Heater Co., Ltd., supra, to the effect that if the defective condition of the part could have been disclosed by reasonable inspection and tests, and such inspection and tests had been omitted, the defendant has been negligent. In Smith v. Peerless Glass Co., Inc., 259 N.Y. 292, 181 N.E. 576, it was held that reasonable care consisted of making the inspections and tests during the course of manufacture and after the article was completed which the manufacturer should recognize were reasonably necessary to secure the production of a safe article."

The principle was also discussed in the leading case of Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576, 577, as was also the fact that Justice Cardozo had left the question open in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440. The court had this to say: "* * * The doubt seemed to hang on the problem of causation. Whatever was shadowy then in respect to the principles both of negligence and of causation has vanished in the light of subsequent decisions." (Citations omitted.)

"* * * There emerges, we think, a broad rule of liability applicable to the manufacturer of any chattel, *whether it be a component part or an assembled entity.* Stated with reference to the facts of this particular case, it is that, if either defendant was negligent in circumstances pointing to an unreasonable risk of serious bodily

injury to one in plaintiff's position, liability may follow *though privity is lacking.*" (Emphasis added.) See also Willey v. Fyrogas Co., 363 Mo. 406, 251 S.W.2d 635, 640, 641; American Radiator & S. S. Corp. v. Titan Valve & Mfg. Co., D.C. N.D.Ohio 1956, 144 F.Supp. 841, 847.

[3] However, whether or not, as contended by appellant, the evidence shows, *as a matter of law,* freedom from actionable negligence in the construction of the "D" ring, presents a more serious question, and necessarily involves an analysis of the testimony offered by respondents to establish their claim in that regard. Appellant earnestly urges that no showing whatsoever was made that the defect in the particular "D" ring here involved could have been discovered by the exercise of ordinary care. That therefore, since respondents' evidence showed that the alleged defect was *latent,* to hold appellant liable without any further showing of knowledge on its part would be to hold that appellant was an absolute insurer. It is argued that prior to the accident appellant had sold on the average of 2,500 "D" rings per year over a 15-year period, or in other words, had sold approximately 37,500 "D" rings to Lewis Manufacturing Co. and there is no evidence that appellant ever received any complaint concerning this product or had any knowledge or notice that any of the "D" rings were only partially welded or were in any way defective. That the mere breaking of the ring, if it actually was broken in the fall of Edison, could not give rise to an inference that appellant was negligent in failing to discover the defect at the time it manufactured this "D" ring. In support of this contention, appellant relies heavily upon the case of Trust v. Arden Farms Co., 50 Cal.2d 217, 220, 324 P.2d 583, wherein it was held that the manufacturer and purveyor of a bottle were not insurers. However, in that case, 50 Cal.2d at page 221, 324 P.2d at page 585 the court said: "Unless we are prepared to hold defendant as an insurer, it is hard to see how else it could be held responsible without some showing that its opportunity to exercise care was in some measure proportionate to the duty imposed—without some showing *that a more thorough inspection would have been effective.*" (Emphasis added.) In the case at bar there was expert testimony that the ends of the broken "D" ring had never been welded together in the central portion, in an area amounting to about one-fourth of the total cross-section of the ring, and that the ring broke at the point of the weld as a result of a "dynamic" or "shock" load. Dr. Clark, an expert witness, further testified that in order to produce a weld on a D-ring such as the one involved in this action which would be as strong as the rest of the ring, it should have a complete joint, with the same grain structure and composition of metal as the parent metal itself. In answer to appellant's contention that to discover a defect in the D-ring a "destructive" test would be required, that is one which after its use would destroy any future commercial use of the ring, Dr. David Wood, a professor of mechanical engineering at California Institute of Technology, described and illustrated a *non-destructive* method of testing the D-ring which he termed a "sizing operation". According to this expert, such a method would be more likely to reveal a hidden defect in the weld than appellant's test, and would simulate a condition of shock loading. *He testified that sizing operations had been used in the metal industry for a long time prior to 1950,* and that such sizing operations are used to test flash welds. After explaining the effect of stress concentration on the strength of a material, Dr. Wood stated that in one case he knew of, where the effect had been measured by experiment, the breaking point in a low carbon steel used in ship-building, and similar to the D-ring material, had been found to be as low as one-fifth the normal strength of such steel when a stress concentration was present.

In reply to a hypothetical question assuming the circumstances of Edison's fall, Dr. Wood testified that the force produced

under such circumstances would exceed 4,000 pounds. In fact he estimated that the fall in this case resulted in a maximum force of 4,800 pounds. He also stated that the absence of weld in the central portion of Edison's D-ring was, in his opinion, the cause of the ring's fracture when Edison fell.

The witness further testified that the load carrying capacity of the entire D-ring itself, as compared to the rod of which it was composed, would be slightly less than twice as much, assuming the weld was complete; in other words, a completely welded D-ring would require almost twice as much load to break it as would a straight piece of the rod from which it was made. Dr. Wood explained this by pointing out that pulling the ring to fracture would deform it to the point where there would finally be a rough similarity to two wires being pulled in tension. This was corroborated by appellant's own expert, who produced records of the breaking point of several of appellant's D-rings which he had actually pulled to destruction. They broke at loads varying from 9,600 pounds to 10,000 pounds.

Another expert witness, Robert Hiller, a metallurgist and testing engineer, testified he was Technical Director for Triplett & Barton, Inc., a materials testing laboratory, particularly in the metallurgical field. That through his work and experience he was acquainted with the flash-welding method of production welds, including metal parts as small as three-eighths of an inch in diameter. He declared that he was familiar through experience, background and training with the various non-destructive methods of testing and that his experience in this field extended back to 1945 or 1946.

Mr. Hiller also testified that he was familiar with the testing and inspection procedures that would be in accordance with good engineering principles, insofar as ascertaining that the weld in a flash-welding process, such as used in manufacturing the appellant's D-ring, was at least as strong as the parent metal itself. Mr. Hiller was then asked what would be a good test and inspection process for the D-ring in order to determine that the weld was at least as strong as the parent metal. He stated the only way to be absolutely certain of this would be to break the weld in tension, a destructive test. *As to a suitable non-destructive inspection method for such welds, however, which would be in accordance with good engineering practice,* he said that *the only reliable and satisfactory procedure* found for flash-welds was to subject them to a suitable predetermined proof-load test across the weld. He further pointed out that proper inspection on an item such as appellant's D-ring required adequate controls for the equipment used in the process, as well as the product. In this regard, he stated that there are engineering procedures which it is good practice to carry out with relation to the equipment. In the case of flash-welding equipment, Hiller stated that one of the methods commonly used to check the machine settings, in order to insure consistency, *is to make sample joints at the beginning of each day's production which are then tested to destruction in order to make certain the weld being produced is as strong as the base metal. Once the settings were checked by this method and the weld thereby produced found to be satisfactory, Hiller testified, production for the day could be commenced. Then, periodically during the day's production, a sample should be tested to destruction to insure continued satisfactory performance.* He stated that in the case of appellant's D-ring one or two rings being so tested from each batch or shipment as made would be a relatively economical and satisfactory method of checking on consistency, because the welding machines tend to make a rather uniform job, within limits. *If the machine controls get out of line, he said, to the point of making a faulty weld, there is a good probability that the ones following will also be faulty, and the inspection control he recommended would protect against that sort of process defect.* He stated that in his opinion such a method of testing or

inspection would be desirable, in accordance with good engineering principles, in addition to a non-destructive proof-loading on the rings. *He further testified that these inspection processes were in effect since the middle 1940's, to his knowledge.*

When appellant's production test (Exhibit 25) was described to Mr. Hiller, he stated that such a test would be particularly sensitive to defects on the top side of the weld but particularly insensitive to defects on the bottom side, and not very sensitive to defects in the interior or center portion. On cross-examination Hiller described a proof-loading method conducted by his firm for welded air cargo rings. He stated that they had tested a great many of these rings, and that they were of a similar diameter to appellant's D-ring. He then described the method used in proof-loading these rings, which was the same as the method recommended by Dr. Wood (sizing operation) insofar as applying a tensile pull to the weld by means of close-fitting jigs, rather than the bending force used in appellant's test. He pointed out that this arrangement, which he diagrammed while testifying *made it possible to subject the weld joint to a much higher test load, without deforming or stretching the ring, then would be possible with appellant's testing method.*

Appellant's procedure from the first step of the manufacturing process for its D-rings until the completion thereof has heretofore been set forth in detail and need not here be repeated. We are satisfied that under the state of the evidence herein it cannot be said that as a matter of law, under the foregoing rules enunciated, appellant was free from actionable negligence in the construction and testing of its D-rings, and therefore, it was a proper question of fact for the jury as to whether feasible means of discovering defects in the D-rings were available to appellant and whether it was shown that more reasonably practicable methods of testing were used in the industry than the method of testing adopted by appellant. In other words, did appellant's testing of its D-ring welds meet the standard of sound and accepted engineering practices in the flash-welding industry? Manifestly, under the conflicting evidence presented by the record before us, that was a question to be resolved by the duly constituted arbiters of the facts.

[4] Appellant contends that, "In view of the absolutely perfect 'service experience' of the defendant up to the time it manufactured and tested the ring in question, how can it be said that the defendant was negligent in continuing to use the same method of manufacturing and testing its 'D' rings?" As heretofore pointed out, prior to the accident appellant had sold approximately 2,500 D-rings per year over a period of fifteen years without any complaint concerning the product. But there is no evidence when if ever appellant's product was subjected to the ultimate test of dependability—the fall of a worker wearing one or a "drop test". Furthermore, evidence of no previous accidents is not admissible to prove due care (Thompson v. B. F. Goodrich Company, 48 Cal.App.2d 723, 729, 120 P.2d 693; Owen v. Rheem Mfg. Co., 83 Cal.App.2d 42, 50, 187 P.2d 785.

[5] Appellant earnestly urges that it had no knowledge or information from which it could determine the required strength of any D-ring which it manufactured and sold to Lewis Manufacturing Co. However, it is conclusively shown that appellant was apprised of the fact that the ring was put in a safety belt for the purpose of arresting a man's fall, and therefore could be subjected to a "shock load". This knowledge of a known danger, upon a known use, makes vigilance a duty. Appellant also held out its product as "tested safety hardware". It was for the jury to determine whether, since appellant's production test admittedly failed to eliminate welds which were not as strong as the parent metal, that appellant's failure to utilize other tests which were recognized as good and sound engineering procedures in the field of flash-welding, established negligence on its part.

[6] Finally, appellant contends that the decedent Edison was guilty of contributory negligence as a matter of law. In this regard, appellant argues that Mr. Edison could not have fallen off the end of the monkey-board had he shortened the rope or life-line to 5½ feet. That in the absence of any emergency, he chose to work with a longer (8½ feet) rope. That having, so to speak, a choice between methods of performing his work, and which were equally available, Edison chose the more dangerous of the methods, and must therefore be deemed negligent. Appellant asserts that had Edison shortened the rope it would have been physically impossible for him to fall over the end of the monkey-board as, says appellant, "he obviously did". But, as pointed out by respondent, "The safety belt worn by Edison at the time of his death was sold for the purpose of saving a derrickman's life if he falls. The derrickman depends on another restraining device know as a 'belly buster' to lean on and prevent him from falling over the end of the 'monkey board', but the 'belly buster' is not attached to the person. The line attached to the safety belt requires sufficient length to permit the wearer to walk around to all points on the derrick platform while working. The tail rope connected to Edison's belt was tied to the railing with at least a foot and one-half of knots so that it would have been quite difficult to shorten. The Petroleum Safety Orders of California in effect on the day of Edison's death required every safety belt, including rings and other fittings thereon which are depended on to sustain a falling person, to be of a type capable of withstanding the force of a 200 pound weight falling five feet. Cal. Admin.Code, Title 8, sec. 6580(c). This was approximately the distance Edison fell. Even if the rope had been shortened, as appellant now claims it should have been, there would have been just as much or more slack if Edison had fallen over the side of the 'monkey board', rather than the end." Under the facts and circumstances here present we perceive no valid grounds upon which to predicate a holding that the workman was as a matter of law, contributorily negligent in permitting the safety belt to be put to the test for which it was manufactured and furnished to him.

For the foregoing reasons, the judgment and the order from which this appeal was taken are, and each is affirmed.

FOURT and LILLIE, JJ., concur.

51 Cal.2d 710

Theodore E. WEIMAN et al., Petitioners,

v.

SUPERIOR COURT of the CITY AND COUNTY OF SAN FRANCISCO et al., Respondents;

John A. Nelson, Incorporated (a corporation), Real Party in Interest.

S. F. 20063.

Supreme Court of California, In Bank.

March 11, 1959.

Rehearing Denied April 8, 1959.

Proceeding for a writ of prohibition to prohibit the court from taking any further steps to enforce an order for arbitration under a construction contract and for a writ of mandate to require the court to order a summary trial to be set on the jury trial calendar. The Supreme Court, Spence, J., held that there was a substantial compliance with the licensing requirements of the statute for contractors, that no condition precedent as to arbitration existed and that there was no need for summary trial.

Petition for writ of prohibition and mandate denied.

McComb, J., dissented.

1. Contracts ⇐292½

Under statute providing for arbitration, only purpose of proceeding thereunder is to obtain an order directing that the arbitration proceed in the manner provided for in the agreement of the parties, and the only appropriate issues of fact which may be raised for determination upon a summary trial are whether a written provision for arbitration was made and whether there was a default in a proceeding thereunder, the word "default" referring only to the default of a party in refusing to proceed to arbitration as agreed rather than to a default by a party under the main provisions of the parties' contract. West's Ann.Code Civ.Proc. § 1282.

See publication Words and Phrases, for other judicial constructions and definitions of "Default".

336 P.2d—31½

2. Arbitration and Award ⇐1

The main purpose of arbitration proceedings is to obtain an expeditious hearing and a determination by the arbitrators of any "disagreement" which might arise. West's Ann.Code Civ.Proc. § 1282.

See publication Words and Phrases, for other judicial constructions and definitions of "Disagreement".

3. Licenses ⇐39.43

Where individual was a licensed contractor and made construction contract with the defendants in his individual capacity and thereafter he incorporated as a corporation and assigned the contract to the corporation which was thereafter duly licensed during the course of the construction, there was a substantial compliance with the licensing requirements of the statute.

4. Contracts ⇐284(1)

Where construction contract made no reference to any condition precedent to arbitration and contained customary provision for supervision by architect and while providing that his decision should be final, provided that all his decisions were subject to arbitration and the agreement further provided that any disagreement arising out of the contract should be submitted to arbitration, there was no condition precedent to arbitration that the building constructed must satisfactorily be completed and that the architect must pass on the building. West's Ann.Code Civ. Proc. § 1282.

5. Contracts ⇐292½

Where making of agreement for arbitration of a construction contract and refusal of defendants to proceed to arbitration were all admitted facts, there was no necessity for a "summary trial" under the arbitration statute and the trial court properly ordered the parties to proceed to arbitration in accordance with the agreement. West's Ann.Code Civ.Proc. § 1282.

Daniel Kass, San Francisco, for petitioners.

No appearance for respondents.

James C. Travis and Carl W. Svenson, San Francisco, for real party in interest.

SPENCE, Justice.

Petitioners, Theodore E. Weiman and Cecelia Weiman, seek a writ of prohibition to prohibit the respondent court from taking any "further steps to enforce its order for arbitration" under a construction contract, and also a writ of mandate to compel the respondent court to order a "summary trial to be set on the jury trial calendar." The "order for arbitration" had been made by the trial court on July 9, 1958, following the hearing of a petition filed by John A. Nelson, Incorporated, under the provisions of section 1282 of the Code of Civil Procedure.[1]

[1, 2] Petitioners contend that they were entitled to a "summary trial" before a jury of issues of fact before any order for arbitration could be made. The consideration of this contention requires a brief analysis of section 1282. As we read the section, it appears that the only purpose of a proceeding thereunder is to obtain an "order directing that such arbitration proceed in the manner provided for in" the agreement of the parties. It further appears clear that the only appropriate issues of fact which may be raised for determination upon a "summary trial" under that section are (1) whether "a written provision for arbitration was made" and (2) whether "there is a default in proceeding thereunder." Thus the word "default," as used throughout the section, obviously refers only to the "default" of a party in refusing to proceed to arbitration as agreed rather than to a default by a party under the main provisions of the parties' contract. As was said in Pneucrete Corporation v. United States Fidelity & Guaranty Co., 7 Cal. App.2d 733, at page 740, 46 P.2d 1000, at page 1003: "The default mentioned in section 1282 of the Code of Civil Procedure refers to 'the failure to comply with the agreement to arbitrate'." We therefore conclude that where the parties have admittedly agreed in writing, as in the present case, that "Any disagreement arising out of this contract * * * shall be submitted to arbitration," then the only "default" which need be shown before an order for arbitration may be made under section 1282 is that a "disagreement" has arisen and that a party has refused to submit such "disagreement" to arbitration. Any other interpretation of the section would defeat the main purpose of arbitration proceedings, which is to obtain an expeditious hearing and determination by arbitrators of any "disagreement" which may arise.

Turning to the record before us, we find that the material facts are not disputed. John A. Nelson, Incorporated, filed a veri-

1. Section 1282 of the Code of Civil Procedure reads: "A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition any superior court of the county or city and county where either party resides, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of the hearing of such application shall be served personally upon the party in default. The court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or the default be in issue an order shall be made directing a summary trial thereof. Where such an issue is raised, the party alleged to be in default, may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand be made, said court shall make an order referring the issue or issues to a jury called and impaneled in the manner provided for the trial of actions at law. If no jury trial be demanded said court shall hear and determine such issue. If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the finding be that a written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

fied petition for an order directing that the Weimans proceed to arbitration in the manner provided by the agreement of the parties. Admittedly, that petition contained all the allegations required for that purpose. The petition was set for hearing for May 28, 1958, and notice of the hearing was served on the Weimans. They filed no answer denying any allegations of the petition, and they did not "on or before the return day of the notice of application" (Code Civ.Proc. § 1282), which was May 28, 1958, demand a jury trial of any alleged issue. In fact, the first suggestion that the Weimans desired a jury trial was made after the hearing had proceeded for some time on June 13, 1958. At the hearings held on May 28, 1958, and June 13, 1958, the Weimans appeared but made no claim that they had not entered into the agreement for arbtiration or that they had not refused to proceed to arbitration. They merely raised two issues of law, which they submitted to the court upon admitted facts: (1) whether the contractor had substantially complied with requirements concerning licensing; and (2) whether their written agreement with the contractor for arbitration should be construed as being subject to a claimed "condition precedent."

[3] With respect to the first issue of law, the admitted facts showed that John A. Nelson, individually, was at all times a licensed contractor; that he made the construction contract with the Weimans in his individual capacity; that thereafter he incorporated as John A. Nelson, Incorporated, and assigned the contract to the corporation; that the corporation was thereafter duly licensed during the course of the construction and has since remained duly licensed at all times, but that there was an interval between the time when the assignment was made by John A. Nelson, individually, to John A. Nelson, Incorporated, and the time when the corporation became duly licensed. The parties submitted briefs on this matter between the time of the hearing on May 28 and the hearing on June 13. We are of the opinion that the trial court properly ruled against the Weimans on this issue of law, as the admitted facts showed that there had been a substantial compliance with the licensing requirements. Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265; Citizens State Bank of Long Beach v. Gentry, 20 Cal.App.2d 415, 67 P.2d 364.

[4] With respect to the second issue of law, the agreement of the parties was before the court. It made no express or implied reference to any "condition precedent" to arbitration unless the existence of a "disagreement" could be so considered. It contained the customary provision for supervision by the architect and for payments to become due upon certification by the architect. While it provided that the decisions of the architect should be "final and conclusive," it also provided in Article 18, that "All his decisions are subject to arbitration." As above indicated, the agreement further provided that "Any disagreement arising out of this contract * * * shall be submitted to arbitration."

In order to understand the Weimans' position concerning the second issue of law, we may turn to their counsel's statements in the trial court. Counsel referred to this contention as the "crux of the problem here," and after conceding that Nelson had sought arbitration and that the Weimans had refused to proceed to arbitration, he said: "We told them that this particular contract does not provide for arbitration except after the condition precedent in said contract is met. And what is that condition precedent? The condition precedent is that this particular building must be satisfactorily completed, and that the architect who has been paid must pass on this building." In other words, counsel was urging the necessity for a judicial determination, as a "condition precedent" to an order for arbitration, of the very questions which were to be presented to the arbitrators under the agreement to arbitrate. No such construction can be placed upon the agreement, more particularly in the light of the parties' express agreement that "any

disagreement" should be "submitted to arbitration" and that the architect's decisions should be "subject to arbitration."

It is true that Mr. Weiman testified and endeavored to take the position that the dispute was between the architect and the contractor rather than between the Weimans and the contractor. It nevertheless was conceded that the contractor had demanded from the Weimans the fourth payment of $42,400 and had not received it. It was further conceded that the Weimans had made written complaints to the contractor concerning the work; and their counsel declared in the trial court that "The work was done unsatisfactorily," and that the architect had decided "that the job was unsatisfactory." Mr. Weiman was asked: "* * * in your mind is there anything wrong with that building?" and he testified: "Definitely." Thus it appears without conflict that there was a "disagreement" between the parties which was subject to arbitration under the agreement of the parties.

[5] Even if it be assumed that the Weimans could have raised appropriate issues of fact requiring a "summary trial" without filing any pleading in the proceeding in the trial court, it appears clear from what has been said that they failed to raise in any manner any appropriate issue of fact. On the contrary, the making of the agreement for arbitration and their refusal to proceed to arbitration were all admitted facts. Thus there was no appropriate issue of fact to be determined by either a court or jury in any "summary trial" under section 1282 of the Code of Civil Procedure; and as the issues of law, which were submitted to the court at the hearings, were correctly decided upon the admitted facts, we conclude that the trial court properly made its order "directing the parties to proceed to arbitration in accordance with the terms of the agreement." Code Civ.Proc. § 1282.

In view of our conclusion that petitioners raised no appropriate issue of fact to be determined by a court or jury in any "summary trial," it becomes unnecessary to discuss the effect of petitioners' failure to demand a jury trial "on or before the return day of the notice of application," as provided in section 1282 of the Code of Civil Procedure.

The petition for a writ of prohibition and a writ of mandate is denied.

GIBSON, C. J., and SHENK, CARTER and TRAYNOR, JJ., concur.

McCOMB, J., dissents.

Rehearing denied; McCOMB, J., dissenting.



51 Cal.2d 716

PEOPLE of State of California, Respondent,

v.

Nicholas GORSHEN, Appellant.

Cr. 6310.

Supreme Court of California,
In Bank.
March 11, 1959.

Prosecution for murder. From adverse judgment of the Superior Court, City and County of San Francisco, Harry J. Neubarth, J., the defendant appealed. The Supreme Court, Schauer, J., held that statement by court that theories of medical expert were in all probability correct and that defendant may have had no particular intent to commit crime but judge had feeling that expert was too advanced and that judge's hands were tied with legal jurisprudence, did not affirmatively show that court believed expert testimony that defendant lacked intent to kill and malice aforethought but yet erroneously concluded that the law required it to find that those elements were present.

Judgment affirmed.

Opinion, 326 P.2d 188, vacated.

1. Criminal Law ⇐469

In prosecution for murder, opinion of doctor of the medical essence of malice

aforethought was not objectionable on ground that such testimony was a medical interpretation of a legal principle. West's Ann.Pen.Code, § 188.

2. Criminal Law ⇐474

In prosecution for murder wherein defendant claimed that he did not intend to take human life or at least did not act with malice aforethought, medical testimony that defendant acted almost as an automaton and that defendant could not stop the train of obsessive thoughts that resulted in the killing and that defendant did not have a mental state which was required for malice aforethought or premeditation and medical testimony on free will was properly admitted. West's Ann. Pen.Code, § 188.

3. Criminal Law ⇐456

On trial of issues raised by a plea of not guilty to a charge of a crime which requires proof of a specific mental state, evidence that because of mental abnormality not amounting to legal insanity defendant did not possess the essential specific mental state is admissible.

4. Criminal Law ⇐494

Admission of medical testimony for purpose of consideration by trier of fact upon issues of particular essential mental state does not imply acceptance on the general issue of defense of irresistible impulse, nor does it imply rejection of the criminal law's postulate of free will.

5. Criminal Law ⇐50

Alleged irresistible impulse is not a test of the defense of legal insanity.

6. Criminal Law ⇐474

Medical testimony concerning uncontrollable compulsion is admissible on issue of specific intent or other particular mental state of a defendant.

7. Criminal Law ⇐474

Expert testimony concerning uncontrollable compulsion is received not as a complete defense negating capacity to commit any crime, but as a partial defense negating specific mental state essential to a particular crime. West's Ann.Pen.Code, §§ 20, 21, 22, 26, subd. 5, 188.

8. Criminal Law ⇐20

A person may objectively manifest discretion of free will and a sound mind, and yet be without intent. West's Ann. Pen.Code, §§ 20, 21, 22, 26, subd. 5, 188.

9. Homicide ⇐9

The requisite intent in first degree murder is not merely to commit the act of discharging a gun but includes the intent to kill a human being as the objective or result of such act. West's Ann. Pen.Code, § 189.

10. Homicide ⇐12, 13

The malice essential to murder may be express or implied and is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature and is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. West's Ann.Pen.Code, § 188.

11. Homicide ⇐11

The word "malice" as used in statutes specifically relating to homicide means something more than the word imports under statute defining malice as importing a wish to vex, annoy or injure another person. West's Ann.Pen.Code, §§ 7, 187–189.

12. Homicide ⇐142(1)

In prosecution for murder wherein evidence showed infliction of a mortal wound for purpose of killing but there was no evidence showing provocation which would meet law's definition of voluntary manslaughter, an unlawful killing upon a sudden quarrel, or a killing in heat of passion, plea of not guilty put in issue existence of particular mental states essential to elements of two degrees of murder and manslaughter and defendant was entitled to show that in fact, subjectively, he did not possess the mental state or states in issue. West's Ann.Pen.Code, §§ 7, 187–189, 192, 195.

13. Homicide ⇐254

Evidence was sufficient to sustain conviction for murder in the second degree.

14. Criminal Law ⇐656(1)

In prosecution for murder, statement by court that theories of medical expert were in all probability correct and that defendant may have had no particular intent to commit crime but judge had feeling that expert was too advanced and that judge's hands were tied with legal jurisprudence, did not affirmatively show that court believed expert testimony that defendant lacked intent to kill and malice aforethought but yet erroneously concluded that the law required it to find that those elements were present. West's Ann.Pen. Code, §§ 7, 26, subd. 6, 187–189, 192, 195; West's Ann.Code Civ.Proc. § 1962.

Garry, Dreyfus, McTernan & Keller, Benjamin Dreyfus and Charles R. Garry, San Francisco, for appellant.

George C. Olshausen, San Francisco, as amicus curiae on behalf of appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendant pleaded not guilty to a charge of murder. Trial by jury was waived (as authorized by Cal.Const., art. I, § 7) and the court (see Pen.Code, § 1167) found defendant guilty of second degree murder. Defendant appeals from the ensuing judgment. He urges that uncontradicted psychiatric testimony, accepted by the trial court, establishes that defendant did not intend to take human life or, at least, that he did not act with malice aforethought, and that therefore he should be acquitted or, as a minimum of relief, that the offense should be reduced to manslaughter. We have concluded: (1) that the evidence as to the objective circumstances of the killing supports all findings essentially implied by the judgment; (2) that the record does not support defendant's position that the trial court believed the evidence that defendant did not have the state of mind which was required as an element of second degree murder yet found defendant guilty of that crime; and (3) that, accordingly, the judgment should be affirmed.

Defendant, a longshoreman, shot and killed his foreman, Joseph O'Leary, at about 2:30 a. m. on March 9, 1957. The record discloses the following events leading up to the homicide: At 5 p. m. on March 8 defendant reported to the dispatching hall. Between 6 and 7 o'clock he and a fellow worker ate and consumed a fifth of a gallon of sloe gin. Defendant worked until 11 p. m. Between 11 and 12 o'clock defendant and the fellow worker ate and consumed a pint of sloe gin. Shortly after 12 midnight O'Leary saw defendant standing on the deck of the ship drinking a glass of coffee. O'Leary told defendant to go to work. Defendant threw the glass to the deck, exchanged "a few words" with O'Leary, and went to work. Thereafter O'Leary told defendant that he was drunk and was not doing his work properly and directed defendant to go home. They argued, defendant spat in O'Leary's face, and O'Leary knocked defendant down and kicked him. At the request of other workers O'Leary walked away from defendant. Defendant threw a piece of dunnage and brandished a carton at O'Leary.

Paul Baker, a "walking boss," took defendant to a hospital. Defendant was bleeding and bruised; his left eye was swollen shut and a deep cut under it required five or six stitches. Defendant was discharged at 1:45 a. m. The hospital records bear the notation, "Alcoholic Breath." As Baker drove defendant back to the pier where they worked, defendant said "that he was going to go home and get a gun and kill this fellow."

When he reached the pier defendant said that he wished to return to work but his superiors insisted that he go home. Defendant said, "I'll go home and get my gun. I'll come back and take care of him."

Defendant drove to his home, got a .25 caliber automatic pistol which contained two bullets, fired one shot in his living room, put the gun in his apron, and drove back to the pier. He arrived there about 30 minutes after he had been sent home and went onto the ship looking for O'Leary.

O'Leary and Nelson, a union business agent, had followed defendant to his house and, when they saw defendant leave his house, had driven to a police station. Police officers went to the pier. They searched defendant but did not find his gun. Defendant told the officers that he "had a fight with Mr. O'Leary, and * * * that he couldn't forget about the eye that he had obtained during the fight." One of the officers described defendant as "angry," "almost tearsome," "emotional," but not incoherent or boisterous.

O'Leary and Nelson then appeared. Defendant said, "My buddy. Hah, my buddy," and produced the gun. O'Leary shouted, "Look out, he's got the gun." Defendant shot. The single bullet entered O'Leary's abdomen, killing him; it also wounded Nelson's arm.[1] The officers subdued defendant after a brief struggle. Defendant told the authorities, shortly after the homicide, that O'Leary was "looking at me, smiling, so I just let him have it. * * * Nelson was standing by; I had to take chance to hit him, because I had only one bullet."

Defendant had a very good reputation for peace and quiet and did not usually drink to excess. He testified as follows: During the 15 years he had known O'Leary prior to the night of the homicide they had been friends and had had no trouble. Defendant's recollection of the events of that night was "kind of hazy." He considered it unfair of O'Leary to order him to go home but to retain the fellow worker with whom defendant had been drinking. "The argument starts about he wants me to go home and I * * * tell him that I intend to wait until business agent comes in, so apparently he, he hit me and knocked me off, off the floor and when I jumped up, he got on and hit me again, and that's—then I tried to defend myself. I, I didn't hit him * * *; he was apparently too fast for me or stronger, bigger." Defendant did not recall throwing a piece of dunnage or brandishing a carton or threatening to go home and get a gun. When he discharged the gun in his home, "I didn't know it was on the safety or not, I was shaky, I didn't know what I was doing." Defendant recalled little of his return to the pier, but did recall that the police searched him. Then he saw O'Leary "grinning, looking at me. I don't know what, what become of me. I just grabbed the gun and shot."

Dr. Bernard L. Diamond, a psychiatrist who examined defendant, testified as follows:[2]

After described examinations and tests of defendant, the doctor concluded that defendant suffers from chronic paranoiac schizophrenia, a disintegration of mind and personality. For 20 years defendant has had trances during which he hears voices and experiences visions, particularly of devils in disguise committing abnormal sexual acts, sometimes upon defendant. Defendant recognizes that these experiences are "not real" but believes that they are forced upon him by the devil. Apparently defendant, prior to his examination by Dr. Diamond, had not disclosed these experiences to anyone.

A year before the shooting defendant (who was 56 years of age at the time of trial) became concerned about loss of sexual power. With this concern his sexual hallucinations occurred with increased frequency and his ability in his work became increasingly important to him as a proof of manhood.

On the night of the shooting, O'Leary's statement that defendant was drunk and

1. The trial court found defendant not guilty of a charge of assault with a deadly weapon with intent to murder Nelson.

2. It should be noted that no question of legal insanity is here involved.

should leave his work was to defendant the psychological equivalent of the statement that "You're not a man, you're impotent, * * * you're a sexual pervert." Then, according to defendant's statements to Dr. Diamond, O'Leary applied to defendant an epithet which indicated sexual perversion. At this point, according to Dr. Diamond's opinion, defendant was confronted with "the imminent possibility of complete loss of his sanity. * * * [A]s an alternate to total disintegration * * *, it's possible for * * * an individual of this kind, to develop an obsessive murderous rage, an unappeasable anger * * *. The strength of this obsession is proportioned not to the reality danger but to the danger of the insanity * * *. [F]or this man to go insane, means to be permanently in the world of these visions and under the influence of the devil. * * * [A]n individual in this state of crisis will do anything to avoid the threatened insanity, and it's this element which lends strength to his compulsive behavior so that he could think of nothing else but to get O'Leary, so he went home and got the gun and shot him; and [as] is usually the case in this type of event, the shooting itself released the danger of [defendant's complete mental disintegration]."

Defendant told Dr. Diamond that from the time he was taken to the emergency hospital until the time of the shooting "That is all I was thinking about all of this time is to shoot O'Leary. I forgot about my family, I forgot about God's laws and human's laws and everything else. The only thing was to get that guy, get that guy, get that guy, like a hammer in the head."

In the opinion of the doctor, defendant acted almost as an automaton; "even the fact that policemen were right at his elbow and there was no possibility of getting away with this, still it couldn't stop the train of obsessive thoughts which resulted in the killing * * *. [H]e did not have the mental state which is required for malice aforethought or premeditation or anything which implies intention, deliberation or premeditation."

[1] Dr. Diamond quoted section 188 of the Penal Code, which provides that the "malice aforethought" which is an essential element of murder "may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." He then gave his opinion of the "medical essence" of "malice aforethought"; i. e., "whether an individual performs an act as a result of his own free will or intentionality, or * * * whether the action is directly attributable to some abnormal compulsion or force, or symptom or diseased process from within the individual." [3]

The doctor further explained that in his opinion "actions, like the threat to kill, the going home to get the gun and so forth"—actions which "in an ordinary individual" would be evidence "that he intended to do what he did do, and that this was an act of free will and deliberation"—in defendant's case were, rather, "just as much symptoms of his mental illness as the visions and these trances that he goes into."

In cross-examining Dr. Diamond, the prosecuting attorney quoted the following statements from an article by the doctor entitled *"With Malice Aforethought"* (Archives of Criminal Psychodynamics (1957), Vol. 2, No. 1): [4]

3. The trial court correctly overruled the People's objection that by this testimony the doctor gave "a medical interpretation of a legal principle." The court did not permit the doctor to usurp the judicial function of interpreting legislative language; rather, it properly permitted him to explain what he meant by his opinion that defendant lacked malice aforethought. (See People v. Woods (1937), 19 Cal.App.2d 556, 561–562, 65 P.2d 940; People v. Martinez (1952), 38 Cal.2d 556, 562–563, 241 P.2d 224.)

4. The trial court considered the entire article, not merely the portions which

"Freud, in 1904, brilliantly demonstrated by analysis of slips of the tongue, forgetting, and trains of association that what we call free will or voluntary choice is merely the conscious rationalization of a chain of unconsciously determined processes. Each act of will, each choice presumedly made on a random basis, turns out to be as rigidly determined as any other physiological process of the human body. Yet all of us continue to live our lives, make our choices, exercise our free will, and obey or disobey the law as if we actually had something to say about what we are doing. * * * It does no good to proclaim to the jurist that scientific evidence proves that there is no such thing as free will. * * *"

The prosecuting attorney then asked, "you feel there is no such thing as free will?" The doctor replied, "I believe in what the philosophers call the posit of free will. A posit is a working assumption. When I treat a patient, if I believed as a working assumption, that everything is predetermined or determined by forces outside of the patient's choice and consciousness, there would be no point in my doing psychotherapy or psychoanalysis; because obviously nobody would ever get better. I certainly proceed on the theory that I and our patients have something to say about what I do and about our choices. What I cannot tell you, because there is no scientific proof, is how much. * * * I know that individuals who are suffering from certain kinds of mental illnesses, tend to have very little to say about many of the things that happen to them; other people have a great deal to say about it * * *. Now, whether or not it could be scientifically demonstrated that in no instance is there any free will, this is something I can't give you any answer to."

The trial court stated at some length the matters which it considered in reaching its decision. It said, "up till the time that Dr. Diamond testified in this case, there was no explanation of why this crime was committed. * * * [The doctor is] the first person that has any reasonable explanation. Whether it's correct or not, I don't know * * *. [I]f I would follow Diamond's testimony in toto, I should acquit this man. * * *

the prosecuting attorney read aloud. The doctor's position can be better understood when the statements excerpted by the prosecuting attorney are read in their context, which is as follows:

"[T]he central issue [in a psychiatric evaluation of malice aforethought], that of the age-old philosophical abstraction of free will vs. determinism, is itself undetermined. Freud, in 1904, brilliantly demonstrated by analysis of slips of the tongue, forgetting, and trains of association that what we call free will or voluntary choice is merely the conscious rationalization of a chain of unconsciously determined processes. Each act of will, each choice presumedly made on a random basis, turns out to be as rigidly determined as any other physiological process of the human body. Yet all of us continue to live our lives, make our choices, exercise our free will, and obey or disobey the law as if we actually had something to say about what we are doing. Criminal law could not exist were it not for this posit that each normal person intends to do the act which he does do and that such intention is based upon the exercise of free will.

"Medical psychology has embarrassingly few answers to this one question which the criminal law is most interested in. It does no good to proclaim to the jurist that scientific evidence proves that there is no such thing as free will. There is a subjective phenomenon which the normal individual experiences as free will. Illusory or not, free will remains the basis of all criminal law simply because free will is the basis of all normal social behavior.

"In truth, today, *we do not have a sufficient foundation of scientific knowledge about the ego functions of decision, choice, and determination of action to justify the formulation of any general principles which could be applied to the law.* * * *

"*The task then becomes to understand the motivations, intent, and actions of the individual who deviates from the common-sense posit of free will. This can be accomplished without specious generalizations which would attack the very structure of the law itself and would compel non-acceptance by the juridical mind.* * * *" (Italics added.)

"I'm willing to go on the record, that in all probability his theories are correct * * * that he had no particular intent to commit this crime.

"I like to be advanced. But it seems to me that my hands are tied with the legal jurisprudence as it stands today, and that's why I'm saying this for the purposes of the record. The Appellate Court might say that my hands are not tied, but I think they are. * * * [E]ven accepting in part the testimony of Dr. Diamond, I still feel that this man is guilty of second degree murder."

In reply to defense counsel's assertion that "There is not one scintilla of malice," the court said, "it all depends on how you view it * * *. Some other person or another Judge, might say, 'Malice, why, it's full of it. He planned it. He said he was going to do it, he went home, he had an hour.'"

Again defense counsel asked, "Does your Honor feel that there is malice here?" The court replied, "there was some intent. Now, whether you have free will or not free will, that's so advanced, we're not prepared for that * * * There's plenty, plenty of malice as far as statements are concerned, and plenty of malice as far as actions are concerned. Now, whether he was compelled to do this because of some mental condition, that is so advanced and so far from us that we don't understand it. * * * [I]t would be a perfect first degree if it wasn't for the fact that he's never been in trouble and because of the statement of the Psychiatrist."

[2–6] Dr. Diamond's testimony was properly received in accord with the holding of People v. Wells (1949), 33 Cal.2d 330, 346–357, 202 P.2d 53, that on the trial of the issues raised by a plea of not guilty to a charge of a crime which requires proof of a specific mental state, competent evidence that because of mental abnormality not amounting to legal insanity [5] defendant did not possess the essential specific mental state is admissible. The admission of testimony such as that of the expert here, for the purpose of consideration by the trier of fact upon issues of particular essential mental state, does not, as it has been suggested, imply acceptance (on the general issue) of the defense of irresistible impulse (which is rejected in this state as a test of the defense of legal insanity; see 25 Cal.Jur.2d, Homicide, § 254; 14 Cal.Jur.2d, Criminal Law, § 218) nor does it imply rejection of the criminal law's postulate of free will. It has been said (in People v. Hoin (1882), 62 Cal. 120, 123) that "Whatever may be the abstract truth, the law has never recognized an impulse as uncontrollable which

5. I. e., insanity measured by the familiar test restated in M'Naughton Case (1843), 10 Clark & Fin. 200, 8 Eng.Rep. 718, and long accepted in this state (People v. Coffman (1864), 24 Cal. 230, 235; People v. Wells, supra, at pages 350, 351 [20] of 33 Cal.2d at pages 65, 66 of 202 P.2d): that at the time defendant committed the act, he was laboring under such a defect of reason, from disease of the mind, that he did not know the nature and quality of his act or, if he did know it, that he did not know that he was doing what was wrong.

We have recently had occasion to say that, if this test is to be changed, arguments for such change should be addressed to the Legislature rather than the court. (People v. Berry (1955), 44 Cal.2d 426, 433 [3], 282 P.2d 861; People v. Daugherty (1953), 40 Cal.2d 876, 894, 256 P.2d 911.) The conclusion that the courts should not initiate a new definition or test of the insanity which absolves legal responsibility for any crime is supported by the circumstance that the Legislature, when it enacted the rather unusual procedure for determination of the issue of such insanity at a stage of the proceedings separate from the proceedings at which the other issues are tried (Stats.1927, ch. 677, Pen.Code, §§ 1016, 1017, 1020, 1026) did not suggest any change in the McNaghten test. (Cole v. Rush (1955), 45 Cal.2d 345, 355 [8–9], 289 P.2d 450, 54 A.L.R.2d 1137 [the Legislature is presumed to have known of domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing on them; failure of the Legislature to change the law in a particular respect when the subject is before it and changes in other respects are made indicates an intent to leave the law as it stands in the aspects not amended].)

yet leaves the reasoning powers—including the capacity to appreciate the nature and quality of the particular act—unaffected by mental disease." (See also People v. Stein (1918), 23 Cal.App. 108, 115–116, 137 P. 271.) But this statement must be considered in its context; it was made in the course of an opinion which holds that irresistible impulse does not constitute the insanity which is a complete defense; i. e., which is exculpatory of all penal responsibility for any otherwise criminal act. So considered, statements such as that quoted from the Hoin case do not preclude the admission and consideration, on the issue of specific intent or other particular mental state, of expert testimony which includes such concepts as the uncontrollable compulsion described by the expert here (described, it may be added, not as an "abstract truth" but as arising upon the specific facts, objective and subjective, of this particular killing).

[7] Such expert evidence, like evidence of unconsciousness resulting from voluntary intoxication, is received not as a "complete defense" negating capacity to commit any crime but as a "partial defense" negating specific mental state essential to a particular crime. In People v. Baker (1954), 42 Cal.2d 550, 575 [17], 268 P.2d 705 this court pointed out that "Unconsciousness is a complete, not a partial, defense to a criminal charge (Pen.Code, § 26, subd. 5),[6] and, although voluntary intoxication may at times amount to unconsciousness, yet it can only have the effect of negating specific intent, the applicable code section being section 22[7] and not 26, subdivision 5." People v. Sanchez (1950), 35 Cal.2d 522, 531 [6], 219 P.2d 9, recognizes that the voluntary intoxication relied on as a partial defense to negate *specific intent* may in fact be sufficient to *destroy volition.* And People v. Harris (1866), 29 Cal. 678, 681–684 (described by the code commissioners as "a correct and authoritative exposition of [Pen.Code] Sec. 20;[8] see, also, Sec. 22," in their note at the time (1872) when the Legislature codified the rules which still appear in sections 20, 22, and 26, subdivision 5) explains a situation in which, although it is exprssly recognized that voluntary intoxication is not an excuse for crime, such intoxication could result in acquittal. Harris was convicted of voting more than once at an election. He was intoxicated when he voted. In reversing his conviction because of error in the instructions, the court says, "The theory upon which it was sought to exculpate the defendant of criminality was that he was in such a condition, mentally, when he voted the second time, as not to know that he had already voted * * * [I]t is a universal doctrine that to constitute what the law deems a crime there must concur both an evil act and an evil intent. * * * Therefore the intent with which the unlawful act was done must be proved * * *. Now, when the statute declares the act of voting more than once at the same election by the same person to be a felony, it must be understood as implying that the interdicted act must be done with a criminal intention, or under circumstances from which such intention may be inferred. * * While the condition of the accused, caused by drunkenness, may be taken into consideration by the jury with the other facts of the case, to enable them to decide in re-

6. Pen.Code, § 26, subd. 5: "All persons are capable of committing crimes except those belonging to the following classes: * * * Five. Persons who committed the act charged without being conscious thereof."

7. Pen.Code, § 22: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

8. Pen.Code, § 20: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

spect to the question of intent, it is proper to observe that [voluntary] drunkenness will not excuse crime. (People v. King, 27 Cal. 507, 514.) The inquiry to be made is whether the crime which the defendant is accused of having committed *has in point of fact been committed,* and for this purpose whatever will fairly and legitimately lead to the discovery of the mental condition and status of the accused at the time, may be given in evidence to the jury, and may be considered by them in determining whether the defendant was in fact guilty of the crime charged against him."

[8] It should be noted that there are certain other peculiarities, arising out of statutory language, in connection with the meaning and proof of the mental states requisite to criminal homicide. With reference to the general intent referred to in section 20 of the Penal Code (quoted *ante,* footnote 8), section 21 says, "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity." Section 21 is of little aid in appraising either general or specific intent. A person may *objectively* manifest discretion ("Power of free decision"; Webster's New Internat. Dict. (2d ed., 1958)) and a sound mind, yet be without intent because, e. g., he is unconscious. And the second sentence of section 21 is not very enlightening. In this state there appears to be no statutory or judicial definition or test of idiocy or lunacy as related to criminal state of mind.[9] Nor are the dictionary definitions helpful.[10] More enlightening is the judicial recognition (in People v. Baker (1954), supra, 42 Cal.2d 550, 568, 569 [9, 11, 12], 268 P.2d 705) that " 'Sound mind' and 'legal sanity' are not synonymous. * * * 'Soundness' of mind is defined as 'free from flaw, defect or decay, perfect of the kind; undamaged or unimpaired; healthy, not diseased or injured, robust—said of body or mind.' (Webster's New Internat. Dict., p. 2403.) * * * If the defendant has a 'sound mind,' that is, 'a healthy and robust mind, neither diseased nor injured,' it necessarily follows that he would not have a mental infirmity making him incapable of premeditating or deliberating. * * * Although moronity and the mental condition caused by epileptic seizures, unless they amount to unconsciousness, are not included within the exempting provisions of section 26 of the Penal Code [lack of criminal capacity], nevertheless these conditions may indicate some lack of a 'healthy and robust mind' and do have bearing on the question of the capacity to premeditate and deliberate."

[9] Section 7 of the Penal Code provides that "The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context: 1. The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage * * *. 4. The words 'malice' and 'maliciously' import a wish to vex, annoy,

9. It has been said that "Imbecility is no defense against crime unless its existence deprives the individual of the power to distinguish between right and wrong." (People v. Keyes (1918), 178 Cal. 794, 801, 175 P. 6.)

10. An idiot is one afflicted with idiocy, and idiocy is "Extreme deficiency in intelligence, commonly due to incomplete or abnormal development of the brain. The deficiency is usually congenital or due to arrest of development following disease or injury in early childhood." A lunatic generally is "A person affected with lunacy; an insane person, orig. one who had lucid intervals; a madman; a person of unsound mind" and, in relation to law, "A person whose abnormal mental condition renders him incapable or irresponsible before the law." Lunacy is "a. Orig., a kind of insanity interrupted by lucid intervals, formerly supposed to be influenced by the changes of the moon. b. Later, any form of insanity. c. Now, chiefly in legal usage, insanity amounting to lack of capacity or of responsibility in the eyes of the law." (Webster's New Internat.Dict. (2d ed., 1958).)

or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law * * *." The context of the word "willful" in the statutory definition of the here pertinent kind of first degree murder ("willful, deliberate, and premeditated killing"; Pen. Code, § 189) shows that the requisite intent here is not merely, e. g., to commit the act of discharging a gun, but includes the intent to kill a human being as the objective or result of such act.

[10, 11] As used in relation to the "malice aforethought" essential to murder, section 188 of the Penal Code declares that "Such malice [see definition of murder in Pen.Code, § 187] may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." [11] The context of the word "malice" in the statutes specifically relating to homicide shows that the word there means "something more than the word imports as defined in section 7." (People v. Waysman (1905), 1 Cal.App. 246, 248, 81 P. 1087; People v. Chavez (1951), 37 Cal.2d 656, 666 [3], 234 P.2d 632 [section 7 definition of malice should not be read to the jury in a murder case].)

Section 1962 of the Code of Civil Procedure declares that "A malicious and guilty intent" is conclusively presumed "from the deliberate commission of an unlawful act, for the purpose of injuring another." This "conclusive presumption" has little meaning, either as a rule of substantive law or as a rule of evidence, for the facts of deliberation and purpose which must be established to bring the presumption into operation are just as subjective as the presumed fact of malicious and guilty intent.

[12] A further problem arises as to whether evidence of defendant's abnormal mental or physical condition (whether caused by intoxication, by trauma, or by disease, but not amounting to legal insanity or unconsciousness) can be considered to rebut malice aforethought and intent to kill in a case such as the one at bar, where the prosecution evidence shows infliction of a mortal wound for the purpose of killing and the evidence does not show provocation which would meet the law's definition of voluntary manslaughter, an unlawful killing upon a sudden quarrel or in a heat of passion such as would naturally be aroused in the mind of an *ordinarily reasonable person* under the circum-

11. We need not now undertake the task of formulating an inclusive or comprehensive definition of the malice aforethought which distinguishes murder from manslaughter. The difficulty of such task has been often pointed out. (See People v. Holt (1944), 25 Cal.2d 59, 83, 85, 153 P.2d 21; People v. Miceli (1951), 101 Cal.App.2d 643, 650, 226 P.2d 14; Pike, What is Second Degree Murder in California (1936), 9 So.Cal.L.Rev. 112; Perkins, A Reexamination of Malice Aforethought (1934), 43 Yale L.Jour. 537). It has been said that "Malice aforethought is a term ordinarily used in connection with the felonious killing which is murder to designate it from manslaughter. The words do not imply deliberation or the lapse of considerable time between the malicious intent to take life and its actual execution, but rather denote *purpose* and *design* in contradistinction to accident and mischance. (See Bouvier's Law Dictionary, vol. 2, p. 2068.)" (People v. McNabb (1935), 3 Cal.2d 441, 456 [8], 45 P.2d 334; People v. Wells (1949), supra, 33 Cal.2d 330, 338 [5], 202 P.2d 53.) But this is not a sufficiently complete definition or test, for (a) voluntary and some kinds of involuntary manslaughter may in fact be committed with purpose and design, yet the law removes malice aforethought from all forms of manslaughter (see People v. Bender (1945), 27 Cal.2d 164, 181 [14], 163 P.2d 8; People v. Holt (1944), supra, 25 Cal.2d 59, 85, 153 P.2d 21); (b) "Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence," have no capacity to commit crime (Pen.Code, § 26, subd. Six) and homicide "committed by accident and misfortune" is, in the circumstances described in section 195 of the Penal Code, "excusable."

stances (People v. Valentine (1946), 28 Cal.2d 121, 137 [14], 139, 169 P.2d 1). In such a case the question whether the intent to kill was formed as the result of deliberation and premeditation can be answered by evidence that the particular defendant, because of impairment of his mental ability by intoxication, injury, or disease, could not and therefore did not deliberate, as well as by evidence of objective circumstances, but the question whether defendant was guilty of murder or manslaughter is traditionally answered on the basis of the objective (reasonable man) standard of the provocation which, by rule of law, removes malice aforethought (even though it may in fact exist) from manslaughter. (See Weihofen and Overholser, Mental Disorder Affecting the Degree of a Crime (1947), 56 Yale L.Jour. 959, 969.) So it has been held that voluntary intoxication, although it can be considered on the question of the degree of murder, cannot be considered on the question whether defendant is guilty of murder or manslaughter. (People v. Keyes (1918), supra, 178 Cal. 794, 797, 175 P. 6; People v. Methever (1901), 132 Cal. 326, 332, 64 P. 481; People v. Vincent (1892), 95 Cal. 425, 428, 30 P. 581; People v. Jones (1883), 63 Cal. 168, 169; People v. De La Cour Soto (1883), 63 Cal. 165; People v. Langton (1885), 67 Cal. 427, 428, 7 P. 843; People v. Ferris (1880), 55 Cal. 588, 592; People v. Williams (1872), 43 Cal. 344, 345–346, 352; People v. Lewis (1869), 36 Cal. 531, 532; People v. Nichol (1867), 34 Cal. 211, 215–216, 217; People v. Belencia (1863), 21 Cal. 544, 547; People v. Hopper (1919), 42 Cal.App. 499, 503 [5], 183 P. 836; see also People v. Miller (1896), 114 Cal. 10, 13, 45 P. 986 [which incorrectly states that evidence of intoxication was "valueless" on the issue of the degree of murder because other evidence showed that the crime was deliberate and premeditated].)

These last cited cases appear mistaken in view of the following rules: Section 22 of the Penal Code says that "whenever the actual existence of *any particular purpose, motive, or intent* is a necessary element to constitute any particular *species* or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." (Italics added.) The section refers to any "species" (kind) of crime as well as to any "degree" of crime. The state of mind known as "malice aforethought" comes within the meaning of the phrase "any particular purpose, motive, or intent." (See People v. Baker (1954), supra, 42 Cal.2d 550, 568, 571, 268 P.2d 705 [referring, in regard to murder, to "the intent involved in the elements of malice aforethought, premeditation, and deliberation," "the 'intent' necessary to constitute malice aforethought"]; People v. Wells (1949), supra, 33 Cal.2d 330, 343 [9], 202 P.2d 53 [referring to "the specific intent or motive amounting to malice aforethought" in the crime of violating Pen. Code, § 4500, which provides that certain kinds of assault committed by life-term prisoners "with malice aforethought" are capital offenses].) "Malice aforethought" is a "necessary [statutorily prescribed] element" of both degrees of murder ("Murder is the unlawful killing of a human being, with malice aforethought"; Pen.Code, § 187). Specific intent to kill is not a "necessary [statutorily prescribed] element" of second degree murder but is a necessary element of the kind of first degree murder which we are here considering (a "willful, deliberate, and premeditated killing"; Pen.Code, § 189) and is implicit in the statutory description of the kind of manslaughter which we are here discussing ("the unlawful killing of a human being * * Voluntary"; Pen.Code, § 192).

It would seem elementary that a plea of not guilty to a charge of murder puts in issue the existence of the particular mental states which are essential elements of the two degrees of murder and of manslaughter (a crime traditionally regarded as necessarily included in murder although in some cases the mental element of manslaughter may be more accurately described as differing from, rather than included in,

the mental element of murder). Accordingly, it appears only fair and reasonable that defendant should be allowed to show that in fact, subjectively, he did not possess the mental state or states in issue.

Some cases have recognized the propriety of considering evidence of subjective mental condition for this purpose. Thus, People v. Selph (1930), 106 Cal.App. 704, 707, 289 P. 918, in discussing the effect of evidence of voluntary intoxication in a homicide case, says that "while the insanity of the defendant is not in issue under the general plea, yet this does not preclude the introduction of evidence tending to establish the mental condition of the accused [12] at the time the offense was committed for the purpose of showing a lack of criminal intent, malice or premeditation."

In People v. Chesser (1947), 29 Cal.2d 815, 824, 178 P.2d 761 (where there was a little evidence of premeditation and no evidence of provocation), this court recognizes that defendant "may have been so deeply under the influence of intoxicating liquor that he was incapable of forming in his mind that malice aforethought which is an essential element of the crime of murder in either degree." Also, in the following cases of apparently intended unlawful killings where there was no evidence of provocation sufficient to arouse the passion of the ordinarily reasonable man, the court mentions without disapproval instructions which would permit the jury to find manslaughter because of evidence of intoxication: People v. Tuthill (1947), 31 Cal.2d 92, 103, 187 P.2d 16; People v. Burkhart (1931), 211 Cal. 726, 733 [7], 297 P. 11; People v. Yeager (1924), 194 Cal. 452, 474 [8], 229 P. 40. (See also People v. Gomez (1953), 41 Cal.2d 150, 164–165 [15], 258 P.2d 825, where there was evidence of mental abnormality; cf. People v. Danielly (1949), 33 Cal.2d 362, 376–379 [1–5], 202 P.2d 18, where the rejected evidence of nervous instability was not shown to be relevant to defendant's possession of malice aforethought, the evidence adduced by the defense presenting only the alternatives that defendant did not kill the deceased or that if he did kill her he acted while unconscious.) We conclude that the Selph (1930) case, supra, at page 707 of 106 Cal.App., at page 920 of 289 P. (opinion authored for the District Court of Appeal by the late Justice Ira F. Thompson, who thereafter became a justice of this court), rather than the cases (Keyes through Miller) cited ante, 336 P.2d 502, represents a correct view of the consideration which the trier of fact should give to relevant evidence of mental condition upon the issues of malice aforethought and intent to kill. Implications in thoses cases (Keyes through Miller) inconsistent with this holding are disapproved.

[13, 14] Defendant and amici curiae urge that in the present case statements of the trial court affirmatively show that it believed the expert testimony that defendant, because of the concurrence of mental disease and the objective circumstances with which he was confronted, in fact lacked intent to kill and malice aforethought, yet erroneously concluded that the law required it to find that those elements were present. Defendant would attribute to selected portions of the trial court's remarks [13] the force of findings of fact and conclusions of law. But those remarks when read as a whole (see ante, 336 P.2d at pages 497, 498) set forth reflections and reasoning pro and con, matters which tend to support the judgment and matters which tend to suggest a contrary conclusion, but all proper to be considered by the fair, impartial, conscientious, and able judge in resolving the several issues and reaching his ultimate conclusion.

12. This must be understood to mean mental condition other than legal sanity or insanity. (People v. Wells (1949), supra, 33 Cal.2d 330, 350 [14b], 202 P.2d 53.)

13. "[I]n all probability [Dr. Diamond's] theories are correct * * * that [defendant] had no particular intent to commit this crime * * *, but I have a feeling that you are too advanced. * * * [I]t seems to me that my hands are tied with the legal jurisprudence as it stands today."

In accord with the normal process of appellate review, we accept those statements which support the judgment as representing the court's final determinations, and interpret favorable to the judgment those statements which are susceptible of such interpretation. (See People v. Jennings (1959), 158 Cal.App.2d 159, 167 [6], 322 P.2d 19.) When the statements are so viewed, it is apparent that this is a case where the trial court considered all the conflicting evidence and resolved it in support of its judgment, not a case where the trial court admitted evidence but because of a misapprehension of law refused to consider and weigh it upon the erroneous theory that it could not be considered. (Cf. Smith v Fetterhoff (1956), 140 Cal.App. 2d 471, 473 [1], 295 P.2d 474.)

The trial court's informally expressed opinion was that defendant's threats and actions evidenced intent to kill and malice aforethought, but that "whether he was compelled to do this because of some mental condition, that is so advanced and so far from us that we don't understand it." A fair interpretation of the quoted statement is, not that the expert testimony was as a matter of law incomprehensible or unacceptable to the court as a finder of fact or as a judge of the law, but rather that the court as a trier of fact did not have a reasonable doubt that this particular defendant, when he killed, lacked intent to kill and malice aforethought. This interpretation of the quoted statement is borne out by the trial court's further statement that "it would be a perfect first degree [murder] if it wasn't for the fact that he's never been in trouble and because of the statement of the Psychiatrist"; from this statement of the court it affirmatively appears that the implied finding of lack of deliberation and premeditation was based in part upon acceptance of the doctor's testimony.

Thus it is apparent that whatever the trial judge may have had in mind when he stated in the course of his pro and con deliberations that "I like to be advanced. But it seems to me that my hands are tied with the legal jurisprudence as it stands today," he did in truth finally decide that his fact-finding hands were not tied; he must have so concluded because he received, considered and gave effect to the expert's testimony on the issues to which it was pertinent. Some of those issues he resolved in favor of the prosecution (he found the defendant guilty of murder), but others he determined in favor of the defendant (he found that the murder was *not* of the first degree). In other words, within the area of culpability for the crime charged the testimony of the expert apparently created a reasonable doubt that the homicide was murder of the first degree but not that it was murder. The differences between the degrees of murder and between murder and voluntary manslaughter have been carefully spelled out in People v. Bender (1945), supra, 27 Cal.2d 164, 180–182 [13–17], 163 P.2d 8 (see also People v. Caldwell (1955), 43 Cal.2d 864, 869 [3–5], 279 P.2d 539; People v. Byrd (1954), 42 Cal.2d 200, 212 [16], 266 P.2d 505; People v. Deloney (1953), 41 Cal.2d 832, 837–839 [1–4], 264 P.2d 532; People v. Daugherty, (1953), supra, 40 Cal.2d 876, 901 [26], 256 P.2d 911; People v. Carmen (1951), 36 Cal.2d 768, 777–778 [11–12], 228 P.2d 281; People v. Cornett (1948), 33 Cal.2d 33, 40 [3], 198 P.2d 877; People v. Honeycutt (1946), 29 Cal.2d 52, 60–61 [3–4], 172 P.2d 698; People v. Valentine (1946), supra, 28 Cal.2d 121, 131–132 [1–4], 169 P.2d 1; People v. Thomas (1945), 25 Cal.2d 880, 898–901, [13–17], 903 [20], 156 P.2d 7; People v. Holt (1944), supra, 25 Cal.2d 59, 84–87 [11], 90–91 [15], 153 P.2d 21) and need not be reviewed here. In the light of the cited cases and the record before us, we conclude that the judgment of conviction reached by the trial court is based on a reasonable view of the evidence and a correct understanding and application of the law.

For the reasons above stated, the judgment is affirmed.

GIBSON, C. J., and TRAYNOR and McCOMB, JJ., concur.

SPENCE, J., concurs in the judgment.

51 Cal.2d 682

PEOPLE of the State of California, Respondent,

v.

Earl Fernando MATLOCK, Appellant.

Cr. 6227.

Supreme Court of California,
In Bank.
March 10, 1959.

Prosecution for murder and robbery. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment of conviction for first degree murder, and second degree robbery and denied defendant's motion for new trial, and defendant appealed. The Supreme Court, Schauer, J., held that where theory of defense was that defendant did not murder his victim in the perpetration of robbery, but rather, acted solely at the request of the victim who, because he desired to die but did not wish to give the appearance of suicide, induced defendant to strangle him and to take his property so that he would appear to have been the victim of murder and robbery, evidence, consisting of a life policy purchased by victim some 10 days before his death in the sum of $250,000 and containing a two year suicide clause, was relevant on issue of victim's state of mind, and on probability that he asked defendant to strangle him, and exclusion of the policy was prejudicial error even though defendant did not know of the insurance at the time of the strangulation.

Judgment and order denying new trial reversed and cause remanded for a new trial.

1. Homicide ⇐169(1), 339

In prosecution for murder and robbery, where theory of defense was that defendant did not murder his victim in the perpetration of robbery, but rather, acted solely at the request of victim who, because he desired to die but did not wish to give appearance of suicide, induced defendant to strangle him and to take his property so that he would appear to have been victim of murder and robbery, evidence, consisting of a life policy purchased by victim some 10 days before his death in the sum of $250,000 and containing a two-year suicide clause, was relevant on issue of victim's state of mind, and on probability that he asked defendant to strangle him, and exclusion of the policy was prejudicial error even though defendant did not know of the insurance at the time of the strangulation. West's Ann. Pen.Code, § 211.

2. Homicide ⇐172, 339

In prosecution for robbery and murder wherein theory of defense was that victim requested defendant to strangle him because he desired to die, but did not wish to give the appearance of suicide, evidence showing victim had been convicted in federal court on seven counts of felony and sentenced to imprisonment was relevant to robbery-murder, and separately charged crime of robbery, since such evidence tended to absolve defendant of robbery by tending to show victim had a motive for asking, and, therefore, might well have asked defendant to choke him and take his property and the exclusion thereof was prejudicial notwithstanding fact that evidence as to victim's convictions had come in as part of the evidence on rebuttal for the state.

3. Criminal Law ⇐1036(1)

In robbery-murder prosecution, in view of court's rejection of certain evidence at first stage of the trial, renewal of offer of such evidence during separate proceedings on issue of penalty was not a prerequisite to defendant's maintaining the contention that the receipt of such evidence might well have influenced the jury to choose a lesser penalty. West's Ann.Pen.Code, § 190.1.

4. Homicide ⇐169(8)

In robbery-murder prosecution wherein theory of defense was that victim asked defendant to kill victim because he desired to die but did not wish to give the appearance of suicide, evidence that victim short-

ly before his death requested an acquaintance to introduce him to some "shady character" who would "do a job" in connection with a large insurance policy which victim had recently purchased, and that victim said that he was depressed because of certain criminal convictions and was worth more dead than alive, was relevant and admissible on issue of victim's state of mind.

5. Criminal Law ⇐814(1)

In prosecution for murder and robbery wherein defendant's theory of defense was that the defendant acted solely at request of victim who, because he desired to die but did not wish to give the appearance of suicide, induced defendant to strangle him and take his property, instruction on aiding a person to commit suicide was properly refused in view of fact defendant actively strangled his victim, and under such circumstances, section of the Penal Code dealing with aiding a person in committing suicide was inapplicable. Penal Code, § 401.

6. Larceny ⇐3(1)

The taking of property is not theft in the absence of intent to steal.

7. Criminal Law ⇐824(4)

In prosecution for murder and robbery wherein theory of defense was that defendant did not murder his victim in the perpetration of robbery, but rather acted solely at request of victim who, because he desired to die but did not wish to give the appearance of suicide, induced defendant to strangle him and take his property, trial court would not be deemed to have erred in failing to instruct on its own motion concerning grand theft even though evidence might have supported such an instruction based on defendant's testimony that he did not intend to steal the property but took it in compliance with victim's express request.

8. Criminal Law ⇐522(1)

A confession coerced by a threat to arrest a near relative is not admissible.

9. Constitutional Law ⇐266
Criminal Law ⇐394.1(1)

Real evidence may be discovered in circumstances which show defendant's guilt without any substantial question whatsoever, yet convictions obtained by such evidence may be stricken down because of requirement of due process or of court-made rules of evidence based upon the court's refusal to condone, and thereby in effect encourage official flouting of the law.

10. Criminal Law ⇐394.1(1), 531(2)

In robbery-murder prosecution, evidence failed to establish that circumstances in which defendant gave his statements were so inherently coercive as to require rejection of officers' testimony that the statements were freely made, nor, under the circumstances, would victim's jewelry, discovered as a result of a threat to members of defendant's family, be deemed inadmissible.

11. Criminal Law ⇐1183

Although on proper motion a trial court can, and must, pass upon the weight of the evidence in determining whether a conviction should be reduced in degree or class, the power of the Supreme Court to decree reduction can be exercised only where it finds the evidence to be as a matter of law insufficient to sustain the essential finding.

Phil H. Curry, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

A jury found defendant guilty of murder of the first degree and robbery of the second degree and fixed the penalty on the murder count at death. This is an appeal (pursuant to Pen.Code, § 1239, subd. (b)) from the ensuing judgment and from an order denying defendant's motion

for new trial. The theory of the defense was that defendant did not murder his victim, Max Shayne, in the perpetration of robbery but, rather, acted solely at the request of Shayne who, because he desired to die but did not wish to give the appearance of suicide, induced defendant to strangle him and to take his property so that he would appear to have been the victim of murder and robbery. For reasons hereinafter set forth we have concluded that reversal is necessary because the trial judge erroneously excluded evidence proffered by defendant which was relevant to this theory of the defense. In the course of our ensuing discussion we also consider (as directed by Code Civ. Proc. § 53) other asserted errors which may be pertinent upon a new trial.

Defendant's contention that the evidence is insufficient to support the verdicts is without merit. It is based upon the unwarranted assumption that the jury were required to believe certain testimony of defendant and could not draw reasonable inferences favorable to the People from the evidence as a whole.

For the purposes of this opinion, it is unnecessary to state the evidence in the light most favorable to respondent. Rather, in order that we can properly appraise the effect of the exclusion of admissible evidence favorable to appellant, it is necessary to set forth in some detail his version of the killing and the circumstances which led up to it. (See People v. Dail (1943), 22 Cal.2d 642, 650 [1], 140 P.2d 828.) Such version is as follows:

Defendant met Shayne in 1952 when defendant borrowed $1,400 from Shayne to complete construction of a house. Shayne told defendant that the financing "was going through the FHA." (As is hereinafter stated, Shayne was subsequently convicted of fraud in connection with FHA transactions.) In 1954 defendant had also borrowed $350 from Shayne in connection with the proposed purchase of a service station. The trial court struck defendant's testimony that defendant's wife discovered that Shayne's interest charges on the loans were exorbitant and that defendant complained of this to the Better Business Bureau.

On the day of the killing, September 29, 1957, Shayne came to defendant's house and told defendant, "I think I have got a job for you." Shayne further told defendant that Shayne and his brother had been "convicted by the federal government," had appealed, and needed money. Defendant had not repaid Shayne the $350 but this had been "discharged in bankruptcy." Shayne, however, "explained the bankruptcy was only to give a person time to do something." Defendant stated that he had been ill (defendant is an epileptic) and unable to work but "would be glad to start giving him some money" when he was able to work.

Shayne further "told me if his brother went to prison that he would take care of me and my family. * * * He asked me had I been subpoenaed in court and I told him no. He thought that was funny because I had already turned him in to the Better Business Bureau."

Shayne asked defendant to enter Shayne's sedan. Defendant got into the back of the car. Shayne drove about, stopped to make a telephone call, and thereafter stopped at a rather isolated spot. He told defendant that he wanted defendant "to rough up a couple of guys for me." Although defendant protested that he wanted "nothing to do with nothing like that," Shayne persisted in his attempts to induce defendant to agree to "rough up" someone for pay. It developed that Shayne wished himself "roughed up." He said, "to me it wouldn't make no difference because I have only got about six months to live." Defendant asked Shayne why, if he wished to die, he did not take poison. Shayne replied, "it can't look like suicide. It have to look like a murder or accident." Shayne suggested that defendant strangle him and give the killing the appearance of "murder-robbery." Defendant protested. Shayne put his wallet, rings, and watch in defendant's shirt pocket and warned defendant to hide the jewelry because it was readily

identifiable as Shayne's. Shayne put ten $100 bills on the seat of the car. Defendant "began to think then that he was actually serious, and I reached for the door to open it to get out, and that is when he caught me, pulling me back into the car, and he busted my shirt loose * * *; he had really a horrible look on his face. I said, 'Mr. Shayne, I told you I wasn't going to have nothing to do with nothing like that. * * * I am going home.' He say, 'You can't go now; you have got my money.'"

Defendant then put a cord or strap which had become detached from the back seat of the car around Shayne's neck, Shayne adjusted it, and defendant began to choke Shayne, then became frightened and released the pressure. Shayne said, "Come on, let's get it over with." Defendant again choked Shayne. Shayne "was fumbling on the seat." Defendant was afraid of Shayne because "I felt that the man could have been armed, he could have had a gun, anything. Then my intentions was to hold that strap on him until he became unconscious." When Shayne "went into a slump" defendant removed the strap. Defendant wiped off the part of the car where he had been sitting "because I am feeling that if the man becomes to be conscious he is really mad at me and in his state of mind he would probably try to get the police to come out to my house and press some kind of charge against me which was not true." Also defendant was afraid of "a syndicate." Defendant picked up the $1,000 which was lying, with some handkerchiefs, on the front seat. Defendant knotted two handkerchiefs about Shayne's neck so that "if he comes to he will have some evidence here that actually what he wanted did I started to do." Defendant then left.

After defendant returned to his home he took the jewelry from his shirt pocket without touching it with his bare hands, "figuring, as I afore stated, that he [Shayne] would be angry with me, and I wanted to handle it with care, to take it out of my pocket so my hands wouldn't be all over it, and if he would try to start trouble for me, well, I could have evidence right here that I had not had my hands on that stuff." Defendant put the jewelry in two cans, placed them in his yard, and covered them with leaves. (According to one of the investigating officers, when defendant, after he had given various false and incomplete statements, "decided that he would show us where the jewelry was," defendant asked the officers, "Please do not touch the jewelry because it will show only Shayne's fingerprints on it.")

Defendant's manifest naivete and lack of judgment may have led him to invent the above account of Shayne's death and defendant's possession of Shayne's property in the belief that such account would exonerate defendant; on the other hand Shayne, recognizing such naivete and lack of judgment, may have exploited defendant in the manner which defendant recounted. Defendant's obvious mental weakness and the unusual nature of his story make it more, not less, important that he be accorded full opportunity to corroborate that story by any available admissible evidence.

A material issue in the case was whether defendant murdered Shayne in the perpetration of robbery and, particularly, whether defendant took Shayne's property "against his will, * * * by means of force or fear" (Pen.Code, § 211). Relevant to this issue is evidence that defendant strangled Shayne and took his property at Shayne's request. Tending to show that Shayne would be likely to, and did, make such a request was evidence that Shayne had substantial reasons for wishing to die, and for wishing to die in circumstances which would give the appearance of murder in the perpetration of robbery. The fact that Shayne faced the possibility of imprisonment furnishes a motive for his desiring death. The fact that a few days before he assertedly requested defendant to strangle him he had purchased a large life insurance policy with a suicide clause furnishes a motive for his wishing to die in the circumstances of his asserted request.

[1] In accord with the above outlined theory of relevance, defendant, to show "the motive for wanting himself [Shayne] killed instead of having it look like suicide," offered in evidence the life insurance policy purchased by Shayne some ten days before his death; the policy was in the sum of $250,000 and provided that in the event of suicide of the insured within two years of issue the liability of the insurer was limited to premiums paid. The trial judge sustained the People's objection to this evidence. The People urge that the evidence is irrelevant because defendant did not know of the insurance at the time he strangled Shayne. But the fact that *defendant* did not act with the insurance in mind does not at all affect the relevance of the evidence to *Shayne's* state of mind, and the probability that he asked defendant to strangle him. Furthermore, the fact that defendant, until after he had told his naive story of Shayne's request, did not know of the existence of the large insurance policy with its suicide exclusion clause, would in itself appear to suggest truth as the most logical explanation for an otherwise uncanny coincidence of fact and fiction.

The People also urge that the exclusion of the evidence of insurance, even if it was error, was not prejudicial because such evidence would have been only cumulative to testimony of the witness Hersch that Shayne, two days before his death, told Hersch that Shayne had just taken out an insurance policy which named his wife as beneficiary and that Shayne expressed concern as to whether the proceeds of the policy were subject to inheritance tax. Defendant's offered and excluded evidence as to the policy was more than merely cumulative of Mr. Hersch's testimony. The excluded evidence would have established that Shayne in fact had purchased the policy, that it was for $250,000, and that it provided for limitation of liability in the event of suicide of the insured. Certainly these latter facts would be much more impressive than the testimony of Hersch in tending to show Shayne's possible state of mind, and therefore the probability of his request to defendant, concerning the manner of his death.

[2] Defendant further offered, and the trial judge refused to admit, a certified copy of a record of the United States District Court showing that Shayne, on October 8, 1956, had been convicted of seven counts of felony (frauds connected with the Federal Housing Administration) and sentenced to imprisonment. This evidence was offered as "a part of the motive for the death." The People urge that such evidence is irrelevant because defendant would not be relieved from responsibility for first degree murder by showing that he killed Shayne at his request so that Shayne would not have to serve prison sentences. The prosecution presented evidence tending to show one or both of two types of first degree murder; i.e., murder in the perpetration of robbery, or by willful, deliberate, and premeditated killing. It may be assumed that the jury found defendant guilty of robbery-murder, for they found him guilty of robbery. As has been pointed out, the evidence as to Shayne's sentences is relevant to robbery-murder and the separately charged crime of robbery; such evidence tends to absolve defendant of robbery by tending to show that Shayne had a motive for asking, and therefore may well have asked, defendant to choke him and take his property. And it cannot properly be said that the exclusion of this evidence, relevant to robbery, was harmless upon the assumption that the jury found defendant guilty of willful, deliberate and premeditated murder, for we cannot assume that the jury could not have believed defendant's testimony to the effect that his final choking of Shayne was not with intent to kill but, under the influence of panic, with intent to render Shayne unconscious.

The People further argue that the exclusion of the record of Shayne's federal conviction and sentences was not prejudicial because that evidence was cumulative to testimony of an investigating officer that defendant said that Shayne had stated

that he was under a five-year prison sentence, testimony of defendant that Shayne had said that he had suffered a federal conviction and had appealed, and testimony of Attorney Morris Lavine that Shayne had suffered a federal conviction and that Mr. Lavine was representing him on appeal. However, the rejected record of the federal convictions of seven felonies would have come in as part of defendant's case and at that stage of the trial shown the probability that defendant was not manufacturing his assertions that Shayne had stated that he had been convicted, whereas Mr. Lavine's testimony was no doubt less effective for the defendant, since it was part of the People's rebuttal and was coupled with testimony that Mr. Lavine and Shayne expressed optimism as to obtaining a reversal on appeal.

Also the People suggest that lack of prejudice in the exclusion of evidence as to Shayne's insurance and conviction is shown by the fact that defense counsel argued concerning those subjects to the jury. But argument is not evidence; the jury were so instructed; and defense counsel could not properly and did not argue the significance of the erroneously excluded evidence as to the amount and the suicide clause of the insurance policy.

[3] Not only is the excluded evidence relevant and important on the essential questions of robbery, of the specific intent to kill, and of the deliberation and premeditation with which such intent, if any, was formed; also it might well have been significant upon the question of penalty if the jury had properly found defendant guilty of first degree murder. Defendant did not renew his offer of such evidence during the separate proceedings on the issue of penalty (Pen.Code, § 190.1) but in view of its rejection at the first stage of the trial we do not believe that such renewal is a prerequisite to defendant's maintaining the contention that the receipt of such evidence might well have influenced the jury to choose the lesser penalty.

[4] In support of his motion for new trial defendant presented affidavits of asserted newly discovered evidence that Shayne shortly before his death requested an acquaintance to introduce him to some "shady character" who would "do a job" in connection with a large insurance policy which Shayne had recently purchased, and that Shayne said that he was depressed because of his convictions and was worth more dead than alive. From the above discussion concerning the relevance and import of the rejected evidence concerning the insurance and the convictions it is apparent that such newly discovered evidence of Shayne's state of mind will be admissible upon a new trial.

[5] Defendant contends that the trial judge erred in refusing his requested instructions based upon section 401 of the Penal Code. That section provides, "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." It is defendant's position that (assuming that the jury believed his testimony) he could be guilty only of violation of section 401 (added, Code Amdts. 1873–1874, p. 433), not of murder (defined by Pen.Code, §§ 187–189, enacted 1872), because section 401 is a later enacted statute specifically related to, and therefore governing, conduct such as that of defendant here.

Rather, the reasoning of State v. Bouse (1953), 199 Or. 676, 702–703 [264 P.2d 800, 812 [23–25]], is applicable. There defendant's wife was found drowned beside a bathtub which contained water. There was evidence that she had told defendant that she wished to die. Upon the evidence the jury could have determined that defendant put her in the tub and, despite her struggles, held her head under water until she drowned, or they could have determined that if defendant participated in her death at all he did no more than run the water into the tub and assist his wife to get into it. The reviewing court concluded that the trial court correctly instructed the jury in the follow-

ing statutory language (§ 23-407, O.C. L.A.): "If any person shall purposely and deliberately procure another to commit self-murder, or assist another in the commission thereof, such person shall be deemed guilty of manslaughter." But, the court said, "Contrary to the claims of defendant's counsel, the statute [just quoted] does not contemplate active participation by one in the overt act directly causing death. It contemplates some participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about death,—the gun, the knife, the poison, or providing the water, for the use of the person who himself commits the act of self-murder. But where a person actually performs, or actively assists in performing, the overt act resulting in death, such as shooting or stabbing the victim, administering the poison, or holding one under water until death takes place by drowning, his act constitutes murder, and it is wholly immaterial whether this act is committed pursuant to an agreement with the victim, such as a mutual suicide pact."

Here defendant by his own account actively strangled Shayne and, although defendant indicated that he did not intend to kill Shayne and did not believe that he had done so, the only reasonable view of the evidence is that Shayne was fatally choked by defendant. In these circumstances the instructions based upon Penal Code section 401 were properly refused.

[6, 7] Defendant urges that the trial judge of his own motion should have instructed the jury concerning the crime of theft, an offense which as a matter of law is necessarily included in the charged crime of robbery. However, there was no direct evidence of the lesser offense of theft. It is elementary that the taking of property is not theft in the absence of an intent to steal (People v. Coon (1940), 38 Cal.App.2d 512, 516, 101 P.2d 565; People v. Banks (1953), 120 Cal.App.2d Supp. 921, 922 [1] 261 P.2d 362), and according to defendant's testimony he did not intend to steal the property but took it in compliance with Shayne's express request. Defendant could have been guilty of theft only if he first strangled Shayne and then formed the intent to and did steal. The physical facts of the killing would support an inference that it was in the perpetration of robbery; they do not in themselves suggest a killing followed by the formation of an independent intent to steal. Although the jury could have accepted portions of defendant's testimony and statements, disbelieved other portions (People v. Davis (1957), 48 Cal.2d 241, 248 [1] 309 P.2d 1; People v. Johnston (1957), 48 Cal.2d 78, 83 [2], 307 P.2d 921), and determined that defendant first strangled Shayne and then formed the intent to steal, upon the present record there was no occasion for the trial court of its own motion to instruct concerning grand theft. (Cf. People v. Carnine (1953), 41 Cal.2d 384, 389, 260 P.2d 16.)

Defendant contends that due process was violated by the admission in evidence of confessions obtained by psychological coercion. The extrajudicial statements of defendant, termed "confessions" by counsel, were made in the following circumstances:

Police investigation of Shayne's death led officers to defendant at his home at 5:30 p. m. on Monday, September 30, 1957. Defendant then said that he had seen Shayne the previous day but had not entered his automobile. The officers "asked the defendant to accompany us to the police station, which he did, for the purpose of finger printing and one thing and another." Defendant was questioned intermittently from 6 p. m. until 3 a. m. the next morning. During this period, defendant testified, he was from time to time put in a cell and "As soon as I thought I was going to sleep they would call me right back and they would keep me about an hour and a half or two hours"; in the morning for an unspecified time "they had me in what you would call the hold, where you make no communication with nobody, and they take your shoes away from you, and that is all that was in there,

just a piece of board to lay on." At 5 p. m. on October 1 the officers took from defendant a "formal [stenographically reported] statement" in which he again denied having been in Shayne's car.

On October 2, 1957, at 8 a. m. defendant asked to talk with a detective and gave a second "formal statement" in which he said that Shayne paid him $1,000 to "rough him up," that defendant became frightened and tried to leave the car, that Shayne "grabbed" him and he strangled Shayne. In this statement defendant did not mention Shayne's jewelry.

Defendant was then questioned until 5 p. m.; during this questioning an officer told defendant "that if he didn't tell us where the jewelry was we would probably have to bring the rest of the family in until we get this straightened out." At 5 p. m. on October 2 defendant directed and accompanied the officers to the yard of his home where he had hidden the jewelry. They returned to the police station and at 6:45 p. m. defendant gave his third "formal statement," amplifying his second statement, emphasizing that the strangling was at Shayne's request, and asserting that Shayne had given defendant the jewelry.

In violation of Penal Code section 825,[1] defendant was not arraigned until the afternoon of October 3. At 4:30 p. m. on October 4 he made a fourth "formal statement" further amplifying his previous incriminatory statements.

In addition to the foregoing uncontradicted evidence we consider the fact that the record shows defendant's lack of education and mental weakness. His counsel also emphasizes that there is no evidence that the police officers informed defendant of the privilege against self-incrimination or of the right to counsel.

In our appraisal of the totality of the circumstances in which defendant's statements were made, the following holdings are pertinent: "[A] confession is not rendered inadmissible by a failure to advise a suspect of his right to remain silent, of his right to counsel and that his statements may be used against him [citation], or by an absence of a suspect's counsel and friends [citation], or by a delayed detention, where the confession is not the product of that detention [citation] or by a low emotional and mental stability on the part of the suspect if he is nevertheless capable of understanding the meaning and effect of his confession [citation]. Such matters may be taken into consideration in determining whether a particular confession was voluntarily made." (People v. Tipton (1957), 48 Cal.2d 389, 393–394 [4], 309 P.2d 813.) Also to be considered in determining whether a confession was voluntary, but not necessarily to be accepted as establishing that it was coerced, are the facts that defendant was questioned extensively (Stein v. People of State of New York (1953), 346 U.S. 156, 184–185, 73 S.Ct. 1077, 97 L.Ed. 1522) and for a time was held incommunicado (People v. Nagle (1944), 25 Cal.2d 216, 224, 153 P.2d 344).

[8–10] A serious question is presented by the threat of an officer to "bring the rest of the family in" which was expressly made in order to, and did, induce defendant to "tell us where the jewelry was." A confession coerced by a threat to arrest a near relative is not admissible. (People v. Shelton (1957), 151 Cal.App.2d 587, 588 [2], 311 P.2d 859; People v. Mellus (1933), 134 Cal.App. 219, 225, 25 P.2d 237.) Contrary to the People's argument, the situation here is not susceptible of the interpretation that defendant led the officers to the jewelry in the mere hope, not induced by threat or promise, that consideration would be shown to defendant's friends or family. (Cf. People v. Nagle (1944), supra, 25 Cal.2d 216, 224–225 [5], 153 P.2d 344; People v. Abbott (1958), 156 Cal.App.2d 601, 604–605, 319 P.2d

1. Pen.Code, § 825: "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays * * *"

664; People v. Newman (1954), 127 Cal. App.2d 430, 434 [2, 3], 273 P.2d 917.) Nor are we impressed by holdings that evidence of physical facts discovered by aid of a coerced confession, and so much of the confession as relates to the discovery of those facts, are admissible because the physical facts preclude the possibility of the confession being false. (People v. Castello (1924), 194 Cal. 595, 601 [4], 229 P. 855; People v. Murphy (1873), 47 Cal. 103, 105; People v. Hoy Yen (1867), 34 Cal. 176, 177; People v. Ah Ki (1862), 20 Cal. 177, 179.) Real evidence may be discovered in circumstances which show defendant's guilt without any substantial question whatsoever, yet convictions obtained by such evidence may be stricken down because of the requirements of due process or of court-made rules of evidence based upon the court's refusal to condone, and thereby in effect encourage, official flouting of the law. (Rochin v. People of California (1952), 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183; see also opinions of the District Court of Appeal, and opinions of dissenting justices on denial of hearing in California Supreme Court, in People v. Rochin (1950), 101 Cal.App.2d 140, 225 P.2d 1, 913; Anderson v. United States (1943), 318 U.S. 350, 63 S.Ct. 599, 87 L.Ed. 829, reversing Anderson v. United States, 6 Cir. (1941), 124 F.2d 58, 66 [13, 15]; People v. Cahan (1955), 44 Cal.2d 434, 445–449, 282 P.2d 905, 50 A.L.R.2d 513.) In the whole circumstances of this case, however, we conclude that on the present record neither the threat alone nor its combination with the other circumstances in which defendant gave his statements was as a matter of law so inherently coercive as to require that we reject the officers' testimony that the statements were freely made, or that we now hold that the jewelry discovered as a result of the threat must be inadmissible upon a new trial.

Defendant asserts that the prosecuting attorney was guilty of "flagrant" misconduct. We do not believe that this characterization is warranted and, since the matters of which defendant complains will probably not recur, we need not discuss them in detail.

[11] While the errors in the proceedings on the homicide count appear to go only to the validity of the finding that the murder was of the first degree (and to the selection of penalty), and the evidence strongly supports a determination that the homicide was murder of the second degree, this is not a case which can properly be disposed of on appeal by reduction of the degree of the homicide and affirmance as modified. On the record this court cannot hold that the evidence is insufficient to sustain the determinations of the trier of fact that the defendant committed robbery, that the homicide was murder, and that the murder was of the first degree. Although on proper motion a trial court can (and must) pass upon the weight of the evidence in determining whether convictions should be reduced in degree or class (People v. Borchers (1958), 50 Cal.2d 321, 328 [1, 2], 330 [9, 10], 325 P.2d 97; People v. Sheran (1957), 49 Cal.2d 101, 109 [6], 315 P.2d 5; People v. Todd (1957), 154 Cal.App.2d 601, 608 [6–8], 317 P.2d 40), the power of this court to decree a reduction can be exercised only where it finds the evidence to be as a matter of law insufficient to sustain the essential finding (People v. Deloney (1953), 41 Cal.2d 832, 837 [1], 264 P.2d 532; People v. Thomas (1945), 25 Cal.2d 880, 904–905 [22, 23], 156 P.2d 7).

For the reasons above stated, the judgment and the order denying a new trial are reversed and the cause is remanded for a new trial.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

McCOMB, J., dissents.

51 Cal.2d 766

PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO, Respondent.

S. F. 20060.

Supreme Court of California,
In Bank.
March 17, 1959.

Rehearing Denied April 15, 1959.

Telephone company's action for declaratory relief to establish its claim to state franchise to construct and maintain telephone lines in streets in City and County of San Francisco. The Superior Court, City and County of San Francisco, William F. Traverso, J., rendered judgment for defendant, and plaintiff appealed. The Supreme Court, McComb, J., held that for purposes of constitutional provisions granting certain cities and towns control over "municipal affairs", construction and maintenance of telephone lines in streets and other public places within a city was not a "municipal affair" and city could not exclude such lines essential to furnishing of communication services to people throughout the state from streets.

Reversed.

1. Telecommunications ⇐78

Statute providing that telegraph and telephone companies may construct lines along and on any public road or highway constitutes a continuing offer extended to telephone and telegraph companies which, when accepted by construction and maintenance of lines, gives a franchise from the state to use public highways for prescribed purposes without the necessity of grant by any subordinate legislative body. West's Ann.Public Util.Code, § 7901.

2. Municipal Corporations ⇐57

For purposes of constitutional provisions granting certain cities control over "municipal affairs", the concept of "municipal affairs" is not a fixed or static quantity but it changes with changing conditions and what may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by general law. West's Ann.Const. art. 11, §§ 6, 8.

3. Telecommunications ⇐78

For purposes of constitutional provisions granting certain cities and towns control over "municipal affairs", construction and maintenance of telephone lines in streets and other public places within a city was not a "municipal affair" and city could not exclude such lines, essential to furnishing of communication services to people throughout the state, from streets. West's Ann.Const. art. 11, §§ 6, 8; West's Ann.Public Util.Code, §§ 6001–6017, 7901.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Affairs".

4. Telecommunications ⇐78

Statute providing that telegraph or telephone corporations may construct lines along any public road or highway, as it was re-enacted in 1905, extended to telephone corporations offer of state franchise for construction and maintenance of communication lines on same terms as offer was previously made to telegraph corporations, extending throughout the entire state for purpose of providing people with state-wide communication services. West's Ann.Public Util.Code, § 7901.

Pillsbury, Madison & Sutro, John A. Sutro, Francis N. Marshall and Noble K. Gregory, San Francisco, for appellant.

Dion R. Holm, City Attorney, George E. Baglin and Robert M. Desky, Deputy City Attorneys, San Francisco, for respondent.

McCOMB, Justice.

Plaintiff, hereinafter referred to as "the telephone company," brought an action for declaratory relief to establish its claim of a state franchise to construct and maintain telephone lines in the streets in the City and County of San Francisco. The City and County of San Francisco is hereinafter referred to as "the city."

After trial before the court without a jury, the court found that the construction and maintenance of telephone and telegraph lines on the public streets and other public places located within the city was not a matter of concern to all the people of the State of California, but that the use and occupation of the city streets and other public places by the company's telephone lines was a municipal affair.

The court entered a judgment which determined that the city could exclude from its streets telephone lines essential to the furnishing of communication services to people throughout the State of California, unless the telephone company obtained a franchise from the city.

This is the sole question necessary for us to determine: *Is the construction and maintenance of telephone lines in the streets and other public places within the city today a matter of state concern or a municipal affair under sections 6 and 8 of article XI of the state Constitution?* [1]

We are of the opinion that the construction and maintenance of telephone lines in the streets and other public places within the city is today a matter of state concern and not a municipal affair.

Prior to 1896 the Legislature had plenary authority over all cities and their charters. (People ex rel. Blanding v. Burr, 13 Cal. 343, 351.) This rule was also applicable to cities which adopted freeholders' charters under the Constitution of 1879 (Davies v. City of Los Angeles, 86 Cal. 37, 41, 24 P. 771; Ex parte Ah You, 82 Cal. 339, 342, 22 P. 929) and to cities which continued to

1. Section 6 of article XI reads: "Corporations for municipal purposes shall not be created by special laws; but the Legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed; and the Legislature may, by general laws, provide for the performance by county officers of certain of the municipal functions of cities and towns so incorporated, whenever a majority of the electors of any such city or town voting at a general or special election shall so determine. Cities and towns heretofore organized or incorporated may become organized under the general laws passed for that purpose, whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith. Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. Cities and towns heretofore or hereafter organized by authority of this Constitution may, by charter provision or amendment, provide for the performance by county officers of certain of their municipal functions, whenever the discharge of such municipal functions by county officers is authorized by general laws or by the provisions of a county charter framed and adopted by authority of this Constitution."

Section 8 of article XI reads, in part: "(j) In submitting any such charter or amendment separate propositions, whether alternative or conflicting, or one included within the other, may be submitted at the same time to be voted on by the electors separately, and, as between those so related, if more than one receive a majority of the votes, the proposition receiving the largest number of votes shall control as to all matters in conflict. It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. It shall be competent in any charter to provide for the establishment of a borough system of government for the whole or any part of the territory of the city or city and county governed thereby, by which one or more boroughs or districts may be created therein and to provide that each borough or district may exercise such general or special municipal powers, and to be administered in such manner, as may be provided for such boroughs and districts in the charter of the city or city and county."

operate under a special act adopted prior to 1879 (Thomason v. Ashworth, 73 Cal. 73, 76 et seq., 14 P. 615).

In 1896 section 6 of article XI of the Constitution was amended to provide a limited amount of autonomy for freeholders' charter cities. It provided that charters "framed or adopted by authority of this Constitution, *except in municipal affairs,* shall be subject to and controlled by general laws." (Italics added.) The city acquired its first freeholders' charter under this amendment, and this was the charter in effect when the telephone company began to render telephone services in the city.

It has been uniformly held that where a freeholders' charter adopted while such amendment was applicable specifically delegated to a city power with respect to particular municipal affairs, such delegated power controlled over general laws, but that if there was no specific charter provision delegating power with respect to a particular subject, the general laws applied within the city even if the subject was a municipal affair. (Fragley v. Phelan, 126 Cal. 383, 389, 395, 58 P. 923; Civic Center Ass'n of Los Angeles v. Railroad Commission, 175 Cal. 441, 447 et seq., 166 P. 351; Stege v. City of Richmond, 194 Cal. 305, 310 [1] et seq., 228 P. 461.)

In 1914 sections 6 and 8 of article XI of the Constitution were amended to give greater autonomy with respect to municipal affairs to cities whose charters were adopted or amended after 1914. After 1914 the city, by appropriate amendment to its charter, acquired autonomy with respect to all municipal affairs except to the extent that its charter limited or restricted such autonomy. (West Coast Advertising Co. v. City and County of San Francisco, 14 Cal.2d 516, 522 [2], 95 P.2d 138.)

As to matters which are of state concern, however, freeholders' charter cities remained subject to and controlled by general state laws regardless of the provisions of their charters. (Cal.Const. art. XI, § 6; Civic Center Ass'n of Los Angeles v. Railroad Commission, supra at page 445, of 175 Cal. at page 352 of 166 P.; Douglass v. City of Los Angeles, 5 Cal.2d 123, 128 [2], 53 P.2d 353.)

Since 1850 the State of California has by statute authorized the construction and maintenance of telegraph lines in the roads, highways and other public places in this state. (Cf. County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal.2d 378, 381 [1], 196 P.2d 773.) This statute was codified as section 536 of the Civil Code.[2]

In Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 114 et seq., 116 P. 557, it was held that section 536 of the Civil Code constituted an offer by the state to telegraph corporations of a franchise to construct and maintain their lines in the highways and other public places within the state, including the streets located in freeholders' charter cities.

In 1905 the Legislature repealed section 536 of the Civil Code and re-enacted it to read as follows: "Telegraph or *telephone corporations* may construct lines of telegraph or *telephone lines* along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." (Italics added.) The legislative intention in re-enacting this statute was to extend to telephone corporations the same offer previously made to telegraph corporations without any other change in its effect or operation. (County of Los Angeles v. Southern Cal. Tel. Co., supra at 382, of 32 Cal.2d at page 776 of 196 P.2d.)

In 1912 the United States Supreme Court in City of Pomona v. Sunset Telephone & Telegraph Co., 224 U.S. 330, 344 et seq., 32 S.Ct. 477, 479, 56 L.Ed. 788, held that the

2. The statute now appears as section 7901 of the Public Utilities Code, but it will be referred to in this opinion as section 536 of the Civil Code.

legislative intention to extend the offer of a state franchise to telephone corporations had been frustrated by another statute, the Broughton Act (Stats.1905, chap. 578, p. 777, now Pub.Util.Code, §§ 6001–6017) enacted by the Legislature at the same session at which it had re-enacted section 536 of the Civil Code. The Broughton Act provided a procedure for cities and counties to grant franchises "to erect or lay telegraph or telephone wires" in the public streets. The Supreme Court of the United States in this case held that "Until the state court shall decide otherwise," this act must be construed as a delegation by the state to all California cities of the power to grant franchises to California corporations and, therefore, that the Legislature, by enacting the Broughton Act, had repealed section 536 of the Civil Code before it could apply to telephone corporations.

In 1921 the District Court of Appeal in County of Inyo v. Hess, 53 Cal.App. 415, 200 P. 373 (hearing denied by the Supreme Court), did "decide otherwise" and repudiated the Pomona decision as a misconstruction of California law. The court held that the Broughton Act was purely a procedural statute and did not delegate to cities or counties any substantive authority. This court confirmed the holding of the County of Inyo case in County of Los Angeles v. Southern Cal. Tel. Co., supra, where we said: "The Broughton Act, unlike section 536, does not grant any right or privilege, nor does it purport to empower or authorize boards of supervisors to grant franchises or other privileges, but instead indicates an intent to limit and restrict the powers which may have been granted under other laws by specifying the procedure which must be followed and the conditions which must be imposed in the granting of any franchises by subordinate legislative bodies." (32 Cal. 2d at page 383, 196 P.2d at page 777.)

[1] It is now settled that section 536 of the Civil Code constitutes "a continuing offer extended to telephone and telegraph companies * * * which offer when accepted by the construction and maintenance of lines" (32 Cal.2d at page 384, 196 P.2d at page 777) gives a franchise from the state to use the public highways for the prescribed purposes without the necessity for any grant by a subordinate legislative body.

[2] It is likewise settled that the constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state. (Helmer v. Superior Court, 48 Cal.App. 140, 141 [3] et seq., 191 P. 1001; cf. Key System Transit Co. v. City of Oakland, 124 Cal. App. 733, 740 [3], 13 P.2d 979; Shean v. Edmonds, 89 Cal.App.2d 315, 324 [3], 200 P.2d 879; People v. Western Air Lines, Inc., 42 Cal.2d 621, 635 [19], 268 P.2d 723.)

The undisputed evidence in this case discloses that all the communication services provided by the telephone company involve the transmission of intelligence by electrical impulses through its lines.

The telephone company provides direct communication service to the public in California, Oregon, Washington, the northern part of Idaho and, through a subsidiary, in Nevada. In California, either directly or in conjunction with connecting telephone companies, it provides communication service to all the people of the state.

The telephone company, directly or by connecting with the other 49 telephone companies operating in California, makes instantaneous communication available to all the people of the state. Because of the long distance service provided subscribers of the company and the connecting companies, all the people in this state, by the use of over six million telephones, may communicate by telephone with each other.

Likewise, the people of the United States, by the use of over 60 million telephones, and the people in many parts of the world, may communicate directly with the people in this state, including the residents of the city. In 1957 the telephone company handled 250 million long distance messages

in California. Of these, over 18 million were to telephones located in the San Francisco exchange and over 11 million were from telephones in that exchange.

In addition to long distance service, the telephone company provides local telephone service within exchange and extended areas, —geographical areas established, pursuant to orders of the Public Utilities Commission of California, to meet the communications requirements of the people residing in those areas. The geographical area of an exchange is based upon a community of business and social interests of people residing in that area, and thus its boundaries do not necessarily conform to the boundaries of cities. For example, the San Francisco exchange includes the cities of San Francisco, Daly City, Colma, parts of Pacifica and South San Francisco, unincorporated areas of San Mateo County, the Presidio, Fort Miley, Fort Funston, Fort Mason, Hunters Point, Treasure Island, Alcatraz Island, Angel Island and the portions of the San Francisco Harbor under the jurisdiction of the San Francisco Port Authority.

An extended area is made up of two or more exchange areas to permit the subscribers in one exchange area to call subscribers in other exchange areas without making long distance calls. Thus, the San Francisco-East Bay extended area includes 30 exchanges serving the residents of 53 cities as well as unincorporated areas located within the counties of Santa Clara, San Mateo, Alameda, Contra Costa and Marin.

In 1957 the telephone company handled almost 6 billion exchange and extended area telephone messages in California, which included 90 million extended area messages between telephones in the San Francisco exchange and the other 29 exchanges in the San Francisco-East Bay extended area.

In addition to long distance, exchange and extended area telephone service, the communication services provided the public by the telephone company include private line telephone, teletypewriter, public mobile telephone, telephotograph, and the transmission of television and radio programs. In order to provide these communication services, the telephone company must maintain telephone lines in the streets located within the city. A communication circuit cannot be established for a subscriber in the city without lines either along or across the streets. The telephone company maintains 9,358 manholes and vaults in the streets and other public places in the city. It also maintains 14,005 telephone poles, 203,000 miles of aerial wire and cable, 1,740.34 miles of underground duct, and over a million miles of underground and buried cable in the streets of the city, all of which are used not only for telephone calls within the city but also for calls throughout California, the United States, and other parts of the world.

If the telephone lines were removed from the streets in the city, the people throughout the state, the United States, and most parts of the world who can now communicate directly by telephone with residents in the city could no longer do so. In addition, the more than 300,000 residents of San Mateo County would be cut off from all long distance telephone communication with the people throughout the state, the nation, and other parts of the world. Without lines in the streets of the city, the telephone company could not provide private line services for agencies of the federal government, such as the Civil Aeronautics Administration, the Federal Communications Commission, the Army, the Navy, and the Air Force.

The private line service afforded over 300 businesses and industries with offices in the city and offices elsewhere in the state or nation would also be cut off if the telephone lines were removed from the streets in the city. For example, the Pacific Coast Stock Exchange, with divisions in Los Angeles and San Francisco, is able to operate as a single exchange only by reason of instantaneous communication between the two divisions, requiring the use of telephone lines in the streets in the city.

Pursuant to its Public Works Code, the city controls the particular location of and manner in which all public utility facilities, including telephone lines, are constructed in the streets and other places under the city's jurisdiction. Before a public utility can make an excavation in any such street or place, it must apply to the city's Department of Public Works for a permit and make a deposit sufficient to cover the costs of inspection and of restoring the street or place to its original condition, together with incidental expenses of the Department of Public Works in connection therewith. The application of the utility must show the location and proximate area of each excavation and must be approved by the city engineer's office. After the application has been granted, the utility must install its facilities under the supervision of the Department of Public Works and restore the street to as good a condition as it was in before the excavation was made.

Pursuant to these regulations, the telephone company during 1957 obtained from the city's Department of Public Works 65 permits for the installation of poles and 946 excavation permits, and in each case filed an appropriate application, paid the required fee before obtaining the necessary permit, and repaved the streets after the excavations had been completed. The telephone company concedes the existence of power in the city to exact these requirements.

Also, the telephone company concedes that its state franchise can be taxed by the city. The record shows that it paid the city for the fiscal year 1957–1958 nearly $4,000,000 in ad valorem taxes, which payment included taxes on such franchise.

[3] Applying the above stated rules of law to the facts of the present case, it is apparent that because of the interest of the people throughout the state in the existence of telephone lines in the streets in the city, the right and obligation to construct and maintain telephone lines has become a matter of state concern. For this reason the city cannot today exclude telephone lines from the streets upon the theory that "it is a municipal affair."

[4] When the Legislature in 1905 re-enacted Civil Code, section 536 to extend to telephone corporations the offer of a state franchise for the construction and maintenance of communication lines, it intended that the offer, like the same offer previously made to telegraph corporations (Postal Telegraph-Cable Co. v. Railroad Commission, 200 Cal. 463, 473 [9], 254 P. 258), extend and be accepted in its entirety throughout the state (Pacific Telephone & Telegraph Co. v. City of Los Angeles, 44 Cal.2d 272, 276 [1], 282 P.2d 36; City of Petaluma v. Pac. Tel. & Tel. Co., 44 Cal.2d 284, 287 [2], 282 P.2d 43; County of Los Angeles v. Southern Cal. Tel. Co., supra at 382 of 32 Cal.2d at page 776 of 196 P.2d).

The offer was made for the purpose of providing the people of the state with statewide communication services. (County of Los Angeles v. Southern Cal. Tel. Co., supra at page 384 [3] et seq., of 32 Cal.2d at page 777 of 196 P.2d.)

This conclusion is in accord with other decisions of this court. In Ex parte Daniels, 183 Cal. 636, 639, 192 P. 442, 444, 21 A.L.R. 1172, we held that the regulation of traffic on the public streets was a matter of state concern, notwithstanding that such regulation "is of special interest to the people of a municipality."

Sunset Telephone & Telegraph Co. v. City of Pasadena, 161 Cal. 265, 118 P. 796, relied on by the city in support of its contention that placing telephone lines in the streets of a city is a municipal affair, was decided in 1911. It was held that since Pasadena's charter contained an express delegation of power to grant franchises to telephone corporations to construct and maintain telephone lines in the streets and this was a municipal affair within the meaning of the 1896 amendment to section 6 of article XI of the Constitution, the Legislature's offer of a franchise to telephone corporations in 1905, made by re-enacting section 536 of the Civil Code to include

such corporations, did not apply to streets in Pasadena. This case is not controlling now because, as hereinabove stated, the concept of a "municipal affair" is not a fixed quantity but may fluctuate with changing conditions. Accordingly, what may have been a "municipal affair" a half century ago is not necessarily one today.

In 1909, when the case of Sunset Telephone & Telegraph Co. v. City of Pasadena, supra, was tried, the telephone company had only about 195,000 telephones in use in California. At that time subscribers of one competing company could not speak to subscribers of another. Today the 50 telephone companies providing service in California all connect with each other, as do the other telephone companies throughout the United States, so that the people throughout the State of California, through the use of 6 million telephones, and the people throughout the United States, through the use of 60 million telephones, may communicate with any telephone subscriber in the city.

In 1909 there was a vast difference in long distance telephone service. No long distance calls from San Francisco could be made to any place south of Los Angeles, north of Portland, or east of Reno. In contrast to the over 3,000 circuits now available for communication between Los Angeles and San Francisco, in 1909 only two circuits were available and only two conversations could be carried on between those two cities at the same time. In 1909 there was only one circuit north to Portland and one east to Reno. Telephone conversations between San Francisco and those cities frequently would be impaired or impossible because of weather conditions.

In 1909 parties in long distance conversation could not understand each other if they spoke in a normal tone of voice; they had to shout to be heard, and long distance conversations frequently had to be repeated by the operators in order that the parties could understand each other. It was not until 1915, with the opening of the transcontinental telephone line and the development of the vacuum tube repeater, that telephone conversations over any substantial distance became practicable. Today any person throughout the United States and most other parts of the world can talk directly with any telephone subscriber in the city.

Clearly, there has been a vast change in conditions since the decision in Sunset Telephone & Telegraph Co. v. City of Pasadena, supra, in 1911, and it is evident that telephone service is not at the present time a municipal affair but is a matter of statewide concern.

Pacific Telephone & Telegraph Co. v. City of Los Angeles, supra, 44 Cal.2d 272, 276 [3], 282 P.2d 36, is not applicable here for this reason:

The principal issue in that case was whether the telephone company held a state franchise under section 536 of the Civil Code to construct and maintain its lines and equipment on the streets and other public places located within all areas which have been annexed to or consolidated with the city since 1905. The telephone company did not contend in the trial court that the city had no power to require a franchise for use of the streets within the 1905 boundaries of the city, and the statement in the opinion on that subject (44 Cal.2d at pages 276–277, 282 P.2d at pages 38–39) merely recognized the rule which had been applied in Sunset Telephone & Telegraph Co. v. City of Pasadena, 161 Cal. 265, 118 P. 796.

City of San Diego v. Southern Cal. Tel. Co., 92 Cal.App.2d 793, 208 P.2d 27, also relied on by the city, wherein the court held that the construction and maintenance of telephone lines in streets is not a matter of state concern but is a municipal affair, is contrary to the views hereinabove expressed and is therefore disapproved.

In view of our conclusions, it is unnecessary to discuss other contentions made by counsel.

The judgment is reversed.

GIBSON, C. J., and TRAYNOR, SCHAUER and SPENCE, JJ., concur.

Rehearing denied; SHENK, J., dissenting.

51 Cal.2d 759

ROHR AIRCRAFT CORPORATION (a Corporation), Appellant,

v.

COUNTY OF SAN DIEGO et al., Respondents.

L. A. 24556.

Supreme Court of California.

March 17, 1959.

Rehearing Denied April 15, 1959.

Aircraft company brought action against city and county to recover real estate taxes paid by company under allegedly legal assessments. The Superior Court, San Diego County, Arthur L. Mundo, J., entered judgment denying a refund, and the company appealed. The Supreme Court, Spence, J., held that since realty of the Reconstruction Finance Corporation was taxable under the Reconstruction Finance Corporation Act at all times before it became surplus to the needs of the Reconstruction Finance Corporation, and since much of such realty was destined to be sold to private persons and thereafter to be subject to local taxes, it could not be held that Congress intended such realty to be immune from taxation during disposal process, and therefore realty, which the Reconstruction Finance Corporation declared to be surplus to its needs and responsibilities pursuant to Surplus Property Act, and which the Reconstruction Finance Corporation leased to an aircraft company until the Reconstruction Finance Corporation conveyed its interests in the realty to the United States, was not immune from city and county taxes while held by aircraft company under the lease.

Judgment affirmed.

McComb, J., dissented.

Opinion, 330 P.2d 291, vacated.

1. Counties ⇐190(1)
Municipal Corporations ⇐956(1)

Since realty of Reconstruction Finance Corporation was taxable under Reconstruction Finance Corporation Act at all times before it became surplus to needs of Reconstruction Finance Corporation, and since much of such realty was destined to be sold to private persons and thereafter to be subject to local taxes, it could not be held that Congress intended such realty to be immune from taxation during disposal process, and therefore realty, which Reconstruction Finance Corporation declared to be surplus to its needs and responsibilities pursuant to Surplus Property Act, and which Reconstruction Finance Corporation leased to aircraft company until Reconstruction Finance Corporation conveyed its interests in realty to United States, was not immune from city and county taxes while held by aircraft company under lease. Reconstruction Finance Corporation Act, § 8 as amended 15 U.S.C.A. § 607; Act June 30, 1945, 15 U.S.C.A. § 611 note; Federal Property and Administration Services Act, § 105, 5 U.S.C.A. § 630c; Surplus Property Act of 1944, §§ 1 et seq., 10(a), 11–23, 58 Stat. 765; West's Ann.Const. art. 13, § 1.

2. Courts ⇐97(5)

California Supreme Court is bound by interpretations of federal statutes by the United States Supreme Court but decisions of lower federal courts on federal questions are merely persuasive. U.S.C.A. Const. art. 6.

3. Courts ⇐97(5)

Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law, and any rule which would require state courts to follow in all cases decisions of one or more lower federal courts is undesirable, since it has effect of binding state courts where neither reasoning nor number of federal cases is found persuasive, and such rule will not significantly promote uniformity in federal law, because interpretation of act of Congress by lower federal court does not bind other federal courts except those directly subordinate to it.

4. Courts ⇐97(5)

California courts may decline to follow decision of Court of Claims in construing federal statute, where reasoning of such decision is not persuasive.

Glenn & Wright and Leroy A. Wright, San Diego, for appellant.

James Don Keller, Dist. Atty., and County Counsel, Carroll H. Smith, Deputy Dist. Atty., and Manuel L. Kugler, City Atty., San Diego, for respondents.

SPENCE, Justice.

Plaintiff, Rohr Aircraft Corporation, sought to recover property taxes paid to the defendants County of San Diego and City of Chula Vista under allegedly illegal assessments. From a judgment denying a refund, plaintiff appeals.

During the years for which recovery is sought, plaintiff occupied the land in question under a lease obligating it to pay "all taxes, assessments and similar charges * * * upon the leased premises." Plaintiff's lessors were the "Reconstruction Finance Corporation * * * and the United States of America, both acting by and through the General Services Administrator." While plaintiff concedes the taxability of its possessory interest, it maintains that taxes levied upon the realty itself were unlawful because of the general rule that lands owned by the United States of America or its instrumentalities are immune from state and local taxation. Clallam County, Wash., v. United States, 263 U.S. 341, 44 S.Ct. 121, 68 L.Ed. 328; Van Brocklin v. State of Tennessee, 117 U.S. 151, 6 S.Ct. 670, 29 L.Ed. 845. Defendants argue, however, that the property was owned by the Reconstruction Finance Corporation, that Congress had waived the tax immunity of such property (Reconstruction Finance Corporation Act, ch. 166, § 8, 61 Stat. 205 (1947), as amended, 15 U.S.C.A. § 607 (formerly Reconstruction Finance Corporation Act, ch. 8, § 10, 47 Stat. 9 (1932)), and that the assessments were therefore lawful.

In 1942 and 1943, plaintiff's predecessor, also named Rohr Aircraft Corporation, conveyed the property in question to the Defense Plant Corporation, a subsidiary of the Reconstruction Finance Corporation (hereinafter sometimes referred to as the RFC). The Defense Plant Corporation improved the property and leased it to plaintiff's predecessor for the production of aircraft parts and assemblies during World War II. On July 1, 1945, the Defense Plant Corporation was dissolved and all its assets were transferred to the RFC by operation of law. Act of June 30, 1945, ch. 215, 59 Stat. 310, 15 U.S.C.A. § 611 note. In October, 1945, the lease was terminated at Rohr's request, and there was evidence that the company then vacated the premises. On May 29, 1946, the RFC declared the property to be surplus to its needs and responsibilities pursuant to the Surplus Property Act of 1944, § 11, 58 Stat. 769. Later in the year the War Assets Administration, a federal instrumentality designated as a surplus property disposal agency (see Surplus Property Act of 1944, ch. 479, § 10(a), 58 Stat. 769), accepted possession and control of the property pending its ultimate disposition. No deed was executed at that time, and legal title remained in the RFC. The functions of the War Assets Administration were subsequently transferred to the General Services Administration. Federal Property and Administrative Services Act of 1949, ch. 288, § 105, 63 Stat. 381, 5 U.S.C.A. § 630c.

In May, 1948, the former Rohr Aircraft Corporation began renting portions of the property on a month-to-month basis, and in September, 1949, its successor, the plaintiff, obtained the above-mentioned lease of the entire property. In accordance with its terms, plaintiff paid taxes on the land pursuant to defendants' assessments against the RFC as record owner for the fiscal years 1951–1952 through 1954–1955. In 1955 the RFC conveyed its interest to the United States.

Plaintiff's right to recover the amounts so paid depends on whether the leased premises were immune from local taxation or whether Congress had waived the federal immunity. The waiver in question provides, "[A]ny real property of the [Reconstruction Finance] Corporation shall be subject to * * * county, municipal, or local taxation to the same extent accord-

ing to its value as other real property is taxed." Reconstruction Finance Corporation Act, ch. 166, § 8, 61 Stat. 205 (1947), as amended, 15 U.S.C.A. § 607 (formerly Reconstruction Finance Corporation Act, ch. 8, § 10, 47 Stat. 9 (1932)). Before the RFC's surplus property declaration, this statute unquestionably subjected the land to local taxes. Reconstruction Finance Corp. v. Beaver County, Pa., 328 U.S. 204, 66 S.Ct. 992, 90 L.Ed. 1172; Boeing Aircraft Co. v. Reconstruction Finance Corp., 25 Wash.2d 652, 171 P.2d 838, 168 A.L.R. 539, appeal dismissed and certiorari denied Boeing Aircraft Co. v. King County, 330 U.S. 803, 67 S.Ct. 972, 91 L.Ed. 1262. Its taxable status was not changed by the mere declaration that it was surplus to the RFC's needs and responsibilities. Board of County Com'rs of Sedgwick County, Kan. v. United States, 105 F.Supp. 995, 1001, 123 Ct.Cl. 304. Thus the sole question for determination is whether the land ceased to be "real property of the" Reconstruction Finance Corporation when control and responsibility were subsequently transferred to the War Assets Administration. The identical question has been presented in two previous cases.

In Board of County Com'rs of Sedgwick County, Kan. v. United States, supra, 105 F.Supp. 995, 123 Ct.Cl. 304, the Court of Claims held that RFC surplus property was immune from local taxes once the War Assets Administration had accepted control of and accountability for the property. The court reasoned that "the waiver of constitutional immunity from taxes * * * was undoubtedly intended to apply to that real property of the corporation held by it in the performance of the duties and responsibilities imposed upon it by law. But by the * * * declaration of the property as surplus * * * the RFC declared that the property was surplus to its 'needs and responsibilities', and by * * * acceptance [of the War Assets Administration] was divested of all control and responsibility. At no time after the acceptance by the WAA * * * did the RFC or any of its employees have physical possession, control, or custody of the property. It had neither the use nor the right to use the property. It could not even withdraw the declaration of surplus property without the approval of the War Assets Administrator." Id. 105 F.Supp. at page 1001. Although the court recognized that the RFC continued to be the "owning agency" within the meaning of the Surplus Property Act (§ 3(b), 58 Stat. 767), it viewed the RFC as holding no more than "a bare legal title for the use of the United States." 105 F.Supp. at page 1001; see United States v. Shofner Iron & Steel Works, 9 Cir., 168 F.2d 286. On the basis of this reasoning and the assumption that the RFC omitted to transfer title merely "as a matter of convenience to the Government and to minimize actual paper work and expense" (105 F.Supp. at page 1001), the court concluded that "the purpose of the waiver provision had been fully served when the property passed to the control of the WAA." Id., 105 F.Supp. at page 1001–1002.

In Continental Motors Corporation v. Township of Muskegon, 346 Mich. 141, 77 N.W.2d 370, the Supreme Court of Michigan rejected the reasoning of the Sedgwick case and came to an opposite conclusion on similar facts. The court declared that the Congressional waiver of immunity "was intended to prevent prejudice to local economic conditions" and that the reason for the waiver persisted during the disposal process where the use of the property remained unchanged. Id., 346 Mich. at pages 149–150, 77 N.W.2d at page 374. We are in accord with the result reached by the Supreme Court of Michigan in the cited case.

[1] In providing for taxation of "real property of the" RFC, Congress must have intended to insure that RFC ownership of property would not withdraw important revenue sources from the local tax rolls. By enacting the Surplus Property Act of 1944 (58 Stat. 765), Congress expressed its desire to maintain competition, "to avoid dislocations of the domestic economy," and "to prevent * * * unusual and excessive

profits being made out of surplus property." 58 Stat. 766. These objectives are inconsistent with the asserted intent that RFC surplus property should be immune from taxation during the disposal process. While some of that property was ultimately to be transferred to tax-exempt entities such as federal agencies, local and state governments, and charitable organizations (58 Stat. 770–772), it was also anticipated that much of it would be returned to private hands. 58 Stat. 773–779. Since RFC property was taxable at all times before it became surplus to the needs of the RFC, and since much of that property was destined to be sold to private persons and thereafter to be subject to local taxes, it cannot be held that Congress intended such property to be immune from taxation during the disposal process. Moreover, it appears that the disposal agencies, acting under similar reasoning, left legal title in the RFC not merely as a "matter of convenience," as the Court of Claims assumed, but for the sole purpose of continuing the tax immunity waiver until final disposition of the property. See 32 Decs.Comp. Gen. 164, 166; Hearings on Amendment to the Federal Property and Administrative Services Act of 1949, as Amended, Before the House Committee on Government Operations, 84th Cong., 1st Sess. 126. We conclude that the property did not become immune from local taxes until legal title was transferred to the United States in 1955, and that plaintiff is therefore not entitled to a refund of the amounts paid. Cal.Const. art. XIII, § 1; see Boeing Aircraft Co. v. Reconstruction Finance Corp., supra, 25 Wash.2d 652, 663, 171 P.2d 838, 845, 168 A.L.R. 539, appeal dismissed and certiorari denied Boeing Aircraft Co. v. King County, 330 U.S. 803, 67 S.Ct. 972, 91 L.Ed. 1262.

[2] Plaintiff contends, however, that we must reverse the judgment on the authority of the Sedgwick case, supra, 105 F.Supp. 995, even though we disagree with the decision of the Court of Claims. It is true that we are bound by interpretations of federal statutes by the United States Supreme Court. U.S.Const. art. VI, cl. 2. In our opinion, however, the decisions of the lower federal courts on federal questions are merely persuasive. See Stock v. Plunkett, 181 Cal. 193, 194–195, 183 P. 657; Continental Motors Corp. v. Township of Muskegon, supra, 346 Mich. 141, 77 N.W.2d 370; State ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 298 Mo. 474, 489–490, 251 S.W. 383, 387, affirmed 266 U.S. 200, 45 S.Ct. 47, 69 L.Ed. 247; Note, 147 A.L.R. 857; 21 C.J.S. Courts § 206, p. 365. Although the parties have cited no decision of the United States Supreme Court directly passing upon the point, plaintiff argues that in any event our own decisions require us to follows the Court of Claims. Plaintiff relies on general statements to the effect that this court must accept the construction placed upon federal statutes by the federal courts. Those statements were made, however, either in the light of controlling United States Supreme Court decisions (In re Hallinan, 43 Cal.2d 243, 250–252, 272 P.2d 768; Mackenzie v. Hare, 165 Cal. 776, 779, 785, 134 P. 713, L.R.A. 1916D, 127) or in cases where this court had no disagreement with the position taken by the lower federal courts. Pennsylvania R. Co. v. Midstate Horticultural Co., 21 Cal.2d 243, 245, 131 P.2d 544; Dougherty v. California Kettleman Oil Royalties, 9 Cal.2d 58, 88–89, 69 P.2d 155.

[3, 4] Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law. Any rule which would require the state courts to follow in all cases the decisions of one or more lower federal courts would be undesirable, as it would have the effect of binding the state courts where neither the reasoning nor the number of federal cases is found persuasive. Such a rule would not significantly promote uniformity in federal law, for the interpretation of an Act of Congress by a lower federal court does not bind other federal courts except those directly subordinate to it. United States v. Cincotta, D.C., 146 F.Supp. 61, 62; General Electric Co. v. Refrigeration Pat-

ents Corp., D.C., 65 F.Supp. 75, 81; United States v. St. Clair, D.C., 62 F.Supp. 795, 797; see also Rule 19, Revised Rules of the Supreme Court, subd. 1(b), 28 U.S. C.A. We therefore conclude that the courts of this state may decline to follow the decision of the Court of Claims, as the reasoning of that decision is not persuasive.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, and SCHAUER, JJ., concur.

McCOMB, Justice.

I dissent. I would reverse the judgment for the reasons stated by Mr. Justice Coughlin in the opinion prepared by him for the District Court of Appeal in Rohr Aircraft Corp. v. County of San Diego, Cal.App., 330 P.2d 291.

Rehearing denied; McCOMB, J., dissenting.



51 Cal.2d 702

Jessie F. ERNIE, Appellant,

v.

TRINITY LUTHERAN CHURCH (a Nonprofit Corporation), Respondent.

S. F. 19821.

Supreme Court of California,
In Bank.
March 11, 1959.

Action to quiet title to disputed strip of property. The Superior Court, Marin County, Thomas F. Keating, J., quieted title in defendant and plaintiff appealed. The Supreme Court, Shenk, J., held that where landowner, upon acquiring property, caused survey to be made, and on basis of such survey erected fences, concrete walkway, and building with concrete foundation on a strip of such property subsequently claimed by a coterminous owner, but no objection to erection or maintenance of such structures was made by one coterminous owner for 26 years or by his successor for first ten year period of his possession and such successor waited another four years before maintaining action to quiet title to strip, by such time, line indicated by such structures became boundary line by agreement.

Judgment affirmed as modified.

McComb and Schauer, JJ., dissented.

Opinion, 327 P.2d 145, vacated.

1. Quieting Title ⇐10(1)

Plaintiff in quiet title action may recover only on strength of his own title and not on weakness of defendant's title.

2. Quieting Title ⇐10(2)

When plaintiff in action to quiet title relies on paper title alone he must trace his title to the government, or to a grantor in possession at the time of the conveyance to the plaintiff, or to a source common to the chains of title of plaintiff and defendant.

3. Quieting Title ⇐44(1)

Burden of proof is on plaintiff in an action to quiet title.

4. Quieting Title ⇐44(4)

In action, against coterminous owner, to quiet title to disputed strip of land, plaintiff could not establish prima facie case merely by introduction of deed from her immediate grantor who was not a grantor in defendant's chain of title.

5. Adverse Possession ⇐86

Payment of taxes on property involved is a necessary prerequisite to establishing title by adverse possession, and title to disputed strip could not be quieted in defendant where plaintiff had continuously paid taxes on land including such strip.

6. Boundaries ⇐46(1)

Doctrine of title by agreed boundary requires that there be uncertainty as to true boundary line, agreement between the coterminous owners fixing line, and acceptance and acquiescence in line so fixed for a period equal to statute of limitations or

under such circumstances that substantial loss would be caused by a change of its position.

7. Boundaries ⇐46(1)

It is not required under doctrine of title by agreed boundary that true location be absolutely unascertainable, that an accurate survey from calls in deed is possible or that uncertainty should appear from deeds, but agreed line may be founded on a mistake.

8. Boundaries ⇐48(8)

Court may infer that there was an agreement between coterminous owners ensuing from uncertainty or a dispute from long-standing acceptance of fence as boundary between their lands.

9. Boundaries ⇐46(1)

Where landowner, upon acquiring property, caused survey to be made, and on basis of such survey erected fences, concrete walkway, and building with concrete foundation, on a strip of such property subsequently claimed by a coterminous owner, but no objection to erection or maintenance of such structures was made by one coterminous owner for 26 years or by his successor for first ten year period of his possession and such successor waited another four years before maintaining action to quiet title to strip, by such time, line indicated by such structures became boundary line by agreement.

10. Quieting Title ⇐47(2)

In quiet title action, general finding of ownership is finding of ultimate fact.

Joseph A. Brown and Miguel A. Leite, San Francisco, for appellant.

John B. Ehlen, San Francisco, for respondent.

SHENK, Justice.

The plaintiff appeals from a judgment quieting title in the defendant church and enjoining the plaintiff from asserting any claim in or to a disputed strip of land 9/10 of a foot wide and 140 feet long located in the city of San Rafael. The issues on appeal are whether the plaintiff failed to prove her cause of action and whether the judgment properly quieted title in the defendant in and to this narrow strip.

The complaint alleged that the plaintiff owned a described parcel of land 55 feet by 140 feet fronting on Fifth Avenue in San Rafael; that the defendant owned the adjoining property to the west; that without her wishes and against her consent the defendant maintained encroachments consisting of a cement walkway, a rectory building and a fence on a strip of land 9/10 of a foot wide within the westerly boundary line for its entire 140 foot length; that the defendant was claiming some right, title or interest in this strip, and that this claim was without right. The answer denied the plaintiff's ownership and asserted defendant's ownership and possession of this strip. Separate defenses based on adverse possession, agreed boundary, and the bar of the statutes of limitation contained in section 318 and subdivision 2 of section 338 of the Code of Civil Procedure were pleaded. The answer prayed that the plaintiff take nothing by her complaint, that the defendant be awarded its costs of court and "such other and further relief as is meet and just in the premises."

The plaintiff introduced as evidence of her title a deed to her from a Mrs. Anna Hock dated May 17, 1944, the description in which included the disputed strip, and a survey map prepared for the plaintiff in 1952 which showed the extent of the encroachments upon this land. She also introduced evidence that she had paid the taxes on the land deeded to her, and that the description of the adjoining property in a deed to the defendant's predecessor from a Mrs. Clara Hock, dated January 9, 1925, did not include this strip.

It appears without conflict that the evidence supports the findings that in the year 1925 the defendant's predecessor, the St. Matthew's Evangelical Church of San Rafael, owned the property described in Finding II; that in the year 1926 that church built, as an integral part of its

church building, a rectory building having a concrete foundation, upon a portion of the disputed strip, described in Finding III; that at that time it built on other portions of this strip a cement walkway about six feet wide leading from the southerly line of Fifth Avenue to the rectory; that along the easterly line of this walkway it built a substantial wooden fence, the supporting posts of which were firmly and substantially embedded in the walkway and attached to the rectory building; that at that same time it built a substantial wooden fence, the uprights of which were firmly and substantially embedded in the soil, extending southerly from the rectory along the easterly line of the strip to the rear property line; that continuously, and ever since these structures were erected and until June 30, 1942, the St. Matthew's Evangelical Church was in the sole and exclusive possession of this strip of land; that the church, its parishioners, pastors, Sunday School and Confirmation Classes openly, visibly, peaceably, notoriously, and without objection from any one used the walkway and rectory for the purposes of the church; that from January 1926 until October 1952 no one made any claim or demand of any kind adverse to the use of, or claim to this strip by the church, its parishioners, pastors, Sunday School and Confirmation Classes; that on June 30, 1942, the defendant purchased its property from St. Matthew's Evangelical Church in the belief that the easterly line of the property purchased was along the easterly line of the strip, and that ever since June 30, 1942, the defendant, its pastors, parishioners, Sunday School and Confirmation Classes have solely and exclusively, openly, visibly, peaceably and notoriously used said cement walkway, said rectory and said fences.

The court found further, also without any conflict in the evidence, that on May 17, 1944, one Mrs. Anna Hock executed a conveyance to the plaintiff of the 55 x 140 foot parcel described in Finding VI; that ever since that date the plaintiff has paid all taxes levied or assessed upon this property and that no taxes were at any time levied or assessed upon any easement over the disputed strip; that neither Mrs. Anna Hock, nor the plaintiff at any time used, occupied or possessed this strip or any of the improvements thereon; that in October of 1952 the plaintiff, for the first time, informed the defendant that she claimed title to this strip, and that she commenced the present action on January 30, 1956.

As conclusions of law from these facts the court found that the plaintiff's action was barred by the provisions of section 318 and of subdivision 2 of section 338 of the Code of Civil Procedure, and by laches and lack of due diligence of the plaintiff and her predecessor in interest; that the defendant was entitled to judgment that the plaintiff and all persons claiming under her be enjoined from asserting any claim adverse to the defendant or to the disputed strip, together with the defendant's costs of suit, and that judgment should be entered quieting the defendant's title in the strip. The legal description of the strip is set forth in Conclusion IV.

[1–3] In this state a quiet title action may be brought by a party not in possession (Code Civ.Proc. § 380) against another who claims an estate or interest in property adverse to him (Code Civ.Proc. § 738). Section 318 of the Code of Civil Procedure provides that "No action for the recovery of real property, or for the recovery of possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action." The plaintiff may recover only upon the strength of his or her own title, however, and not upon the weakness of the defendant's title. Where the plaintiff relies on a paper title alone he must trace his title (1) to the government; or (2) to a grantor in possession at the time of the conveyance to the plaintiff; or (3) to a source common to the chains of title of plaintiff and defendant. Helvey v. Sax, 38 Cal.2d 21, 24, 237 P.2d 269; Rockey v. Vieux, 179 Cal. 681, 682,

178 P. 712. The burden of proof is upon the plaintiff. Akley v. Bassett, 189 Cal. 625, 646, 209 P. 576; Haney v. Kinevan, 73 Cal.App.2d 343, 344, 166 P.2d 361.

[4] The plaintiff did not offer evidence to establish a prima facie case on any of these alternatives or to overcome the bar of the statute of limitations contained in section 318 of the Code of Civil Procedure. No evidence was offered to deraign her title from the government or to show that any common grantor appeared in the chain of title of herself and the defendant. What title the plaintiff's grantor had or how she acquired it does not appear, and no proof was offered that she or her grantor ever had possession. The mere introduction of the deed from her immediate grantor was not sufficient to establish a prima facie case. Coffin v. Odd Fellows Hall Ass'n, 9 Cal.2d 521, 525, 71 P.2d 266; San Diego Improvement Co. v. Brodie, 215 Cal. 97, 100, 8 P.2d 1027. The plaintiff, therefore, failed to prove either legal title or actual possession and judgment was properly entered denying her any relief.

[5] Now as to the sufficiency of the record in support of the judgment quieting the title in the defendant and enjoining the plaintiff from asserting any interest therein. It is true that the judgment for the defendant cannot be supported on any theory of title by adverse possession because of the affirmative showing and finding of payment of taxes by the plaintiff since the acquisition of her deed. The payment of taxes on the part of a claimant is a necessary prerequisite in establishing a title by adverse possession. The trial court found that no taxes had been levied or assessed upon any easement in the disputed strip, but it made no finding that the defendant had acquired a prescriptive easement. While such a finding could have been made it would not support the judgment quieting the title in the defendant in fee.

The answer pleaded the defendant's ownership of the disputed strip, and also pleaded title by agreed boundary. Although no specific finding was made on this issue of the defendant's title, all of the essential elements necessary to sustain such a finding and judgment appear in the record.

[6, 7] The requirements of proof necessary to establish a title by agreed boundary are well settled by the decisions in this state. Mello v. Weaver, 36 Cal.2d 456, 459, 224 P.2d 691; Hannah v. Pogue, 23 Cal. 2d 849, 856–857, 147 P.2d 572; Martin v. Lopes, 28 Cal.2d 618, 622–627, 170 P.2d 881; Young v. Blakeman, 153 Cal. 477, 481–483, 95 P. 888; see also 4 Cal.L.Rev. 179; 14 Cal.L.Rev. 138; 56 Mich.L.Rev. 487 et seq. The doctrine requires that there be an uncertainty as to the true boundary line, an agreement between the coterminous owners fixing the line, and acceptance and acquiescence in the line so fixed for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change of its position. It is not required that the true location be absolutely unascertainable (Price v. De Reyes, 161 Cal. 484, 489, 119 P. 893); that an accurate survey from the calls in the deed is possible (Silva v. Azevedo, 178 Cal. 495, 498, 173 P. 929), or that the uncertainty should appear from the deeds (Mello v. Weaver, supra, 36 Cal.2d 456, 460, 224 P.2d 691). The line may be founded on a mistake. Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 19, 200 P. 651.

[8, 9] The court may infer that there was an agreement between the coterminous owners ensuing from uncertainty or a dispute, from the long-standing acceptance of a fence as a boundary between their lands. Hannah v. Pogue, supra, 23 Cal.2d 849, 856, 147 P.2d 572 and cases cited. The evidence shows that the St. Matthew's Evangelical Church caused a survey to be made at the time it purchased the property in 1925; that the improvements consisted not merely of fences, which might in and of themselves be of an uncertain, temporary or equivocal nature, but were substantial structures such as a cement walkway with a fence solidly embedded therein and a building with a concrete foundation; that no objection to the erection or maintenance

of these structures was made by the adjoining owner for 26 years; that during all of that time no one asserted any adverse claim to the strip; that from 1942, when she bought the adjoining property, until 1952, a period of ten years, the plaintiff made no objection to the open, visible, notorious and peaceable use of the property by the defendants, and that she then waited almost four years longer before bringing this action. It may be inferred that there was an uncertainty as to the true line at the time the structures were erected, which uncertainty was settled by practical location on the ground at that time and was agreed to by the then coterminous owners. It may also be inferred that the uncertainty arose after the improvements were constructed and that the coterminous owners, by acceptance and acquiescence, agreed that the easterly boundary of these structures constituted the true boundary line between their properties. There is no evidence that the defendant's predecessor did not act in good faith. The acquiescence of the adjoining owner continued for a period longer than the statute of limitations and also under such circumstances that substantial loss would be caused to the defendant by a change of position of the boundary line.

Under the foregoing circumstances the line so agreed upon became in legal effect the true line. In Young v. Blakeman, supra, 153 Cal. 477, 482, 95 P. 888, 890, it was said: "It is stated by the authorities that the line so agreed on becomes in legal effect the true line; that the agreement as to the line may be in parol, and that it does not operate to convey title to the land which may lie between the agreed line and the true line, but that it fixes the line itself and the description carries title up to the agreed line, regardless of its accuracy * * * that 'the division line, when thus established, attaches itself to the deeds of the respective parties, and simply defines, not adds to, the lands described in each deed'; and that, if more is thus given to one than the calls of his deed actually requires, he 'holds the excess by the same tenure that he holds the main body of his lands.'" Each coterminous owner is deemed to have paid the taxes according to his deed. Price v. De Reyes, supra, 161 Cal. 484, 489–490, 119 P. 893; Caballero v. Balamotis, 144 Cal.App.2d 58, 61–62, 300 P.2d 363; Carr v. Schomberg, 104 Cal.App. 2d 850, 860, 232 P.2d 597. It is therefore not material to the defendant's claim of title by agreed boundary that the plaintiff paid the taxes assessed upon the land according to her deed.

[10] The equities are in favor of the defendant and the litigation should be terminated. The question of the defendant's title was in issue and the answer prayed for "such other and further relief as is meet and just in the premises." A general finding of ownership is a finding of ultimate fact. Daly v. Sorocco, 80 Cal. 367, 22 P. 211; 41 Cal.Jur.2d Quieting Title § 82; 24 Cal.Jur. Trial § 207. This court has the power to make such a finding on the evidence pursuant to section 956a of the Code of Civil Procedure. This court therefore makes the following finding: that title to the strip of land described in Finding III is in the defendant.

It is not necessary to pass upon the other contentions raised on this appeal.

On the findings and conclusions of law made by the trial court and the additional finding herein made, the judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR and SPENCE, JJ., concur.

McCOMB, Justice.

I dissent. I would reverse the judgment for the reasons stated by Mr. Presiding Justice KAUFMAN in the opinion prepared by him for the District Court of Appeal in Ernie v. Trinity Lutheran Church, Cal.App., 327 P.2d 145.

SCHAUER, J., concurs.

51 Cal.2d 799

SACRAMENTO AND SAN JOAQUIN DRAINAGE DISTRICT,
Respondent,
v.
Peter J. JARVIS et al., Appellants.
Sac. 7026.

Supreme Court of California,
In Bank.
March 20, 1959.

Action by drainage district to condemn certain real property. The Superior Court, Sacramento County, Gordon A. Fleury, J., entered judgment awarding landowners sum for taking of land and landowners appealed. The Supreme Court, McComb, J., held that where prior to jury roll call and voir dire examination of jury it was orally stipulated between attorneys in presence of judge in his chambers that judge should preside over trial of action and that parties waived any disqualification of judge arising under statute disqualifying a judge of the superior court of county in which real property sought to be condemned by drainage district was located, and no objection to qualification of judge was made at any time during trial, disqualification was waived even though parties had not stipulated to waiver in writing signed by them.

Affirmed.

Opinion, 329 P.2d 315, vacated.

1. Stipulations ⇐7

Where drainage district instituted action to condemn land and attorneys orally stipulated in presence of judge in chambers before jury roll call and voir dire examination of jury that the judge should preside over trial and that parties waived any disqualification of judge resulting from statute disqualifying judge of superior court of county in which lands sought to be condemned by drainage district are located unless parties should sign and file a stipulation in writing waiving disqualification, and no objection to qualification of judge was made during trial, disqualification of judge was waived by parties even though no stipulation in writing was signed by them. West's Ann.Code Civ.Proc. § 170, subds. 4, 6.

2. Judges ⇐54

Where oral stipulation waiving disqualification of judge arising under statute was subsequently entered in the minutes of the trial court, this entry constituted a writing within meaning of statute providing that disqualification of judge had to be waived by a stipulation in writing signed by the parties. West's Ann.Code Civ.Proc. § 170, subd. 6.

3. Evidence ⇐142(1), 488

In a condemnation proceeding a witness cannot state his opinion of value of neighboring land, but he may give evidence of prices paid for similar property in the vicinity of the land condemned.

4. Evidence ⇐142(1)

In condemnation action by drainage district there was no error by trial court in sustaining objections to questions asked of landowner's neighbor respecting value of her adjacent property.

Peter J. Jarvis and Beulah V. Jarvis, in pro. per., and Jesse E. Fluharty, Sacramento, for appellants.

Edmund G. Brown, Atty. Gen., Raymond H. Williamson and Marcus Vanderlaan, Deputy Attys. Gen., for respondent.

Harold W. Kennedy, County Counsel, A. R. Early, Deputy County Counsel, Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Peyton H. Moore, Jr., and Weldon L. Weber, Deputy City Attys., Los Angeles, Robert E. Reed, Holloway Jones, Norris J. Burke, San Francisco, Robert F. Carlson, Sacramento, amici curiae on behalf of respondent.

McCOMB, Justice.

Defendants appeal from a judgment awarding them $1,500 for 1.062 acres of land in a condemnation action.

Facts: This case came on for trial on February 1, 1956, before the Honorable Gordon A. Fleury, Judge of the Superior Court of Sacramento County. The action was instituted by the Sacramento and San Joaquin Drainage District and concerned real property located in Sacramento County.

Prior to the jury roll call and the voir dire examination of the jury, it was stipulated between plaintiff's attorneys and defendants' attorney, in the presence of Judge Fleury in his chambers, that said judge should preside over the trial of the action and that the parties would, and thereby did, waive any disqualification of said judge resulting from the provisions of section 170, subdivision 6, of the Code of Civil Procedure.

Following the foregoing stipulation, the case proceeded to trial, and on April 10, 1956, the judgment here appealed from was entered.

No objection was ever made prior to May 14, 1958, by any of the parties hereto to the qualification of Judge Fleury to preside at the trial. Briefs were filed in the District Court of Appeal, Third Appellate District, and the matter was orally argued and submitted for decision. No question was raised by either party in the District Court of Appeal relative to the trial judge's qualification.

On May 14, 1958, the District Court of Appeal on its own motion ordered that the parties be afforded an opportunity to make such presentation as they desired with respect to the effect on the judgment entered herein of the provisions of section 170, subdivision 6, of the Code of Civil Procedure.

These are the questions here presented:

[1] First. *May the disqualification of a judge under the provisions of section 170, subdivision 6, of the Code of Civil Procedure be waived by the parties other than by a stipulation in writing signed by them?*

Yes. Section 170 of the Code of Civil Procedure reads in part as follows: "* * The statement of a party objecting to the judge on the ground of his disqualification, *shall be presented at the earliest practicable opportunity,* after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge.

* * * * * *

"6. In an action or proceeding brought in any court by * * * any * * * drainage district * * * affecting or relating to any real property * * * a judge of the superior court of the county * * * in which such real property, or any part thereof * * * is situated shall be disqualified to sit or act, and such action shall be heard and tried by some other judge requested to sit therein by the chairman of the Judicial Council, unless the parties to the action shall sign and file in the action or proceeding a stipulation in writing, waiving the disqualification in this subdivision of this section provided, in which case such judge may proceed with the trial or hearing with the same legal effect as if no such legal disqualification existed." (Italics added.)

Defendants contend that the disqualification could be waived only by a stipulation in writing, signed by the parties, and that the parties' oral stipulation waiving the disqualification of the judge, made in his chambers prior to the trial and subsequently entered in the minutes of the trial court, did not constitute a waiver of his disqualification.

This court, in passing upon a similar contention relative to whether the provisions of subdivision 3 of section 170 of the Code of Civil Procedure could be waived other than by a written stipulation signed by the parties, held that where an objection to the judge on the ground of his disqualification was not made at the earliest practicable opportunity, it was waived by the

conduct of the parties, even though no written stipulation was signed by them.[1]

[2] In the present case it is obvious that the parties did not at the earliest practicable opportunity object to the judge's disqualification. On the contrary, they waived his disqualification before the trial was commenced and, in fact, never objected thereto until the matter was called to their attention by the District Court of Appeal several years after the trial had taken place.[2]

Second. *Did the trial court err in sustaining plaintiff's objections to questions asked Ethel Geyer, a witness called by defendants?*

No. The following questions, answers, objections, and rulings occurred during the examination of Ethel Geyer:

Direct Examination by Roy B. Hibbitt, Esq., of counsel for defendants:

"Q. Will you please state your name? A. Ethel Geyer.

"Q. And where do you live, Mrs. Geyer? A. 914 Rivera Drive.

"Q. And where is that located? A. Well, it is located in North Sacramento Heights.

1. This court, in Caminetti v. Pac. Mutual Life Ins. Co., 22 Cal.2d 386, 139 P.2d 930, 932, speaking through Mr. Chief Justice Gibson, said at page 390 et seq.: "It is contended, however, that regardless of the 1927 amendment there can be no estoppel to show that a judge is disqualified, that the filing of a written stipulation in the action constitutes the exclusive method of waiver, and that in the absence of such a waiver all decisions and orders of a disqualified judge are void. * * *

"* * * None of the cases cited by appellants indicates that disqualification arising under subdivision 3 of section 170 cannot be waived by failure to urge it at the 'earliest practicable opportunity' as required by the 1927 amendment of the section. Three of the cases, decided before enactment of the amendment, hold that a judgment rendered by a judge disqualified because of *personal interest under subdivision 1* of section 170, which, as distinguished from subdivision 3, contains no provision permitting a written waiver, is invalid, and that no waiver or estoppel by conduct could arise under that subdivision. (Citations.) These decisions are based upon the theory that the subdivision relating to a personal interest of a judge in litigation was intended to protect the state and judiciary as well as the parties to the suit and that therefore a waiver of the provision by a party is immaterial. The reasons of policy there relied upon can have no application to a disqualification arising under subdivision 3 of the section, as the Legislature has declared therein that the parties may avoid its operation by filing a written waiver or consent.

* * * * *

"While the 1927 amendment does not specify in so many words a penalty for failure to urge disqualification at the 'earliest practicable opportunity,' the intention is clear that failure to comply with the provision constitutes a waiver. Any other construction would render the amendment ineffective. Appellants cite Emerson v. Superior Court, 7 Cal.2d 685, 62 P.2d 363, and other cases, to the effect that a waiver by conduct or equitable estoppel may not be urged as a substitute for a statutory requirement of a written stipulation. These cases are inapplicable, since the 1927 amendment affords an additional statutory means by which a disqualification arising under subdivision 3 of section 170 may be waived, viz., failure to urge such disqualification at the 'earliest practicable opportunity.'

* * * * *

"Under all the circumstances, the following from the concurring opinion in the Lindsay-Strathmore case, supra, appears appropriate: *'It would seem * * * intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.'* [Italics added.] We conclude, therefore, that appellants did not present their objection at the 'earliest practicable opportunity' as required by section 170, supra, and that any disqualification of Judge Vickers was waived by their failure to comply with the provisions of the statute."

2. It should be further noted that the oral stipulation waiving the disqualification of the trial judge was subsequently *entered* in the minutes of the trial court. This entry contituted a writing within the meaning of subdivision 6, section 170, of the Code of Civil Procedure. (Cf. Dempsey v. Market Street

"Q. And do you know a waterway known as Arcade Creek? A. Yes.

"Q. Does that adjoin your property there? A. Yes, it does.

"Q. And you know Rio Linda Boulevard? A. Yes.

"Q. Where is Rio Linda Boulevard with reference to where you live? A. Well, you mean the direction?

"Q. Yes. A. It's west.

"Q. It's west of your property? A. Yes.

"Q. Now, Mrs. Geyer, your property runs along Rio Linda Boulevard; is that correct? A. Yes, it does.

"Q. And it runs along Rio Linda Boulevard and backs up to Arcade Creek; is that correct? A. That is right.

"Q. And across the rear end of the property that you own there is this levee that has been recently constructed by the State? A. Yes, sir.

"Q. So that you still have property that faces on Rio Linda Boulevard. And do you know the Jarvis property? A. Yes, sir, I do.

"Q. With reference to your property, the Jarvis property is directly across the street; isn't that right? A. Yes, it is.

"Q. And about how much frontage do you have on Rio Linda Boulevard at that place?

"Mr. Vanderlaan (counsel for plaintiff): I will object to that, your Honor. We are not condemning this lady's property.

"The Court: Objection sustained.

"Mr. Hibbitt: We are trying to establish values, your Honor, and I think probably by comparative values here, I am bringing this lady in to show the value of her adjacent property.

"Mr. Vanderlaan: I am sure that is not admissible, your Honor. She is not an expert.

"The Court: Objection sustained.

"Mr. Hibbitt: That's all then, Mrs. Geyer. You are excused.

"Mr. Vanderlaan: We have no cross-examination."

[3, 4] The rule is settled that in a condemnation proceeding a witness cannot state his *opinion* of the value of neighboring land.[3] (Haven v. Essex County Com'rs., 155 Mass. 467, 29 N.E. 1083, 1085; Beale v. Boston, 166 Mass. 53, 43 N.E. 1029, 1031; Brown v. City of Scranton, 231 Pa. 593, 80 A. 1113, 1116 [5]; Kansas City & T. Ry. Co. v. Vickroy, 46 Kan. 248, 26 P. 698, 699; cf. Consolidated Gas Service Co. v. Tyler, 178 Okl. 325, 63 P.2d 88, 90[3]; Idaho Farm Development Co. v. Brackett, 36 Idaho 748, 213 P. 696, 698.)

In Old Colony R. Co. v. F. P. Robinson Co., 176 Mass. 387, 57 N.E. 670, the rule is stated thus: "The rule has been held very strictly that the opinion of experts as to the value of other lands is not to be received. In Wyman v. Railroad Co., 13 Metc. (Mass.) 327, Mr. Justice Dewey uses language as follows: 'Evidence of mere opinion as to the value of property is to be confined exclusively to the subject in reference to which damages are claimed. If you would aid the jury by reference to other articles or other property similarly situated, the evidence in reference to such other articles or other property must be that of facts, and not opinions.'"

In the present case the proffered testimony fell within the foregoing rule, since defendants' attorney stated to the court, "I am bringing this lady in to show the value of her adjacent property."

There is likewise no merit in defendants' contention that Mrs. Geyer was being pro-

Ry. Co., 23 Cal.2d 110, 115[7], 142 P. 2d 929; Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 394[10], 121 P.2d 829.)

3. However, he may give evidence of the prices paid for similar property in the vicinity of the land condemned. (Los Angeles County v. Faus, 48 Cal.2d 672, 676 [2a], 312 P.2d 680.)

duced to testify concerning the value of defendants' property, since no such statement was made in the trial court.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., and WHITE, J. pro tem., concur.



51 Cal.2d 736

William R. WARD et al., Respondents,

v.

Marshall W. TAGGART et al., Appellants.

L. A. 24825.

Supreme Court of California, In Bank.

March 12, 1959.

Rehearing Denied April 8, 1959.

Action against broker and broker's employee by purchasers to recover secret profits made by broker at expense of purchasers. The Superior Court, Los Angeles County, Joe Raycraft, J., rendered judgment for plaintiffs, and defendants appealed. The Supreme Court, Traynor, J., held that under the circumstances the broker was liable on constructive trust-unjust enrichment-quasi-contractual theory, but that the employee, who had turned over to the broker all that the employee had received, was not liable.

Affirmed in part and reversed in part.

Schauer, J., dissented in part.

Opinions, 325 P.2d 502 and 329 P.2d 320, vacated.

1. Brokers ⇐4, 100
Trusts ⇐101

Where defendant, real estate broker, falsely represented to plaintiff's agent that defendant had been given an exclusive listing by owner, and plaintiffs through their agent submitted to defendant their offer to purchase at $4,000 per acre and a second offer to purchase at $5,000 per acre, and defendant did not present offers to owner but purchased from owner at $4,000 per acre and resold to plaintiffs at $5,000 per acre, and in all the negotiations the plaintiffs dealt at arm's length with defendant through their agent and defendant never purported to act for plaintiffs, defendant violated his statutory duty as real estate broker to be honest and truthful in his dealings, and even though defendant was not plaintiff's agent and there was no fiduciary relief between plaintiffs and defendant, public policy did not permit defendant to take advantage of his own wrong and the law provided plaintiffs with a quasi-contractual remedy to prevent defendant from being unjustly enriched at expense of plaintiffs, and defendant was involuntary trustee for benefit of plaintiffs to the extent of defendant's secret profit of $1,000 per acre, and plaintiffs could recover such profit, even though the property may have been worth $5,000 per acre. West's Ann.Bus. & Prof.Code, §§ 10150, 10176; West's Ann.Civ.Code, §§ 2224, 3343, 3517.

2. Fraud ⇐59(1)

In absence of fiduciary relationship, recovery in tort action for fraud is limited to actual damages suffered by plaintiff.

3. Brokers ⇐4

A real estate broker has statutory duty to be honest and truthful in his dealings. West's Ann.Bus. & Prof.Code, §§ 10150, 10176.

4. Appeal and Error ⇐171(1)

A change in theory is permitted on appeal when a question of law only is presented on the facts appearing in the record.

5. Appeal and Error ⇐171(1)

The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that contemplates a factual situation the consequences of which are

open to controversy and which were not put in issue or presented at the trial.

6. Appeal and Error ⇐171(1)

Where plaintiffs brought action in tort charging fraud on part of defendants and the facts pleaded and proved by plaintiffs would not sustain judgment in their favor on theory of tort but were sufficient to uphold recovery under quasi-contractual theory of unjust enrichment and that theory did not contemplate any factual situation different from that established by the evidence in the trial court and defendants had been given ample opportunity to present their version of the transaction involved, the plaintiffs on appeal could rely on the quasi-contractual theory of unjust enrichment.

7. Trusts ⇐101

Employee who had turned over all that she had received to her employer could not be held liable as an involuntary trustee.

8. Damages ⇐89(1)

In statute authorizing exemplary damages in action for breach of obligation not arising from contract, where defendant has been guilty of oppression, fraud, or malice, the word "contract" is used in its ordinary sense to mean an agreement between the parties, not an obligation imposed by law, despite the absence of any such agreement. West's Ann.Civ.Code, § 3294.

See publication Words and Phrases, for other judicial constructions and definitions of "Contract".

9. Brokers ⇐106

Where broker, by his fraud and violation of his statutory duty to be honest and truthful in his dealings, made a secret profit at expense of purchasers and the fraud did not arise from contract that was implied by law and purchasers' recovery of the secret profit was based on theory of unjust enrichment, the purchasers could in addition recover exemplary damages. West's Ann.Civ.Code, § 3294; West's Ann. Bus. & Prof.Code, §§ 10150, 10176.

10. Money Received ⇐1

In the theory of unjust enrichment that law implies promise to return money wrongfully obtained, the promise is purely fictitious and unintentional and was originally implied to circumvent rigid common-law pleading and was invoked not to deny a remedy but to create one for the purpose of bringing about justice without reference to the intention of the parties.

11. Damages ⇐87(1)

Courts award exemplary damages to discourage oppression, fraud, or malice by punishing the wrongdoer.

12. Damages ⇐87(1)

Exemplary damages are appropriate where restitution would have little or no deterrent effect.

13. Brokers ⇐106

Where broker, by his fraud and violation of his statutory duties to be honest and truthful in his dealings, made a secret profit at expense of purchasers, and purchasers recovered the secret profit on theory of unjust enrichment, there was no abuse of discretion in also awarding exemplary damages, since restitution would have little or no deterrent effect. West's Ann.Bus. & Prof.Code, §§ 10150, 10176.

14. Damages ⇐61

Broker who, by his fraud and violation of his statutory duty to be honest and truthful in his dealings, made a secret profit at expense of purchasers and thereby unjustly enriched himself, could not deduct from purchasers' recovery his expenses which might not have been incurred had the transaction been a legitimate one. West's Ann.Bus. & Prof.Code, §§ 10150, 10176.

James C. Blackstock and Felix H. McGinnis, Los Angeles, for appellants.

Chandler P. Ward, Los Angeles, for respondents.

TRAYNOR, Justice.

At plaintiff William R. Ward's request in February, 1955, LeRoy Thomsen, a real

estate broker, undertook to look for properties that might be of interest to Ward for purchase. During a conversation about unrelated matters, defendant Marshall W. Taggart, a real estate broker, told Thomsen that as exclusive agent for Sunset Oil Company he had several acres of land in Los Angeles County for sale. Thomsen said that he had a client who might be interested in acquiring this property. When Thomsen mentioned to Taggart that another broker named Dawson had a "For Sale" sign on the property, Taggart replied that Sunset had taken the listing away from Dawson. With Ward's authorization Thomsen submitted an offer on his behalf to Taggart of $4,000 an acre. Taggart promised to take the offer to Sunset. Taggart later told Thomsen that Sunset had refused the offer and would not take less for the property than $5,000 an acre, one-half in cash. Thomsen conveyed this information to Ward, who directed Thomsen to make an offer on those terms. Thomsen did so in writing. At Taggart's direction, Thomsen inserted in the offer a provision for payment by Sunset of a ten per cent commission, which Taggart and Thomsen agreed to divide equally. On the following day Thomsen informed Ward of the provision for the commission and Ward agreed to it. Subsequently, Taggart told Thomsen that Sunset had accepted Ward's offer and presented to him proposed escrow instructions naming Taggart's business associate, defendant H. M. Jordan, as seller acting for Taggart. Taggart stated that his designation as principal would enable him to "clear up the Dawson exclusive listing" as well as certain blanket mortgages on the property. Thomsen told Ward of this arrangement when he submitted the escrow instructions to him. When Ward asked why Jordan was to be the payee of the notes and the beneficiary of the trust deeds, Thomsen replied that Taggart had said the arrangement was prompted by certain tax and other problems of the Sunset Oil Company and that the trust deeds would be turned over to Sunset after the escrow. Plaintiffs paid $360,246 for the 72.0492 acres conveyed to them.

Plaintiffs did not learn until after they had purchased the property that Taggart had never been given a listing by Sunset and that he had never presented to Sunset and never intended to present plaintiffs' offers of $4,000 and $5,000 per acre. Instead, he presented his own offer of $4,000 per acre, which Sunset accepted. He falsely represented to plaintiffs that the least Sunset would take for the property was $5,000 per acre, because he intended to purchase the property from Sunset himself and resell it to plaintiffs at a profit of $1,000 per acre. All the reasons he gave for the unusual handling of the sale were fabrications. He never disclosed Ward's offer to Sunset until after the escrow papers were signed. All of the money he used to pay Sunset the purchase price came from the Ward escrow.

Plaintiffs brought an action in tort charging fraud on the part of Taggart and Jordan. The case was tried without a jury, and the court entered judgment against both defendants for $72,049.20 compensatory damages, and against Taggart for $36,000 exemplary damages. The judgment also enjoined defendants from transferring notes and trust deeds received from plaintiffs and ordered them to discharge these and thereby reduce the amount of the judgment. Defendants appeal.

[1] Defendants contend that the judgment must be reversed on the ground that, there can be no recovery in a tort action for fraud without proof of the actual or "out-of-pocket" losses sustained by the plaintiff and that in the present case there was no evidence that the property was worth less than plaintiffs paid for it. Defendants invoke section 3343 of the Civil Code, which provides that one "defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he re-

ceived, * * *." Although, as defendants admit, the evidence is clearly sufficient to support the finding of fraud, the only evidence submitted on the issue of damages was that the property was worth at least $5,000 per acre, the price plaintiffs paid for it. Since there was no proof that plaintiffs suffered "out-of-pocket" loss, there can be no recovery in tort for fraud. Bagdasarian v. Gragnon, 31 Cal. 2d 744, 762–763, 192 P.2d 935.

[2] Plaintiffs contend, however, that their recovery is not limited to actual damages, on the ground that section 3343 does not apply to a tort action to recover secret profits. They rely principally on Crogan v. Metz, 47 Cal.2d 398, 303 P.2d 1029; Savage v. Mayer, 33 Cal.2d 548, 203 P.2d 9; Terry v. Bender, 143 Cal.App.2d 198, 300 P.2d 119; Simone v. McKee, 142 Cal.App.2d 307, 298 P.2d 667; Ramey v. Myers, 111 Cal.App.2d 679, 245 P.2d 360; and Adams v. Harrison, 34 Cal.App.2d 288, 93 P.2d 237. These cases all involved situations in which the defendant was the agent of the defrauded person or in which a confidential or fiduciary relationship existed between the parties. They rest on the theory that "the principal's right to recover does not depend upon any deceit of the agent, but is based upon the duties incident to the agency relationship and upon the fact that all profits resulting from that relationship belong to the principal." Savage v. Mayer, supra, 33 Cal.2d at page 551, 203 P.2d at page 11. In the present case, however, there is no evidence of an agency or other fiduciary relationship between plaintiffs and defendant Taggart or defendant Jordan. Plaintiffs dealt at arms length with Taggart through their agent Thomsen. At no time did Taggart purport to act for plaintiffs. There is no evidence of any prior dealings between the parties or any acquaintanceship or special relationship that would create a fiduciary duty of defendants to plaintiffs. In the absence of a fiduciary relationship, recovery in a tort action for fraud is limited to the actual damages suffered by the plaintiff. Crogan v. Metz, 47 Cal.2d 398, 405, 303 P.2d 1029; Bagdasarian v. Gragnon, supra, 31 Cal.2d 744, 762–763, 192 P.2d 935.

[3] Even though Taggart was not plaintiff's agent, the public policy of this state does not permit one to "take advantage of his own wrong" (Civ.Code, § 3517), and the law provides a quasi-contractual remedy to prevent one from being unjustly enriched at the expense of another.[1] Section 2224 of the Civil Code provides that one "who gains a thing by fraud * * * or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." As a real estate broker, Taggart had the duty to be honest and truthful in his dealings. See Bus. & Prof.Code, §§ 10150, 10176; Rattray v. Scudder, 28 Cal.2d 214, 222–223, 169 P.2d 371, 164 A.L.R. 1356. The evidence is clearly sufficient to support a finding that Taggart violated this duty. Through fraudulent misrepresentations he received money that plaintiffs would otherwise have had. Thus, Taggart is an involuntary trustee for the benefit of plaintiffs on the secret profit of $1,000 per acre that he made from his dealings with them.

[4–6] Although this theory of recovery was not advanced by plaintiffs in the trial court, it is settled that a change in theory is permitted on appeal when "a question of law only is presented on the facts appearing in the record * * *." Panopulos v. Maderis, 47 Cal.2d 337, 341, 303 P.2d 738, 741; American Automobile Ins. Co. v. Seaboard Surety Co., 155 Cal.App.2d 192, 200, 318 P.2d 84. The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that "con-

1. Section 3343 provides that "nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."

templates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial." Panopulos v. Maderis, supra, 47 Cal.2d at page 341, 303 P.2d at page 741. Such is not the case here. Although the facts pleaded and proved by plaintiffs do not sustain the judgment on the theory of tort, they are sufficient to uphold recovery under the quasi-contractual theory of unjust enrichment since that theory does not contemplate any factual situation different from that established by the evidence in the trial court. Defendants were given ample opportunity to present their version of the transaction involved, and the issue of whether or not their actions constituted fraud was decided adversely to them by the trial court.

[7] Accordingly, the judgment for $72,092.20, representing the $1,000 per acre secret profit, against defendant Taggart must be affirmed. The judgment against defendant Jordan, however, must be reversed. Although she permitted her name to be used in the dual escrows, she did not share in the illicit profit that Taggart obtained. One cannot be held to be a constructive trustee of something he has not acquired.

[8–10] Taggart contends that if recovery is based on the theory of unjust enrichment, the judgment for exemplary damages must be reversed. The argument runs that under this theory the law implies a promise to return the money wrongfully obtained, that the plaintiff waives the tort and sues in assumpsit on an implied contract, and that since such an action is "contractual" in nature, it does not admit of the exemplary damages allowed under section 3294 of the Civil Code. That section authorizes exemplary damages "in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice * * *." The word "contract" is used in this section in its ordinary sense to mean an agreement between the parties, not an obligation imposed by law despite the absence of any such agreement. Taggart's obligation does not arise from any agreement between him and plaintiffs. It arises from his fraud and violation of statutory duties. His fraud is not waived, for it is the very foundation of the implied-in-law promise to disgorge. See Corbin, Waiver of Tort and Suit in Assumpsit, 19 Yale L.J. 221, 243–246. The promise is purely fictitious and unintentional, originally implied to circumvent rigid common-law pleading. It was invoked not to deny a remedy, but to create one "for the purpose of bringing about justice without reference to the intention of the parties." 1 Williston, Contracts (rev. ed.) p. 9; see Desny v. Wilder, 46 Cal.2d 715, 735, 299 P.2d 257. Since Taggart's obligation for his fraud does not arise from contract but is imposed by law, the judgment for exemplary damages clearly falls within section 3294. See Brown v. Coates, 102 U.S.App.D.C. 300, 253 F.2d 36, 39–40; Briggs v. Rodriguez, Tex.Civ.App., 236 S.W.2d 510, 514–516; 30 Tex.L.Rev. 371, 372. In Crogan v. Metz, 47 Cal.2d 398, 303 P.2d 1029, the only action sustainable under the pleadings was an action for breach of an agent's contractual duties. In Steiner v. Rowley, 35 Cal.2d 713, 221 P.2d 9, the plaintiff was estopped to allege a cause of action in tort to recover exemplary damages because he had obtained a writ of attachment in pursuit of the contractual remedy, "whereby he has gained any advantage over the other party." 35 Cal.2d at page 720, 221 P.2d at page 13.

[11–13] Courts award exemplary damages to discourage oppression, fraud, or malice by punishing the wrongdoer. See McCormick, Damages, § 79; Morris, Punitive Damages in Tort Cases, 44 Harv.L. Rev. 1173, 1185–1188. Such damages are appropriate in cases like the present one, where restitution would have little or no deterrent effect, for wrongdoers would run no risk of liability to their victims beyond that of returning what they wrongfully obtained. Haigler v. Donnelly, 18 Cal.2d 674, 680–682, 117 P.2d 331; Taylor v. Wright, 69 Cal.App.2d 371, 384–386, 159 P.2d 980; Hartzell v. Myall, 115 Cal.App. 2d 670, 676–678, 252 P.2d 676; Foster v. Keating, 120 Cal.App.2d 435, 454–455, 261

P.2d 529; Devers v. Greenwood, 139 Cal. App.2d 345, 350, 293 P.2d 834. The record herein discloses no abuse of discretion in the award of exemplary damages. Brewer v. Second Baptist Church, 32 Cal.2d 791, 802, 197 P.2d 713; Finney v. Lockhart, 35 Cal.2d 161, 164, 217 P.2d 19; State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal.2d 330, 340–341, 240 P.2d 282; Hartzell v. Myall, supra; Foster v. Keating, supra; see 14 Cal.Jur.2d 813–818.

[14] Taggart finally contends that he is entitled to a deduction of the cost to him of the transaction except those items incurred to accomplish his fraud. He seeks to reduce the compensatory damages by $25,563.10, representing the commission of $15,012.30 paid to Thomsen; the $5,900 commission paid to Harvey Nelson, former land manager of Sunset Oil Company; the $616 cost of the two escrows, one of which channeled title from Sunset to Jordan and the other from Jordan to plaintiffs; and the $4,034.80 paid to Dawson, who had an exclusive agency on the property, to cancel his contract. The $5,900 paid to Nelson and the cost of the Jordan escrow were expenses incurred to accomplish the fraud; they would not have been necessary to a legitimate transaction. It is clear that these expenses must be disallowed. Since it is entirely speculative whether the commissions paid to Thomsen and Dawson and the cost of the second escrow would have been paid by plaintiffs or Sunset had the transaction been a legitimate one, it would be inequitable to permit Taggart to deduct any of these expenses from plaintiffs' recovery. See Kinert v. Wright, 81 Cal.App.2d 919, 927, 185 P.2d 364; Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 152 P. 542; McArthur v. Goodwin, 173 Cal. 499, 160 P. 679.

The judgment against Taggart is affirmed. The judgment against Jordan is reversed.

GIBSON, C. J., and SHENK, CARTER, SPENCE and McCOMB, JJ., concur.

SCHAUER, Justice (concurring and dissenting).

I concur in the judgment because it comes as close to affording justice to the wronged plaintiffs as appears possible under the presently established decisional law of this state as it interprets and applies section 3343 of the Civil Code. In fact this decision, by its ingenious innovation and application of a constructive trust-unjust enrichment-quasi-contractual theory to support an award of exemplary damages as against one of the defendants, avoids much of the evil effect of the majority holding in Bagdasarian v. Gragnon (1948), 31 Cal.2d 744, 759–763, 192 P.2d 935, and is therefore to that extent desirable.

But because the subject section as now interpreted and applied still constitutes more of a shield for, than a sword against, fraud perpetrators, I deem it proper to once more direct attention to it in the hope that the Legislature—if not this court by forthright overruling of Bagdasarian—may provide a remedy.

The judgment of the trial court is amply supported by the evidence and would clearly be supported by the law as against both defendants were it not for the conclusion reached in the Bagdasarian case that the *addition* in 1935 of section 3343 to the Civil Code (Stats.1935, ch. 536, p. 1612, § 1) operated to repeal and supplant the previously existing law governing the measure of damages in fraud cases. It was my view then, and still is, that section 3343 was intended by the Legislature to provide an alternative, not the exclusive, measure of damages in such cases.

As pointed out by Professor Williston, under the construction of the statute adopted by the majority in the Bagdasarian case, "a fraudulent person can in no event lose anything by his fraud. He runs the chance of making a profit if he successfully carries out his plan and is not afterward brought to account for it; and if he is brought to account, he at least will lose

nothing by his misconduct." 5 Williston on Contracts (rev. ed.), 3886, § 1392.

In this connection it is to be noted that the legislation as adopted in California (Stats.1935, ch. 536, p. 1612, § 1) expressly declares that "Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled." I would prefer to reconsider the ruling in the Bagdasarian case and hold that the remedy added by the statute of 1935 is in truth an addition to, rather than a restriction on, the remedies of the person defrauded. So holding, I would affirm the judgment of the trial court, including the award of exemplary damages as against both defendants.



169 Cal.App.2d 27

PEOPLE of the State of California, Plaintiff and Respondent,

v.

James William WILKINS and Joseph Grant, Defendants.

Joseph Grant, Appellant.

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph GRANT, Jr., Defendant and Appellant.

Cr. 6478, 6477.

District Court of Appeal, Second District, Division 1, California.

March 23, 1959.

Prosecutions for attempted burglary and for petty theft resulting in two separate judgments of conviction by the Superior Court of Los Angeles County, McIntyre Faries, J., from which defendant attempted to appeal. The District Court of Appeal, Fourt, J., held that if defendant attempted to appeal from judgment of conviction of attempted burglary as distinguished from order granting probation and desired to have review of matters preceding order granting probation, failure to exercise his right of appeal at or about time probation was granted precluded him from going behind order granting probation, and by entering a plea of guilty to charge of petty theft offense with prior felony conviction defendant conclusively admitted every element of offense charged and such constituted a conclusive admission of guilt.

Affirmed.

1. Criminal Law ⇐1144

Ordinarily, in absence of a showing in record to contrary, reviewing court must indulge in all reasonable presumptions in favor of judgment and rulings of trial court and will presume, unless some showing is made otherwise, that proceedings were regular and free from error.

2. Criminal Law ⇐1144

Where reviewing court's reading of record did not disclose any irregularity or error and defendant had pointed to none, reviewing court would presume that procedure in trial court was proper and regular.

3. Criminal Law ⇐1141(2)

If defendant attempting to appeal from judgments of conviction was to prevail on appeal, he was required to produce a record which disclosed that error relied upon had in fact occurred. West's Ann. Pen.Code, § 1237.

4. Criminal Law ⇐1023(12)

It is immaterial whether a defendant appeals in terms from an order of probation or from the judgment since for purposes of appeal they are interchangeable terms. West's Ann.Pen.Code, § 1237.

5. Criminal Law ⇐1137(1)

Where defendant was convicted of offense of attempted burglary and apparently attempted to appeal from judgment as distinguished from subsequent order granting probation and desired to have a review

of matters preceding order granting probation, defendant having made application for and accepting probation without asserting any claim that he had been deprived of any rights or that evidence was insufficient to convict him, and failing to exercise his right of appeal at or about time probation was granted was precluded from going behind order granting probation.

6. Criminal Law ⇐273

Where defendant entered plea of guilty to offense charged, he conclusively admitted every element of the offense charged and such constituted a conclusive admission of guilt.

7. Criminal Law ⇐982.9(1)

Subsequent conviction of a crime, even though not final because of a pending appeal, is sufficient to warrant trial court in concluding that defendant has violated terms of probation and in revoking the same.

8. Criminal Law ⇐982.9(1)

Where defendant pleaded guilty to charge of petty theft with prior conviction of a felony, he could not contend that his probation on the felony charge was improperly revoked.

Joseph Grant, Jr., in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

FOURT, Justice.

This opinion involves two separate appeals.

In an information filed in Los Angeles county on May 13, 1955, the appellant and James William Wilkins were charged in count I of that information with conspiracy to commit burglary, and in count II thereof with the crime of attempted burglary. It was also alleged that Grant, the appellant, had previously been convicted of a felony, namely burglary in San Diego in April, 1948, and that he had served a term therefor in the State prison. The appellant, in that case, pleaded not guilty to each count and denied the prior conviction. However, before trial the appellant admitted the prior conviction. A trial before a jury was had and the appellant was found guilty on both counts. The appellant then moved for a new trial, and the motion therefor was granted as to count I, and denied as to count II. An appeal was taken from the judgment of conviction on count II, and this court reversed the judgment in People v. Wilkins, 141 Cal.App.2d 557, 297 P.2d 42. Count I was placed off calendar and was never retried.

On August 2, 1956, the case involving count II of the information was called for retrial and it was then stipulated that the matter would be submitted on the reporter's transcript on appeal, subject to such other evidence as might be introduced, and the exhibits admitted at the first trial were received in evidence. The prosecution presented other and additional evidence, including, apparently, a confession by Grant made while he was in the jail awaiting the results of his first appeal. Appellant was found guilty as charged in count II. He made a motion for a new trial, which was denied. On August 2, 1956, proceedings were suspended and probation was granted for three years. In effect, the court, among other things, ordered that the appellant should comply, while under probation, with all of the laws of the State of California. No appeal was taken from the order granting probation.

In the second case in point of time, that is, our case No. 6477, the district attorney of Los Angeles county charged appellant in an information filed on May 8, 1958, with petty theft with a prior conviction of a felony (charging the San Diego burglary of 1948 as the prior felony in the substantive offense). The information also alleged that the appellant previously had been convicted of a felony, namely, the attempted burglary as set forth in count II of the case decided on August 2, 1956. The defendant pleaded guilty as charged and admitted the prior conviction.

Probation was denied and the appellant was sentenced to the state prison for the term prescribed by law. The court also

found that the defendant was in violation of the probation granted after and with reference to the previous conviction of attempted burglary, and such probation was revoked and the sentences were ordered to run concurrently. The appellant, at the time of sentence, was lodged in the county jail upon still another and different charge (failure to provide for his minor children), and the sentence for that offense was, under the law, merged with the state prison sentences, all to the effect that appellant would be serving in one confinement three different terms for three different offenses.

The appellant filed a document in the first case in point of time (our number 6478) titled "Notice of Appeal * * * Attempted *Burgalary.*" In that document he sets forth a brief résumé of the course of events in the case, however nothing is mentioned as to what the appellant appeals from. Substantially the same situation exists in the second case in point of time, our number 6477 (petty theft with prior felony conviction).

We have made an earnest effort to determine from a reading of the appellant's briefs what it is that he complains of with reference to the trial and the disposition of the two cases above mentioned. At best, the briefs are a conglomeration of disconnected statements, with an almost total disregard of the rules as to what shall be contained in an appellant's brief. We have, however, carefully gone over all of the records and the transcript which are before us and have attempted to determine whether there was any error in any respect, insofar as the appellant is concerned.

[1, 2] This court ordinarily, in the absence of a showing in the record to the contrary, must indulge all reasonable presumptions in favor of the judgment and the rulings of the trial court, and we will presume, unless some showing is made otherwise, that the proceedings were regular and free from error. People v. Fratianno, 132 Cal.App.2d 610, 634, 282 P.2d 1002; People v. Garris, 120 Cal.App.2d 617, 618, 261 P.2d 765; People v. Resum, 120 Cal. App.2d 618, 619, 261 P.2d 765; People v. Lane, 144 Cal.App.2d 87, 90, 300 P.2d 321. Our reading of the record does not disclose any irregularity or error as to either case, and the appellant has pointed to none. We accordingly presume that the procedures in the trial court were proper and regular.

The record is entirely silent as to the evidence introduced at the trial on the attempted burglary case, excepting that the minutes do disclose that the cause was submitted on the reporter's transcript on appeal, and that other evidence could be received. The appellant makes mention in his brief that a witness did testify to what apparently amounted to a confession by the appellant while he was in jail awaiting the result of his first appeal. However, as heretofore indicated, no reporter's transcript of the proceedings is before us.

[3] If the appellant is to prevail on this appeal he must produce a record which discloses that an error relied upon has in fact occurred. People v. Ramirez, 139 Cal. App. 380, 382, 33 P.2d 848; People v. Denne, 141 Cal.App.2d 499, 514, 297 P.2d 451; People v. Goldberg, 152 Cal.App.2d 562, 575, 314 P.2d 151.

[4] Furthermore, under section 1237, Penal Code, it is provided in part as follows:

"An appeal may be taken by the defendant:

"1. From a final judgment of conviction; an order granting probation shall be deemed to be a final judgment within the meaning of this section; * * *." (The latter clause having been added to the section in 1951.) In various cases the matter of an appeal from an order granting probation has been discussed and considered. In People v. Easley, 148 Cal.App.2d 565, 566, 307 P.2d 10, 11, the court said, with reference to a notice of appeal which set forth that it was "'from the judgment therein entered' and from the order denying a new trial": "* * * Since that amendment it is immaterial whether a defendant appeals in terms from the order of probation or from the judgment. For pur-

poses of appeal they are interchangeable terms. It was so held in People v. Goldstein, 136 Cal.App.2d 778, 793, 289 P.2d 581 * * *, and People v. Reed, 128 Cal.App. 2d 499, 500, 502, 275 P.2d 633 * * *."

In People v. Frayer, 140 Cal.App.2d 597, at page 598, 295 P.2d 456, it is said, "He appeals from the final judgment, which is the order granting probation (Penal Code, § 1237, Subd. 1)."

In People v. Ross, 139 Cal.App.2d 706, it is set forth in a footnote (at page 707, 294 P.2d 174, at page 175): "Defendant was granted probation but such an order is deemed a final judgment for purposes of appeal."

In People v. Goldstein, 136 Cal.App.2d 778, at page 793, 289 P.2d 581, at page 589, it is said: "* * * An appeal may now be taken from a probation order, Pen.Code, § 1237, and it is established that where probation has been granted and no judgment entered an appeal which purports to be taken from the judgment may be treated as an appeal from the probation order. People v. McShane, 126 Cal.App.2d Supp. 845, 272 P.2d 571; People v. Camargo, 130 Cal.App. 2d 543, 545, 279 P.2d 194."

In People v. Carpenter, 141 Cal.App.2d 884, 885, 297 P.2d 498, and in People v. Cummings, 141 Cal.App.2d 193, 195, 296 P.2d 610, it was said in effect (in a footnote), that the appellant was granted probation, but under Penal Code, section 1237, such an order is deemed a final judgment for the purposes of appeal.

The appellant in the attempted burglary case now before us knew that he was convicted of the crime of attempted burglary. Nevertheless, he made an application for, and accepted probation, and failed to assert any claim to any appellate court that he had been deprived of any rights, or that the evidence was insufficient to convict him. He was no neophyte in matters having to do with court proceedings, as he had theretofore gone through at least one trial and had been convicted of burglary in San Diego in 1948, and had served a term therefor in the state prison. He chose to accept his freedom on probation, as was his right, rather than to attempt to secure a reversal of his conviction on appeal.

As heretofore indicated, it is not made clear from the notices of appeal just what the appellant appeals from, but we have assumed that in the attempted burglary case he attempted to appeal from the order granting probation, and if he did so the notice of appeal was filed many months too late.

[5] If in the attempted burglary case the appellant attempted to appeal from the judgment, as distinguished from the order granting probation, and he now desires to have a review of the matters preceding the order granting probation, we believe, under the circumstances, that his failure to exercise his right of appeal at or about the time probation was granted, precludes him now from going behind the order granting probation. In a case in Arizona, Brooks v. State, 51 Ariz. 544, 78 P.2d 498, at pages 500–501, 117 A.L.R. 925, the court appropriately said, with reference to such a situation:

"When the imposition of sentence is suspended and the terms and conditions thereof fixed, the defendant has his freedom as long as he lives up to these conditions, but, it will be observed, that if the court has reason to believe that he 'is violating the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates, or a vicious life,' and the interests of justice so require, it may at any time within the longest period for which the defendant might have been sentenced revoke and terminate his probation, and then pronounce judgment. For instance, if the maximum punishment of the crime to which he pleads guilty or of which he was convicted is ten years and the court suspends the imposing of sentence for that period of time, the order of suspension may be revoked and judgment pronounced any time during that period. But if the court, even though punishment for the crime involved may extend to ten years, suspends the imposition of sentence for a shorter period of time, six years, for instance, the order revoking suspension and

the pronouncement of judgment must be made within that time. It is apparent from this that it may be a number of years after a plea of guilty or conviction and the entering of the order of suspension before final judgment and sentence is pronounced, and that if a defendant may appeal therefrom at that time and base his case on occurrences at the trial which was had years before, it would in many cases result in defeating justice.

"This is true for several reasons. In the first place it would be impossible in some instances after years had passed to procure a transcript of the evidence for use on appeal, due to the fact that the reporter who took the testimony at the trial might be elsewhere, have become incapacitated or passed away. In the next place, this difficulty not being present, if the court should find it necessary to reverse the case and remand it for a new trial, it would not be possible many times to produce the evidence again after so many years. The witnesses in all probability could not be had because of changes in residence in some instances and of death in others, and in case neither of these diffculties should be encountered the facts would to some extent have been forgotten. That such a result as this may follow, if a defendant who has pleaded guilty or has been convicted and accepted the benefits of probation is permitted to appeal from a judgment or sentence pronounced against him after his probation has been revoked, indicates that it was never intended that a defendant should have the benefits of probation and at the same time retain the right to appeal from a judgment and sentence that may be pronounced against him later on if he violates his probation. When the imposition of sentence is suspended or postponed and the defendant accepts his freedom thereunder, he foregoes his right of appeal from a judgment that may be pronounced in the future on that conviction, because the order of suspension confers benefits, not harm, upon him, and is inconsistent with an appeal based upon errors committed at the trial, whether that appeal is taken then or at some future time. Accepting the benefits of probation, therefore, instead of permitting the case to go to judgment at that time and appealing from it, estops him from bringing the errors committed at the trial to this court for review. His choice between the benefits of suspension and contesting the case further is final, hence, he cannot thereafter reverse his stand and take advantage of the alternative he had theretofore rejected. By choosing probation he is automatically estopped from appealing and by deciding in favor of appeal he estops himself from benefitting [sic] from suspension. He cannot profit from both at the same time, or as the old saying runs, 'He cannot eat his cake and have it too.' So, if a defendant feels that reversible error has been committed and that he was in consequence thereof wrongfully convicted, he should then take the steps the statute provides for correcting the error, and not proceed upon the theory that he will do it years later, provided the necessity therefor should ever arise, by appealing from the judgment and sentence pronounced at that time, long after he has elected otherwise and when the probabilities are that the evidence, if the case were remanded for a new trial, could not again be produced. His acceptance of probation would not, however, prevent him from taking advantage of any error inhering in the judgment and sentence as then pronounced but merely forecloses action based on errors committed at the trial which his acceptance of the benefits of suspension estops him from reviewing."

[6] In the second case in point of time (petty theft with prior) the appellant pleaded guilty. By doing so he conclusively admitted every element of the offense charged; and such constitutes a conclusive admission of his guilt. People v. Cooper, 123 Cal.App.2d 353, 356, 266 P.2d 566.

[7, 8] A subsequent conviction of a crime, even though not final because of a pending appeal, is sufficient to warrant the trial court in concluding that the defendant has violated the terms of his probation, and

in revoking the same. The appellant, having pleaded guilty to the petty theft charge, with the prior, cannot now contend that his probation on the attempted burglary charge was improperly revoked.

Since, from the foregoing it is manifest that the order granting appellant probation was properly revoked, the judgments in each case numbered in this Court "Criminal No. 6478" and "Criminal No. 6477," are, and each is affirmed.

WHITE, P. J., and LILLIE, J., concur.



J. C. PENNEY COMPANY, a corporation, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR The COUNTY OF FRESNO, Respondent,

Irene Johnson and Odel Johnson, Real Parties In Interest.*

Civ. 6025.

District Court of Appeal, Fourth District, California.

March 19, 1959.

Hearing Granted May 13, 1959.

Petition for writ of prohibition restraining Superior Court of Fresno County from proceeding with the trial of an action. The District Court of Appeal held that under statute providing that any action shall be dismissed unless brought to trial within five years after plaintiff has filed his action unless parties have filed a stipulation in writing that the time may be extended, stipulation that pretrial conference should be continued to permit parties to complete taking of depositions did not continue action beyond five-year period when taking of depositions had been completed long before five-year statute had run, and defendant did not waive any of its rights by entering into such stipulation, and motion to dismiss action after expiration of five years for want of prosecution should have been granted.

Writ granted.

1. Dismissal and Nonsuit ⇐60(6)

Under statute providing that any action shall be dismissed unless brought to trial within five years after plaintiff has filed his action unless parties have filed a stipulation in writing that time may be extended, stipulation that pretrial conference should be continued to permit parties to complete taking of depositions did not continue action beyond five-year period when taking of depositions had been completed long before five-year statute had run, and defendant did not waive any of its rights by entering into such stipulation and motion to dismiss action after expiration of five years for want of prosecution should have been granted. West's Ann.Code Civ. Proc. § 583.

2. Prohibition ⇐9

A writ of prohibition will lie to prevent trial court from erroneously proceeding with trial of an action when more than five years had expired after plaintiff had filed the action. West's Ann.Code Civ. Proc. § 583.

3. Dismissal and Nonsuit ⇐60(6)

Under statute providing that any action shall be dismissed unless it is brought to trial within five years after plaintiff has filed action except where parties have filed a stipulation extending time, a mere stipulation extending time for setting for trial or extending time for some other act prior to actual trial itself is not a stipulation extending time of trial unless it expressly extends time of trial to a date beyond five-year period or expressly waives operation of that statute. West's Ann.Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⇐60(6)

A stipulation that a case be dropped from calendar to be reset on notice does not relieve plaintiff from bringing it to trial on time and does not take it out of

* Opinion vacated 343 P.2d 919.

five-year period in which action must be brought to trial. West's Ann.Code Civ. Proc. § 583.

5. Dismissal and Nonsuit ⇐60(1)

Duty rests upon plaintiff to use diligence at every stage of proceedings to expedite his case to a final determination.

6. Action ⇐66

The policy of the law favors prompt disposition of litigation.

7. Appeal and Error ⇐962

Where there was no ambiguity as to written stipulation continuing pretrial conference to permit parties to complete taking of depositions and discovery procedures and there was no conflict in evidence as to intention of parties, and plaintiff did not bring case to trial within five years although taking of depositions had been completed before five-year statute had run, reviewing court had authority to review action of trial court in denying defendant's motion to dismiss action for lack of prosecution. West's Ann.Code Civ.Proc. § 583.

Stammer, McKnight & Barnum, Fresno, for petitioner.

Robert M. Wash, County Counsel, Fresno, for respondent.

James K. Kubota and M. Uchiyama, Fresno, for real party in interest.

PER CURIAM.

[1] The petition of J. C. Penney Company, a corporation, shows that Odel Johnson and his wife Irene, commenced an action in Fresno County on *December 31, 1953,* alleging that on December 31, 1952, Irene Johnson fell while in defendant corporation's store and sustained personal injuries as a result of defendant's negligence. Summons and complaint was not served on defendant corporation until December 31, 1956. Said corporation then filed its answer on January 21, 1957. A memorandum to set said action for trial was not served and filed until December 5, 1957. A pre-trial conference was thereafter set by court order for March 21, 1958. Prior to the pre-trial conference the attorneys for the respective parties entered into the following stipulation:

> "Stipulation And Order Continuing Pre-Trial Conference.
>
> "It is hereby stipulated by and between the parties hereto, that the pre-trial conference in the above entitled action, heretofore set for March 21, 1958, may be continued to be re-set upon motion of either party in order to permit the parties to complete the taking of depositions and discovery procedures.
>
> "Dated: March 12, 1958."

The court so ordered. The case was tentatively set for trial for May 15, 1958. The parties conceded on this hearing that the depositions and discovery proceedings mentioned in said stipulation were taken and completed in October, 1958, at least two months prior to the expiration of the five-year period, and no action was taken by plaintiff to set said action for trial within that period. On January 8, 1959, defendant corporation served and filed its notice of motion to dismiss the action for want of prosecution under section 583 of the Code of Civil Procedure, which provides in part:

> "* * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended * * *."

It appears that no counteraffidavits were filed in the Superior Court in opposition to said motion. The trial judge, upon the showing indicated, denied this motion upon the claimed ground that the written stipulation above quoted extended the time of trial of said action beyond the five-year period within the meaning of that section. He ordered the case set for pre-trial on February 10, 1959, over petitioner's objec-

tion, conducted said pre-trial conference and set the action for trial on March 2, 1959, and, on issuance of the order to show cause in this court, the trial date was tentatively reset for May 18, 1959, pending the decision herein.

Respondent court and Real Parties in Interest have now filed a counter-petition in opposition, claiming that the interpretation placed upon the stipulation by the trial court was reasonable, and accordingly it was binding on a reviewing court, citing such authority as Ruby v. Wellington, 162 Cal.App.2d 132, 327 P.2d 586; Bayle-Lacoste & Co. v. Superior Court, 46 Cal.App. 2d 636, 116 P.2d 458, and Miller & Lux, Inc. v. Superior Court, 192 Cal. 333, 219 P. 1006.

[2] That a writ of prohibition will lie to prevent a trial court from erroneously proceeding with the trial of an action after the time prescribed by section 583 of the Code of Civil Procedure has expired has been well established. Tomales Bay Oyster Corp. v. Superior Court, 35 Cal.2d 389, 392, 217 P.2d 968. The only question here is whether the written stipulation above quoted brings respondent within the exception "when the parties have filed a stipulation in writing that the time (of trial) may be extended beyond the five-year period."

[3–6] It has been uniformly held that a stipulation merely extending the time for setting for trial or extending the time for some other act prior to the actual trial itself is not a stipulation extending the *time of trial* within the meaning of section 583, supra, unless it expressly extends the time of trial to a date beyond the five-year period or expressly waives the operation of that section. Sedarovich v. Paul, 16 Cal.App. 2d 452, 60 P.2d 871; Rosenfelt v. Scholtz, 17 Cal.App.2d 443, 62 P.2d 381; Hastings v. Superior Court, 131 Cal.App.2d 255, 280 P.2d 74. Continental Pacific Lines v. Superior Court, 142 Cal.App.2d 744, 299 P.2d 417, definitely held that a stipulation that a case be dropped from the calendar to be reset on notice does not relieve plaintiff from bringing it to trial on time and does not take it out of the five-year period of Code of Civil Procedure, section 583. It also held that the established doctrine in this state is that it is the plaintiff upon whom rests the duty to use diligence at every stage of the proceedings to expedite his case to a final determination. See also Oberkotter v. Spreckels, 64 Cal.App. 470, 473, 221 P. 698. The policy of the law favors prompt disposition of litigation. Jackson v. De Benedetti, 39 Cal.App.2d 574, 577, 103 P.2d 990.

In Fisher v. Superior Court, 157 Cal.App. 2d 126, 320 P.2d 894, the parties stipulated to a pre-trial hearing to be held on a date more than five years after the filing of the action. The trial court then set an actual trial date beyond that time. By agreement between counsel, on the date set for the pre-trial hearing, such hearing was placed off calendar and the trial date vacated. Thereafter, and beyond the five-year period, plaintiff moved for dismissal of the action under section 583, supra. A writ of mandate was issued compelling the Superior Court to dismiss the action.

[7] The written stipulation here involved pertained only to the pre-trial conference set for March 21, 1958. In fact it was entitled "Stipulation and Order Continuing Pre-trial Conference". The continuance was only for the purpose of taking depositions. As noted, the taking of depositions was completed long before the five-year statute had run. There is nothing stated in this written stipulation that the actual trial of said action could be continued beyond the five-year period and it does not indicate petitioner waived any of its rights under section 583, supra. There is no ambiguity as to the meaning of the written stipulation and no conflict in the evidence as to the intention of the parties. Under these circumstances a reviewing court has authority to review the actions of the trial court in denying the motion. Miller & Lux, Inc. v. Superior Court, supra, 192 Cal. at page 341, 219 P. at page 1009.

Writ granted as prayed for in the petition.

KEY SYSTEM TRANSIT LINES, a corporation, and Railway Equipment & Realty Company, Ltd., a corporation, Plaintiffs and Appellants,

v.

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation, Brown Zarley, Black and White Company, a corporation, Green and Gold Company, a co-partnership, First Doe through Fifth Doe, Defendants and Respondents.*

Civ. 18008.

District Court of Appeal, First District, Division 2, California.

March 12, 1959.

As Amended on Denial of Rehearing April 10, 1959.

Hearing Granted May 6, 1959.

Action by insured against insurer to reform workmen's compensation and employer's liability policy to include, as part of the policy attached endorsement containing agreement to refund difference between premium paid and sum of (1) total amount of losses under policy, including open reserves, and (2) 25.5% of premium paid for insurer's operating expenses. The Superior Court, Alameda County, Richard H. Chamberlain, J., rendered judgment for the insurer, and insured appealed. The District Court of Appeal, Kaufman, P. J., held that the agreement in advance, without regard to what actual cost of operation might be, to deduct only the 25.5% for operating expenses bound insurer to make the refund out of something other than profits if the expenses exceeded 25.5%, and provided not for a "participating" dividend but for a "rebate" in violation of minimum rating law.

Affirmed.

Insurance ⇦184

Workmen's Compensation ⇦1063

Where endorsement, which was attached to workmen's compensation and employer's liability policy but not made a part thereof, contained agreement to refund difference between premium paid and sum of (1) total amount of losses under policy, including open reserves, and (2) 25.5 percent of premium paid for insurer's operating expenses, the agreement in advance, without regard to what actual costs of operation might be, to deduct only the 25.5 percent for operating expenses, bound insurer to make the refund out of something other than profits if the expenses exceeded 25.5 percent and provided not for "participating dividend" but for "rebate" in violation of minimum rating law. West's Ann.Insurance Code, §§ 763, 11730, 11736, 11738, 11742.

See publication Words and Phrases, for other judicial constructions and definitions of "Participating Dividend" and "Rebate".

Donahue, Richards & Gallagher, Oakland, for appellants.

Keith, Creede & Sedgwick, Scott Conley, San Francisco, for respondents.

Edmund G. Brown, Atty. Gen., Harold B. Haas, Deputy Atty. Gen., amici curiae, on behalf of respondents.

KAUFMAN, Presiding Justice.

This is an appeal by plaintiffs, Key System Transit Lines and Railway Equipment & Realty Co., Ltd. from a judgment in favor of the defendants, Pacific Employers Insurance Company and Brown Zarley, entered after a non-jury trial limited to the issues raised by certain special defenses.

Plaintiffs seek to recover dividends to which they claim they are entitled upon an agreement made in conjunction with the purchase of a policy of workmen's compensation insurance.

The complaint to reform and enforce the contract alleged that at some time prior to May 2, 1950, defendant, by and through its agent and employee Brown Zarley, offered plaintiffs' insurance broker, to execute and deliver its Universal Workmen's Compensation and Employers' Liability Policy of Insurance in consideration for plaintiffs' payment of certain premiums. As an inducement to plaintiffs to purchase defendants' policy, defendants offered, as part of its policy, a participation plan, under which an advance premium was payable. This ad-

* Opinion vacated 345 P.2d 257.

vance premium was to be returned to the assureds to the extent that the advance premium paid was determined to exceed the sum of (1) the total amount of losses under the policy, including open reserves, and (2) 25.5% (administration fees to defendant Pacific Employees Insurance Company) of the premium paid during the effective term of the policy. Plaintiffs allege that in reliance on the defendants' oral representation that the participation agreement was to be considered a part of defendants' policy, they agreed to purchase defendants' policy No. 12C–105939. This policy was to be effective for one year from May 14, 1950 to May 14, 1951. Attached to the policy and incorporated as a part thereof was the participation endorsement. The plaintiffs paid all premiums and performed all acts and conditions, but that by the mutual mistake of the parties or by the mistake of the plaintiffs and fraud of the defendants, Policy No. 12C–105939 did not embody the specific terms of the oral agreement. The complaint alleged that in accordance with the agreed upon method of computation, the plaintiffs were entitled to a refund of $21,703.67 under the participation agreement, of which defendants had paid $2,665. The complaint prays that the balance of $19,038.67 be paid to the plaintiffs upon the determination of the existence of reserves sufficient to make the additional payment, and that the contract be reformed to express the true intent of the parties.

The above facts were alleged in two counts. The first is an action on the collateral agreement which the plaintiffs contend is a part of the contract of insurance. The second is on a common count alleging that defendants were indebted to the plaintiffs in the amount of $19,038.67. Defendants denied most of the allegations of the complaint but admitted the execution and delivery of the policy, and the payment of $2,665 as participating policy holders dividend. The answer alleged four special defenses: (1) Statute of Limitations; (2) Laches; (3) Failure to state a cause of action, and (4) Illegality as follows:

"And for a Fourth Further, Separate and Affirmative Defense defendants allege that the policy contract if reformed as prayed by plaintiffs will be illegal, unenforceable and void by virtue of the provisions of the Insurance Code of the State of California, in particular Sections 380, 381, 750–756, and 11732–11738 thereof, and by virtue of the provisions of Section 1624(1) of the Civil Code of the State of California."

Defendants' motion for trial of special defenses under section 597 of the Code of Civil Procedure was granted. After such trial, the court made the following findings of fact and conclusions of law:

"Findings of Fact

"1. That the findings of fact contained herein are made for the purpose of ruling on the issue of special defenses only and do not constitute an adjudication on the merits and are not in any way preventive or conclusive of further findings or decision on eventual issues raised except for the purposes of this trial on special defenses.

"2. That for said purposes it is found that the allegations of the complaint are true and correct; and it is further found that the agreement intended to be established thereby would constitute a rebate and would result in the charging of a premium less than that established by the laws of the State of California.

"Conclusions of Law

"1. That the first special defense raised by the answer is not sustained as a matter of law.

"2. That the second special defenses raised by the answer is not sustained as a matter of law.

"3. That the third special defense raised by the answer is not sustained as a matter of law.

"4. That the fourth special defense as raised in the answer on file herein is sustained in that the dividend agreement alleged in the complaint is contrary to law as constituting a violation of Insurance Code Sections 751, 752, 763, 11736, 11738 and 11742, and of Rule III of the 'Manual

of Rules, Classifications and Basic Rates for Workmen's Compensation Insurance,' and that this defense constitutes a bar to the further prosecution of both causes of action set forth in the complaint.

"5. That defendants are entitled to a judgment against plaintiffs herein, and each of them, for necessary costs expended in this action.

"Judgment shall be entered accordingly."

On appeal the plaintiffs argue that the dividend agreement would not constitute a rebate in violation of the minimum rating law, (Insurance Code, §§ 11730–11742) but is merely a participating dividend permitted by Sections 763 and 11730 of the Insurance Code. The Insurance Commissioner as amicus curiae contends that enforcement of the dividend agreement would violate the minimum rating provisions of the Insurance Code and administrative rulings promulgated under the Code.

The participation endorsement reads as follows:

"After the expiration of this Policy, this Employer shall be entitled to a refund payable from any surplus of premiums derived from all compensation insurance policies insuring Employers and Employees under the Workmen's Compensation Insurance and Safety Laws of the State of California, and which had accrued after adequate provision has been made for all losses, loss expenses, reserves, taxes and other charges. Such refund, if any, shall be computed as follows: From the amount of the entire premium earned and paid to the Company under this Policy, there shall be deducted amounts equal to the cost of incurred losses, including reserves on open claims, and incurred loss and other expenses chargeable to this Policy. The amount of the balance, if any, shall be payable to this policyholder as may be provided in the authorized refund plan of the Company in effect and applicable to this Policy.

"Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, or limitations of the policy to which endorsement is attached other than as above stated."

We need go no further in this case than to follow the declaration of our Supreme Court in Contractor's Safety Ass'n v. Cal. Comp. Ins. Co., 48 Cal.2d 71, at page 74, 307 P.2d 626, 628, "'participating premiums are those in which the profits therefrom are shared by those who have paid the premiums.' * * * Where a dividend agreement is not one to share profits the dividend cannot be said to be 'participating' within the meaning of section 763."

In this case without regard to what the actual costs of operation might prove to be the court found the contract (as pleaded) to be to refund the difference between the premium paid and "the sum of (1) the total amount of losses under the policy, including open reserves, and (2) twenty-five and five-tenths per cent (25.5%) (administration fees to defendant Pacific Employers Insurance Company)." The agreement in advance, without regard to what the actual costs of operation might prove to be, to deduct only 25.5% of the premium for operating expenses clearly binds the insurer to make a refund out of something other than profits, if in fact the operating expenses should turn out to be in excess of 25.5%.

Plaintiffs' other contentions relating to the enforcement of the contract with interpretation aided by "parole" evidence have been examined and are without merit.

In view of the foregoing, the judgment must be affirmed.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

169 Cal.App.2d 35

Matter of the Arbitration between Walter J. HYATT, Petitioner and Respondent,

v.

ECKEL VALVE COMPANY, Defendant and Appellant.

Civ. 23420.

District Court of Appeal, Second District, Division 2, California.

March 23, 1959.

Proceedings on petition for confirmation of arbitration award. From judgment and orders of the Superior Court, Los Angeles County, Bayard Rhone, J., appeals were taken. The District Court of Appeal, Fox, P. J., held that since letter-contract providing for five per cent commission on net sales was unambiguous, arbitrators had properly excluded evidence of prior negotiations relative to a possible agreement to agree in future that plaintiff was not to get five per cent commission but that instead all profits in excess of salary and drawing account were to be placed in a corporation in which plaintiff was to have 51 per cent stock interest; and held that, in any event, rejection of offer of proof to that effect could not have been prejudicial in view of testimony received as to transactions taking place prior to execution of contract.

Affirmed.

1. Master and Servant ⇐3(2)

Where letter-contract providing for five per cent commission on net sales was unambiguous, arbitrators properly excluded the evidence of prior negotiations relative to a possible agreement to agree in future that plaintiff was not to get five per cent commission but that instead all profits in excess of salary and drawing account were to be placed in a corporation in which plaintiff was to have 51 per cent stock interest; and, in any event, rejection of offer of proof to that effect could not have been prejudicial in view of testimony received as to transactions taking place prior to execution of contract.

2. Arbitration and Award ⇐73

Weight and effect of testimony was for Board's determination.

3. Arbitration and Award ⇐73

An appeal from an order denying a motion to vacate an award does not lie.

4. Arbitration and Award ⇐73

If judgment has been entered upon order confirming award, there is no appeal from order but only from judgment.

Franklin L. Knox, Jr., George O. West, Los Angeles, for appellant.

Alef & Schnitzer and Arthur Alef, Beverly Hills, for respondent.

FOX, Presiding Justice.

This is an appeal by the defendant from an order confirming an arbitration award, from the judgment entered thereon, and from the order denying its motion to vacate the award.

The controversy submitted to the arbitrators grew out of a letter-agreement of September 11, 1956, by which the defendant company gave Hyatt the exclusive right to sell the company's products in California and Arizona upon certain specified terms. Under paragraph 4 of the agreement, Hyatt's compensation was 5 per cent commission on net sales. He was to receive what might be termed a drawing account of $1,000 per month, plus mileage and other travel and entertainment expenses. Paragraph 2. By paragraph 3 it was provided that: "If at the time of termination of this agreement, for any reasons other than formation of a jointly owned corporation, the commissions due Mr. Hyatt are not equal to the sums advanced under Item 2, above, the sums advanced shall be considered as remuneration for services rendered, and Eckel Valve Company shall have no further claim for reimbursement from Hyatt." Paragraph 5 stated: "This contract may be terminated without cause, by either party, upon thirty (30) days written notice. In event of such termination, neither party shall have

any claims upon the other, for any reason, except that Hyatt shall receive his full commission fee on all orders from his territory on the books at the time of termination; * * *." Paragraph 6 provided that any disputes would be resolved by arbitration.

On December 5, 1957, the company sent Hyatt a telegram saying: "Advise representation agreement terminated, effective January 4, 1958." That telegram was confirmed by letter from the company which read: "Confirming our telegram of this date, please be advised that Eckel Valve Co. hereby terminates our agreement dated September 11, 1956, in accordance with paragraph 5, to be effective January 4, 1958. A revised agreement may be offered for your consideration prior to January 4, 1958."

Hyatt continued with his sales representation of defendant's products until the January 4, 1958, termination date. On that date he had accrued commissions of $9,668.12 which were unpaid. The company refused to pay these commissions so Hyatt instituted arbitration proceedings as provided in the letter-agreement.

It was stipulated at the hearing that if there was any liability on the part of the company to Hyatt it was in the sum of $9,668.12. It was also stipulated that the agreement of September 11, 1956, was executed by both parties and that the relationship was terminated as above stated.

At the conclusion of the hearing the arbitrators held that the company was indebted to Hyatt "under the terms and provisions of the said contract of September 11, 1956, in the amount of $9,668.12" and, accordingly, awarded him that amount.

Thereafter, Hyatt filed his petition for confirmation of the award and the company filed a motion to vacate said award and objections to the petition for confirmation.

The court confirmed the award and denied defendant's motion.

[1] In seeking a reversal, defendant contends that the arbitrators were guilty of misconduct in that they refused to hear evidence pertinent and material to the controversy and deprived the defendant of a full and fair hearing. Specifically, it was defendant's position that the September 11 agreement was not in fact the contract of the parties. During the cross-examination of Hyatt, defendant's counsel sought to elicit testimony of the oral negotiations prior to the execution of the September 11 contract. The board excluded evidence of conversations prior to that time. Vincent W. Eckel testified on behalf of the company. Defendant's counsel made an offer of proof which outlined the negotiations of the parties prior to September 11 to the effect that Hyatt was not to get a 5 per cent commission, but instead all profits in excess of Hyatt's salary and drawing account were to be placed in a corporation which was to be formed in which plaintiff was to have a 51 per cent stock interest. The tribunal sustained objections to this offer of proof.

An arbitration award must be vacated where the arbitrators refuse "to hear evidence, pertinent and material to the controversy." Code Civ.Proc. § 1288(c). We are of the opinion that the arbitrators quite properly excluded evidence of the prior negotiations of the parties. A fair reading of the letter-contract discloses no ambiguity, and defendant's offer of proof did not show that the parties had a prior contract to form a corporation. The offer of proof, viewed most favorably in defendant's behalf, merely shows conversations relative to a possible agreement to agree in the future.

Even assuming, arguendo, that defendant should have been allowed to increase the scope of his cross-examination and should have been permitted to introduce testimony pursuant to his offer of proof, the defendant was in no manner prejudiced by the board's rulings. The record discloses that evidence relative to the prior negotiations and asserted purpose of paragraph 5 was in fact received into evidence, notwithstanding the above prior rulings. At the conclusion of Eckel's testimony, he asked the board if he could explain the purpose of

paragraph 5 of the contract. The chairman replied: "Well, go ahead Mr. Eckel. This is an informal proceeding. I don't want to tie you down on formalities or technicalities. I want to get anything in the record that we, as arbitrators, think is relevant or material." Eckel then proceeded to testify at length and in essence to the very facts and discussions which took place prior to the execution of the September 11 contract, which the board had previously held inadmissible. The substance of his testimony was that he and Hyatt contemplated the formation of a sales corporation; that Hyatt wanted some protection in the event the corporation was not formed to insure that he would receive his sales commissions in excess of his salary and drawing account; that paragraph 5 was written to give this protection and, inferentially, it was to have no effect if defendant was willing to form the corporation and that this paragraph was not intended to cover the instant situation.

It is clear, therefore, that testimony pertaining to pre-September 11 negotiations and to the intended purpose of an unambiguous contractual provision was allowed in evidence. This testimony even went beyond defendant's offer of proof. Under such circumstances, there is no factual basis for defendant's argument that pertinent and material evidence was not received or that it was denied a full and fair hearing in this regard.

[2] The weight and effect of the testimony was, of course, for the board's determination, and as "[t]he merits of the controversy between the parties are not subject to judicial review" (Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal. 2d 228, 233, 174 P.2d 441, 445; Straus v. North Hollywood Hospital, Inc., 150 Cal. App.2d 306, 310, 309 P.2d 541) and defendant has not presented any further contentions for our consideration, his appeal must fail.

[3, 4] An appeal from an order denying a motion to vacate an award does not lie for such is in effect an appeal from the order confirming the award (see Glesby v. Balfour, Guthrie & Co., Ltd., 63 Cal. App.2d 414, 417, 147 P.2d 60) or the judgment entered thereon and will be reviewed upon an appeal from the confirmation order or the judgment. Code Civ.Proc. § 1293. Furthermore, if a judgment has been entered upon an order confirming the award, there is no appeal from the order but only from the judgment.

The purported appeals from the order denying the motion to vacate and the order confirming the award are dismissed. The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.



169 Cal.App.2d 22

Carlton A. STEINER, Plaintiff and Respondent,

v.

Beulah Lawrence PARKER, Defendant and Appellant.

No. 18077.

District Court of Appeal, First District, Division 1, California.

March 23, 1959.

Action to recover for architectural services rendered. From a judgment of the Superior Court, Alameda County, Richard H. Chamberlain, J., in favor of plaintiff, the defendant appealed. The District Court of Appeal, Bray, J., held, inter alia, that where architect was employed to design a suitable building and only one would be used eventually, and as work on plans progressed the owners changed their minds as to type of building they desired, and architect was instructed to stop work on one type of building and commence on another, but object of agreement was for architect to ultimately perform all archi-

tectural services necessary to construction of whatever was erected on property, and one of owners had agreed that architect was not to bill them until his work was completely terminated, the two-year statute of limitation began to run from time the last service was rendered, and hence action commenced within two years from such time to recover the reasonable value of the architect's services, was not barred by limitation.

Affirmed.

1. Contracts ⇐350(1)

In determining sufficiency of evidence to support judgment for architectural services, where architect when asked whether he had told defendant that she did not owe architect anything replied "No; I don't remember that", and to further question "You don't remember that?" architect replied "No", trial court properly treated that as a denial.

2. Husband and Wife ⇐25(6), 232(3)

In action to recover for architectural services rendered, evidence showed that plaintiff rendered services at direct request of wife and through her husband acting as wife's agent.

3. Husband and Wife ⇐25(6)

Agency of a husband to represent his wife may be shown by circumstantial evidence.

4. Limitation of Actions ⇐50(2)

The statute of limitations begins to run from time the last service is rendered, where services are rendered over a period of time under express or implied agreement, they shall be paid for at termination thereof. West's Ann.Code Civ.Proc. § 339, subd. 1.

5. Limitation of Actions ⇐50(2)

Where architect was employed to design a suitable building and only one design would be used eventually, and as work on plans progressed, the owners changed their minds as to type of building they desired and architect was instructed to stop work on one type of building and commence on another, but object of agreement was for architect to ultimately perform all architectural services necessary to construction of whatever was erected on property, and one of owners had agreed that architect was not to bill them until his work was completely terminated, the two-year statute of limitation began to run from time the last service was rendered, and hence action commenced within two years from such time to recover the reasonable value of architect's services was not barred by limitation. West's Ann.Code Civ.Proc. § 339, subd. 1.

Oswald G. Ingold, Henry Poppic, Berkeley, for appellant.

Sidney Rudy, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment in favor of plaintiff in the sum of $4,278 for architectural services rendered.

Questions Presented.

1. Sufficiency of evidence.
2. Statute of limitations.

1. Evidence.

Plaintiff was a licensed architect. In April, 1953, Mr. Parker, defendant's husband, visited plaintiff's office and discussed the improvement of Berkeley property owned by Parker and defendant in joint tenancy. Thereafter plaintiff worked on designs for a medical building, a women's dormitory and an apartment house. Subsequently plaintiff and Mr. Parker had "perhaps a dozen" conferences concerning the architectural work at which defendant was present at "perhaps half of them" and participated in the discussions.

December 5, 1953, Parker died, at which time defendant requested plaintiff to cease the work. About a week later she requested him to continue with the plans on the apartment house. In mid-January, 1954, defendant ordered plaintiff to stop. At this time the work was in the final

preliminary drawing stage of the apartment house project. On May 18, 1953, plaintiff sent Mr. and Mrs. Parker a letter outlining the architectural services to be rendered and the fees to be paid. If the work proceeded to completion of preliminary drawings, the fee would be one-fifth of 8 per cent of the reasonable estimated cost of construction, 75 per cent of the fee to be paid at the time the contract was awarded. If stopped prior to completion of the drawings, payment would be based upon office costs plus overhead.

The work on the medical building plans stopped at Parker's request in mid-August, 1953, on the dormitory plans in November, and on the apartment building either on December 6, as contended by defendant, or in mid-January, 1954, as testified by plaintiff (either date is within the statutory period). The action was brought November 16, 1955. Defendant contends that the services rendered for the medical building and dormitory plans terminated more than two years prior to filing suit and hence were barred by section 339, subdivision (1), Code of Civil Procedure (two years).

[1–3] Plaintiff testified that he understood that no bill was to be sent until his work was completed. Plaintiff testified to the reasonable costs and overhead in the amount allowed by the court. Defendant denied that she asked plaintiff to continue with the plans after her husband's death. She stated that on December 15 or 16, shortly after her husband's death, plaintiff called at her home and when she asked him how much she owed him he replied that she did not owe him anything. Defendant's main attack on the sufficiency of the evidence to support the court's finding is based upon this testimony of defendant, which defendant claims was not denied by plaintiff. However, plaintiff, when asked whether he told defendant that she did not owe him anything, replied, "No; I don't remember that." "Q. You don't remember that? A. No." The trial court properly could, and obviously did, treat this as a denial. The property was in joint tenancy. The husband, as is common, acted as manager. Originally he contacted plaintiff, but thereafter both husband and wife participated in discussions about the projects with plaintiff. The letter was addressed to both defendant and her husband. The evidence amply shows that plaintiff rendered services at the direct request of defendant and, or through, her husband acting as her agent. Agency of a husband to represent his wife may be shown by circumstantial evidence. Brown v. Oxtoby, 1941, 45 Cal. App.2d 702, 708, 114 P.2d 622.

2. Statute of Limitations.

The question of whether the statute of limitations applies depends upon whether the work to be performed by plaintiff was severable or whether it constituted one complete contract.

[4, 5] Johnstone v. E. & J. Mfg. Co., 1941, 45 Cal.App.2d 586, 587, 114 P.2d 658, points out that the statute begins to run from the time the last service is rendered "Where services are rendered over a period of time under an express or implied agreement that they shall be paid for at the termination thereof * * *." 45 Cal.App.2d at page 588, 114 P.2d at page 659. See also Mendoza v. Gomes, 1956, 143 Cal.App.2d 172, 299 P.2d 707. Plaintiff testified that he was not to be paid until the termination of his services. The action was for the reasonable value of his services. He was employed to design a suitable building and only one design would be used eventually. (It was never contemplated that plans for more than one building would be completed.) For one reason or another, as work on the plans progressed, the Parkers changed their minds as to the type of building they desired. Plaintiff was instructed to stop work on one type of building and commence on another. However, the object of the agreement was for plaintiff to ultimately perform all architectural services necessary to the construction of whatever was erected on the property. There is no

evidence to indicate either party intended a series of agreements or that negotiations for payment were carried on as each building plan was commenced or terminated.

Defendant relies on a payment provision in the May 18th letter stating that if the work was stopped prior to the completion of any step outlined in the method of payment, payment would be based on office costs plus overhead. Because the work on the three buildings was allegedly stopped prior to the completion of the first step, defendant contends payment thereupon became due as each project was stopped based upon cost and overhead.

Defendant relies upon the Johnstone case, supra, as in point. There the court held, (45 Cal.App.2d at page 588, 114 P.2d at page 659): "The contract was not entire. The plaintiff having given his advice and assistance relative to a particular matter, the services were complete and were not dependent upon those previously rendered or subsequently furnished. Neither can it be implied from the evidence that it was the intention of the parties that the services were not to be paid for until all advice and assistance to defendant had been furnished." In our case, the services were part of an entire contract, the furnishing of plans for such type of building as the Parkers might finally determine to be built, and the drawings of the first two types of buildings were merely preliminary to that determination. "[D]ue to difficulty of financing," (language of the letter) plaintiff's services were intended to be paid for after a contract for the construction of the building ultimately selected was let.

The following clauses in the letter are ambiguous: "If the job is stopped at any one of the above steps [this refers to (a) completion of preliminary drawings, (b) half completion of working drawings and specifications, (c) completion and acceptance of working drawings and specifications] payment shall be made as stated" in (a), (b) or (c). "In the event that progress is stopped between any one of these steps, the payment shall be based upon office costs plus overhead." Plaintiff contends that these clauses referred to the method of computing fees, not to the time of payment, and that moreover, the preliminary drawings of the building ultimately to be selected had never been made, even though there were preliminary drawings of the medical and dormitory buildings. Thus, when stopped from further work on the plans of these two buildings, they being merely a part of the general plan, the job was not stopped at or between any of the designated steps. The letter contains no mention of the particular types of buildings to be planned. Hence, the change from one type to another did not constitute a "step."

In view of plaintiff's testimony that Parker had agreed that plaintiff was not to bill them until his work was completely terminated, and a reading of the entire letter, the construction placed on the letter by the court is a reasonable one.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



169 Cal.App.2d 10

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Tom Chester DANIEL, Defendant and Appellant.

Cr. 3542.

District Court of Appeal, First District, Division 2, California.

March 20, 1959.

As Amended April 3, 1959.

Defendant was convicted in the Superior Court, Alameda County, Cecil Mosbacher, J., for unlawful possession of marijuana, and he appealed. The District Court of Appeal, Dooling, J., held that defendant's counsel's argument that heroin ad-

dicts and heroin users normally had nothing to do with marijuana invited prosecutor's argument references to defendant's prior convictions for illegal possession of heroin, and that it was not beyond realm of legitimate counter-argument to suggest that defendant's possession of as large a quantity as 30 marijuana cigarettes might reasonably be explained on hypothesis that defendant had them for sale rather than for his own personal use; and held that, in any event, error, if any, could have been cured by timely admonition if objection had been made thereto.

Affirmed.

1. Criminal Law ⇐730(13)

Evidence of defendant's previous convictions was admissible only for impeachment purposes, and it was improper for prosecutor to refer in argument to such prior convictions for any other purpose; but in view of court's prompt instruction to disregard statement, conviction for unlawful possession of marijuana would not be reversed for misconduct of prosecutor in referring in argument to defendant as "conwise."

2. Criminal Law ⇐726, 728(2)

In prosecution for unlawful possession of marijuana, defendant's counsel's argument that heroin addicts and heroin users normally had nothing to do with marijuana invited prosecutor's argument references to defendant's prior convictions for illegal possession of heroin, and it was not beyond realm of legitimate counter-argument to suggest that defendant's possession of as large a quantity as 30 marijuana cigarettes might reasonably be explained on hypothesis that defendant had them for sale rather than for his own personal use; but, in any event, error, if any, could have been cured by timely admonition if objection had been made thereto.

Robert P. Brorby, Oakland, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Arlo Smith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Defendant appeals from a judgment entered upon a jury verdict convicting him of the unlawful possession of marijuana and from an order denying his motion for new trial.

On December 6, 1957, at about 11:30 p. m. Officers Ingram and Campbell were cruising in a police car in Oakland. They stopped abreast of an automobile parked at the intersection of Seventh and Chester Streets at which time the appellant was on the sidewalk talking to the three men in the parked automobile. As the officers got out of their automobile, Ingram testified, he saw the appellant make a stooping motion as if dropping something and after going around the back of the parked automobile he observed appellant making a kicking motion toward the curb. He found a packet containing 30 marijuana cigarettes wedged between the curb and the parked automobile opposite the point where appellant was standing. He testified that after picking up the packet: "* * * I asked Mr. Daniel[s] at that time if he had any more stuff and he didn't make any statement."

Officer Campbell testified that as he got out of the police car he turned his flashlight into the automobile in which the other men were seated and he saw none of them make any motion such as they would have done if throwing anything out of the automobile. Appellant produced the three occupants of this automobile. They all testified that all of the windows of their automobile were tightly closed, nothing was thrown from the car, they did not see appellant drop or throw anything and they did not see Ingram pick anything up.

Appellant testified that he did not have possession of, drop, throw or kick, the packet of marijuana. He admitted that he saw Ingram pick up the packet from the curb.

[1] The only points made for reversal are two alleged instances of misconduct in the prosecutor's argument to the jury. On cross-examination appellant admitted

his previous conviction on two counts charging possession of heroin. In his opening argument the prosecutor said:

"Now, the officer picked it up at that point * * * then he said to the defendant * * * 'Is this all the stuff you have?' and the defendant said nothing. The defendant is con-wise."

Counsel for defendant (Not his present counsel on appeal) said: "I will assign that remark as misconduct, Your Honor. I don't think that is a fair statement he is con-wise. If he wants to say he didn't reply but I don't think he can accord anything like that to the evidence."

"The Court: The jury will disregard the last remarks of counsel."

Counsel for appellant correctly argues that the previous convictions of appellant were only admissible for impeachment and it was improper for the prosecutor in argument to refer to them for any other purpose. However the court promptly admonished the jury to disregard this part of the argument and counsel for appellant did not ask the court for any further or more specific admonition, nor did he specifically point out in his objection the point now made.

In People v. Braun, 14 Cal.2d 1, 6–7, 92 P.2d 402, 405, relied on by appellant, the court held it prejudicial error under the facts of that case for the district attorney to ask if a place where defendant admitted that he had spent some time was not "a hang-out for ex-convicts." The court said in that case, however, 14 Cal. 2d at page 7, 92 P.2d at page 405: "Obviously, conduct of a prosecutor which would amount to prejudicial misconduct in one case might not result in a miscarriage of justice in another case. In other words, there is no definite rule by which asserted misconduct may be measured for the purpose of determining whether it prevented the defendant from having that fair and impartial trial which the law requires for every person charged with a crime."

Under the facts of this case we cannot find that prejudice resulted to appellant in view of the prompt instruction of the court to disregard the statement. Appellant's counsel did not specifically point out that evidence of the previous convictions could only be used to impeach appellant, nor ask the court to so instruct the jury. If he had done so we must assume that the court would have so instructed.

[2] In his argument to the jury appellant's counsel said: "Let me tell you something that is common knowledge, it is common knowledge that people who smoke marijuana don't fool around with heroin * * * normally heroin addicts and heroin users have nothing to do with marijuana."

In his closing argument the prosecutor made this reply: "He said it is common knowledge that addicts don't use—there is no evidence in this case that a man was an addict. There is no evidence in this case that man wasn't selling. The point is the man has been convicted of a felony. That goes to his credibility. You will be instructed on that point. Again, what was the felony? It was narcotics. So counsel says narcotics addicts, heroin addicts don't use marijuana, that you can infer from the evidence and thirty cigarettes this man is a business man, merchandise on hand."

No objection was made to these statements. The references to the prior convictions of possession of heroin were clearly invited by the argument of appellant's counsel above quoted. Appellant argues however that importing into the argument that he may have been a dealer in marijuana was unsupported by any evidence and prejudicial misconduct. Appellant's counsel having opened the subject we are not satisfied that it was beyond the realm of legitimate counter-argument to suggest that the possession of as large a quantity as 30 marijuana cigarettes might reasonably be explained on the hypothesis that appellant had them for sale rather than for his personal use. In any event we do not regard the argument as one that, if error, could not have been cured by timely admonition.

Judgment and order denying new trial affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.



168 Cal.App.2d 770

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Rex C. MURRIE, Defendant and Appellant.

Cr. 6427.

District Court of Appeal, Second District, Division 2, California.

March 19, 1959.

Prosecution for forgery. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment of conviction and denied defendant's motion for new trial and the defendant appealed. The District Court of Appeal, Fox, P.J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law ⇐1159(2)

In passing on the sufficiency of evidence to sustain a conviction, before a reversal can be had, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.

2. Criminal Law ⇐260(11)

In passing on the sufficiency of evidence to sustain a conviction, District Court of Appeal must assume in support of the judgment the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts justify the inference of guilt, and if the circumstances reasonably justify the determination of the trier of fact, opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant a reversal.

3. Forgery ⇐1

The crime of forgery is committed when one makes or passes a false instrument with intent to defraud. West's Ann. Pen.Code, § 470.

4. Criminal Law ⇐554

In passing on the credibility of a defendant in a criminal prosecution, and the weight to be given his testimony, a court is entitled to take into consideration his interest in the outcome of the case.

5. Forgery ⇐44

Possession of an instrument recently forged, by one claiming under it, like the possession of goods recently stolen, is evidence against the possessor. West's Ann. Pen.Code, § 470.

6. Forgery ⇐44

Evidence sustained conviction for forgery. West's Ann.Pen.Code, § 470.

7. Criminal Law ⇐260(11)

The District Court of Appeal is not at liberty in considering sufficiency of the evidence to sustain a conviction, to reevaluate the credibility of the witnesses, reweigh the evidence, and draw inferences contrary to those drawn by the trial court.

Minsky, Garber & Rudof, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Norman L. Epstein, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

A jury having been waived, defendant was found guilty of a violation of section 470 of the Penal Code, forgery. He has appealed from the judgment and from the order denying his motion for a new trial.

Defendant's sole contention is that the evidence is insufficient to prove the offense charged.

Viewed in the light most favorable to the successful party in the trial court (People v. Caritativo, 46 Cal.2d 68, 70, 292 P.2d 513), the following is a summary of the pertinent facts: On August 15, 1957, defendant purchased certain paints and related materials at the Hollywood Sinclair Paint Company store from salesman Gordon Ivey. The amount of the bill was $79.87. In payment defendant presented a check in the amount of $100 on the Bank of America, made out to himself as payee, and bearing the name and purporting to be signed by Nellie Thomsen as drawer. The back of the check bore the defendant's endorsement. Defendant received the above mentioned merchandise and the difference in cash.

Nellie Thomsen testified that she did not sign the check or write any portion of it, nor did she give anyone permission to sign her name to it.

While in custody, defendant stated that he had endorsed and passed the check at the paint store. He claimed that he had received the check from one "Bruce" as repayment of a loan. He was unable, however, to recall Bruce's last name or to tell the officers where they might be able to locate him. At the trial, defendant stated that one Bruce Gerber had owed him $100; that they had known each other for about six months, having become acquainted as a result of "shooting pool" together, but that he did not know where Gerber lived. He further testified that he and Gerber had loaned each other money on previous occasions. He stated that he had put pressure on Gerber to repay the loan, as he needed the money. According to defendant, Gerber told him that he would see Nellie Thomsen, who was in the hospital, that night and get the money from her. Defendant testified that the following day Gerber gave him the check in question, and told him that he had gotten it from Mrs. Thomsen. The check had the following statement written on its face: "advance on contract." He further testified that on asking Gerber about this notation on the check Gerber said, "I had to tell her something to get the money from her; that this $100.00 was to start a paint job." Defendant stated that he thought the check was proper and hence used it to pay for the materials that he purchased at the paint store. He also testified that he was acquainted with Nellie Thomsen, and that she once operated a bar with Gerber.

Mrs. Thomsen testified that she did not know a man by the name of Bruce Gerber, but that she once operated a bar, and the name of her "bartender was Bruce." She also testified that she had talked to defendant about painting her house "but we never came to any arrangements" about it.

[1, 2] It should be borne in mind in passing on the sufficiency of the evidence to sustain a conviction, that before a reversal may be had, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. We must assume in support of the judgment the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts "justify the inference of guilt." People v. Deysher, 2 Cal.2d 141, 149, 40 P.2d 259, 263. If the circumstances reasonably justify the determination of the trier of fact, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant a reversal. People v. Newland, supra.

[3] "The crime of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud. Sec. 470 Pen.Code." People v. McKenna, 11 Cal.2d 327, 332, 79 P.2d 1065, 1068. This court stated in People v. Morgan, 140 Cal.App.2d 796, 800, 296 P.2d 75, 78, that "crime is committed when one makes or passes a false instrument with intent to defraud."

[4–6] That the check in question was not genuine is established by the testimony

of Nellie Thomsen, the purported drawer, that she neither signed nor authorized anyone else to sign her name thereto. The check must then have been drawn by either the defendant or Bruce Gerber, for no other person appears to have had anything whatever to do with it. The trial court may well have disbelieved defendant's story to the effect that Gerber procured the check from Nellie Thomsen and delivered it to defendant in payment of a loan. Defendant's inability while in custody to recall Bruce's surname or to tell the officers where he might be located, tended to discredit his story since they had known each other for some six months and had purportedly loaned one another money on previous occasions. Furthermore, in passing on the credibility of the defendant and the weight to be given to his testimony, the court was entitled to take into consideration his interest in the outcome of this case. Huth v. Katz, 30 Cal.2d 605, 609, 184 P.2d 521; Hill v. Thomas, 135 Cal.App.2d 672, 681–682, 288 P.2d 157. It is also significant that Bruce Gerber was not produced as a witness either at the preliminary hearing or at the trial in the superior court, nor was any explanation offered for his absence. In light of the foregoing, the trial judge could reasonably draw the inference that defendant drew the check in question. This inference is fortified by the principle that "[t]he possession of an instrument recently forged, by one claiming under it, like the possession of goods recently stolen, is evidence against the possessor." People v. Smith, 103 Cal. 563, 566, 37 P. 516, 517; People v. Geibel, 93 Cal.App.2d 147, 168, 208 P.2d 743; People v. Cline, 79 Cal.App. 2d 11, 14, 179 P.2d 89. From this it obviously follows that defendant knew the instrument was not genuine. The intent to defraud, therefore, is a reasonable inference to be drawn from the fact that defendant knowingly employed this spurious check to procure paint and other materials from the Sinclair Company. These facts "justify the inference of guilt" (People v. Deysher, supra) drawn by the trial court. Therefore it cannot be said that the evidence is insufficient as a matter of law to sustain the conviction.

[7] The basic difficulty with defendant's argument is that he would have this court re-evaluate the credibility of the witnesses, reweigh the evidence, and draw inferences contrary to those drawn by the trial court. Under firmly established principles we are not at liberty to do this. People v. Gould, 111 Cal.App.2d 1, 8, 243 P.2d 809.

The judgment and order are affirmed.

ASHBURN and HERNDON, JJ., concur.



168 Cal.App.2d 619

John W. EWING, Plaintiff and Respondent,

v.

George BALAN and Mary Balan, Defendants and Appellants.

Civ. 23415.

District Court of Appeal, Second District, Division 3, California.

March 12, 1959.

Action by tenant against landlords for property damage resulting from fire caused by explosion of defective gas water heater supplied by landlords. The Superior Court of Los Angeles County, Arthur K. Marshall, Judge pro tempore, entered judgment for tenant and denied landlords' motion for new trial, and landlords appealed. The District Court of Appeal, Shinn, P. J., held that tenant of unfurnished duplex apartment was one of class for whose benefit was enacted State Housing Act which provides that its provisions constitute minimum requirements for protection of occupants of apartment houses, hotels and dwellings and which contains section to effect that every gas heater shall be maintained in good repair, and stat-

ute imposed upon landlords the duty of maintaining gas water heater in a reasonably safe condition and that evidence sustained finding that landlords were negligent in failing to repair heater.

Judgment affirmed and purported appeal from order denying motion for new trial dismissed.

1. Landlord and Tenant ⇐164(1)

Tenant of unfurnished duplex apartment was one of class for whose benefit was enacted State Housing Act, which provides that its provisions constitute minimum requirements for protection of occupants of apartment houses, hotels and dwellings and which contains section to effect that every gas heater shall be maintained in good repair, and statute imposed upon landlords the duty of maintaining gas water heater supplied by them in a reasonably safe condition. West's Ann Health & Safety Code, §§ 15002, 15014, 15018, 15019, 15152, 16905, 17900, 17901.

2. Landlord and Tenant ⇐169(7)

In action by tenant against landlords for damages to his property resulting from fire caused by explosion of defective gas water heater supplied by landlords, evidence established a violation of section of State Housing Act to effect that every gas water heater shall be maintained in good repair. West's Ann.Health & Safety Code, § 16905.

3. Landlord and Tenant ⇐169(11)

In action against landlords by tenant for property damage resulting from fire caused by explosion of defective gas water heater supplied by landlords, question whether explosion and fire would not have occurred had appliance been kept in good repair and whether breach of landlords' duty to keep appliance in good repair was proximate cause of damage were for trier of fact. West's Ann.Health & Safety Code, §§ 15002, 15014, 15018, 15019, 15152, 16905, 17900, 17901.

4. Negligence ⇐121(1)

Where penal statute establishes a standard of care and a violation of statute is proximate cause of kind of injury, which statute was designed to prevent, to a member of the protected class, violator is presumed to have been negligent but presumption may be rebutted by evidence establishing a reasonable justification or excuse for disobeying the statute.

5. Landlord and Tenant ⇐169(7)

In action against landlords by tenant for property damage resulting from fire caused by explosion of defective gas water heater supplied by landlords, evidence sustained finding that landlords were negligent in failing to repair heater. West's Ann. Health & Safety Code, § 16905.

6. Negligence ⇐105

Assumption of risk is not available as a defense to an action based upon violation of a safety law intended to protect plaintiff against very risk which he is said to have assumed.

7. Landlord and Tenant ⇐168(2)

Where landlords were required by safety law to keep gas water heater in good repair, landlords were not entitled to defense of assumption of risk in action by tenant against them for damages resulting from fire caused by explosion of defective gas water heater supplied by landlords. West's Ann.Health & Safety Code, § 16905.

8. Landlord and Tenant ⇐168(1)

Tenant was required to use ordinary care for his own safety in demised premises.

9. Landlord and Tenant ⇐169(11)

In action by tenant against landlords for property damage resulting from fire caused by explosion of defective gas water heater supplied by landlords, question whether tenant used ordinary care for his own safety was one of fact unless upon no reasonable interpretation of evidence could it be said that he was free from negligence. West's Ann.Health & Safety Code, § 16905.

10. Landlord and Tenant ⇐169(11)

In action by tenant against landlords for property damage resulting from fire caused by explosion of defective gas water heater supplied by landlords, questions whether conduct of tenant in relying on

promise of landlords to repair heater was consistent with due care and whether tenant was negligent in not having had heater repaired and deducting cost from his next month's rental following landlords' failure to make repairs within a reasonable time after notice were for trier of fact. West's Ann.Health & Safety Code, § 16905; West's Ann.Civ.Code, § 1942.

Harold I. Cherness, Los Angeles, for appellants.

Philip Mirecki, Los Angeles, for respondent.

SHINN, Presiding Justice.

Action by a tenant against his landlords for property damage resulting from a fire caused by the explosion of a defective gas water heater supplied by defendants. Trial was to the court, which made findings and entered judgment in favor of plaintiff for $1,500 damages. Defendants appeal from the judgment and have noticed an appeal from the denial of their motion for new trial.

Plaintiff testified that he rented an unfurnished duplex apartment from defendants in February 1956 on a month to month tenancy. Defendants had previously installed a gas water heater which was located inside a closet in the kitchen. Plaintiff paid the gas bill. On May 20th, he observed that the heater was out of order; the fire had gone out and gas was leaking. After turning off the gas at the main valve, he waited a few minutes, then turned on the gas and lighted the fire with a match. Plaintiff then telephoned Mrs. Balan and asked her to send someone to look at the heater. She told him that she would discuss the matter with him when she came over to collect the rent. When Mrs. Balan came to the house a few days later, plaintiff asked her to have the heater fixed and she said that she would tell her husband about it. On June 7th, the heater was again out of order. Plaintiff turned off the gas, waited, turned on the gas and relighted the fire as he had done on the previous occasion. He then contacted Mrs. Balan by telephone and asked her if she had talked to Mr. Balan about repairing it. Mrs. Balan told him that her husband was going to have the heater fixed. Relying upon his conversations with Mrs. Balan, plaintiff did not call the gas company. Early the following morning, the heater exploded, causing a fire that spread through the kitchen and living room and destroyed or damaged most of plaintiff's furniture and other belongings.

In her testimony, Mrs. Balan denied having had any conversations with plaintiff about repairing the heater.

The court found: Defendants reserved to themselves the control of, and undertook to care for and maintain all portions of the demised premises. Plaintiff notified defendants of the defective heater prior to June 8th and requested them to repair it. The fire occurring on that date was caused by the negligence of defendants in failing to use reasonable care to keep the premises in a safe condition, in creating a dangerous condition on the premises, and in failing to repair or replace the heater although they knew it was defective and had ample opportunity to remedy the condition. The court found to be untrue the allegations of the answer that plaintiff was also negligent and that the demised premises were under his exclusive dominion and control.

In urging a reversal of the judgment, defendants contend that they were not negligent, that plaintiff assumed the risk and that he was guilty of contributory negligence as a matter of law.

[1] We are of the opinion that defendants were under a duty to repair the heater and that the court was warranted in finding that they were negligent in failing to do so. Section 16905 of the Health and Safety Code states: "Every gas vent, gas water heater, or other gas appliance shall be maintained in good repair." The statute is contained in the State Housing Act, whose provisions "constitute minimum requirements for the protection, health, and safety of the public and of the occupants of apartment houses, hotels, and dwellings."

Health and Safety Code, § 15152. The structure was a dwelling. Health and Safety Code, §§ 15002, 15014, 15018, 15019; Baird v. Bradley, 109 Cal.App.2d 365, 240 P.2d 1016. Since plaintiff was a member of the class for whose benefit section 16905 was enacted, the statute imposed upon his landlords the duty of maintaining the heater in a reasonably safe condition. Black v. Partridge, 115 Cal.App.2d 639, 645, 252 P.2d 760. It also subjected them to criminal liability, for under sections 17900 and 17901 of the Health and Safety Code, a violation of any of the provisions of the State Housing Act is punishable as a misdemeanor.

[2–5] The evidence clearly established a violation of section 16905. The heater was undoubtedly defective. Although repeatedly requested to do so, defendants failed to repair it. It was a reasonable inference, if not a necessary one, that the explosion and fire would not have occurred had the appliance been kept in good repair. The court could properly have concluded that defendants' breach of duty was a proximate cause of the damage. As we have said, the statute was enacted for the benefit of a class to which plaintiff belonged and to prevent the kind of accident which unfortunately occurred. Where a penal statute establishes a standard of care, and a violation of the statute is a proximate cause of the kind of injury to a member of the protected class which it was designed to prevent, the violator is presumed to have been negligent. 35 Cal.Jur.2d 502, 503, 510. Of course, the presumption of negligence may be rebutted by evidence establishing a reasonable justification or excuse for disobeying the statute. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897. But in the present case there was no showing of any circumstances tending to excuse defendants' inaction. The evidence amply supported the finding that they were negligent.

We have now to consider the related contentions of the Balans that plaintiff was guilty of contributory negligence as a matter of law and that he voluntarily assumed the risk of any damage arising from the continued use of the defective heater.

[6, 7] The argument that Ewing must be deemed to have assumed the risk is not sustainable. Defendants rely upon the rule that a tenant assumes the risk of damages arising from conditions of the premises that are obvious to ordinary observation. Powell v. Stivers, 108 Cal.App.2d 72, 238 P.2d 34; 30 Cal.Jur.2d 295–296. The rule is inapplicable. It is merely a corollary of the common law principle that a landlord is not liable to his tenant for damages resulting from patent defects in the absence of a covenant to repair. Dorswitt v. Wilson, 51 Cal.App.2d 623, 625, 125 P.2d 626; Colburn v. Shuravlev, 24 Cal.App.2d 298, 74 P.2d 1060. As we have pointed out, defendants were required by statute to keep the heater in good repair. And assumption of the risk is not available as a defense to an action based upon the violation of a safety law intended to protect the plaintiff against the very risk which he is said to have assumed. Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17; Bickham v. Southern Cal. Edison Co., 120 Cal. App.2d 815, 263 P.2d 32; Atherley v. MacDonald, Young and Nelson Inc., 142 Cal. App.2d 575, 298 P.2d 700.

[8–10] Plaintiff was required to use ordinary care for his own safety. Whether he did so was a question of fact unless upon no reasonable interpretation of the evidence could it be said that he was free from negligence. In urging that plaintiff was negligent, defendants mention several steps consistent with due care that Ewing might have taken but did not take. He could have had the heater repaired and deducted the cost from his next month's rental following the Balans' failure to make repairs within a reasonable time after notice. Civ.Code, § 1942. Or, defendants say, he could have turned off the gas and gone without hot water until they fixed the appliance.

Although these arguments could well have impressed the trial court, they cannot prevail upon this appeal. As we have said, Ewing relied on his landlord's promise to fix the heater. In the absence of a duty of repair, a landlord's failure to make prom-

ised repairs is mere nonfeasance, giving rise to no liability. Daulton v. Williams, 81 Cal.App.2d 70, 75, 183 P.2d 325; Dorswitt v. Wilson, supra, 51 Cal.App.2d 623, 625, 125 P.2d 626. But we cannot say that a tenant is necessarily negligent in relying on the promise in situations where the landlord has a duty to make repairs. Whether plaintiff's reliance on Mrs. Balan's assurances was consistent with due care was a question which the court could reasonably have decided in his favor.

The judgment is affirmed; the purported appeal from the order denying defendants' motion for a new trial is dismissed.

PARKER WOOD and VALLÉE, JJ., concur.



168 Cal.App.2d 753

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert ALEXANDER, Defendant and Appellant.

Cr. 6472.

District Court of Appeal, Second District, Division 2, California.

March 18, 1959.

Rehearing Denied April 8, 1959.

Hearing Denied May 13, 1959.

Prosecution for sale of heroin. From adverse judgment of the Superior Court, Los Angeles County, Thomas L. Ambrose, J., the defendant appealed. The District Court of Appeal, Ashburn, J., held that where person seeming to have been an informer participating in arranging sale of heroin for which defendant was charged could not be located and defendant appeared to have received all the information possessed by the prosecutor concerning such person, informer doctrine would not be expanded to compel prosecutor to locate and produce such person for testimonial purposes.

Judgment affirmed.

Witnesses ⇐216

Where person seeming to have been an informer participating in arranging sale of heroin for which defendant was charged could not be located and defendant appeared to have received all the information possessed by prosecutor concerning such person, informer doctrine would not be expanded to compel prosecutor to locate and produce such person for testimonial purposes. West's Ann.Health & Safety Code, § 11500; West's Ann.Gov.Code, § 27706(a).

Robert Alexander, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Robert M. Sweet, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant, after a non-jury trial, was convicted of selling heroin (Health and Safety Code, § 11500), having admitted prior conviction of a like offense. There was substantial dispute in the evidence and the finding of guilt is adequately supported.

Appellant appears in propria persona, complaining primarily of the absence from the trial of one Eddie Thomas who seems to have been an informer participating in arranging the transaction with defendant. Appellant claims to have been denied constitutional rights because he could not cross-examine said Thomas or subpoena him and asserts the result would have been different if Thomas had been present and testifying.

At the trial Officer Lloyd W. Williams, prosecution witness, revealed the name of Thomas, described him as a thin Negro about 30 years of age, height 5′ 8″, weight 150 pounds and living at the Ruth Hotel on Fifth Street west of Stanford Street, in Los Angeles. He also said he had not

seen Thomas since about the middle of April, 1958; the crime was committed on March 18, 1958 and the trial started on June 16, 1958.

The prosecution made its case through Officer Williams and a forensic chemist. At the close of Williams' testimony defense counsel (a deputy county Public Defender) informed the court that he would later move for a continuance of a week or two to enable him to locate Thomas. Though he declared Thomas to be a material and necessary witness he also said during a discussion of his prospective motion: "I can realize the probabilities are somewhat limited that we could get anything of value from Mr. Thomas, but where we are faced with this proposition, it would seem to me we have potentially a witness who could be very valuable to the court, as far as the information concerning this transaction. I think actually it would almost deprive him of due process to fail to grant us a continuance to attempt to locate him." At the close of the prosecution's case a motion was made by defendant for a continuance of two weeks for the purpose of locating Thomas and same was granted. When the trial next convened the following stipulation was made: "[S]tipulated that one James Conway, an investigator employed by the office of the Public Defender of Los Angeles County, has been called, sworn and testified as follows, that he received a request to attempt to locate an Eddie Thomas and received that request sometime subsequent to June 16, the date we were last here in court, and that he did proceed to the Ruth Hotel, 719 East 5th Street, Los Angeles, made inquiry there, and had the landlord check records back to at least the first day of January, 1958 and was unable to find anyone of that name even approximating the description given in the testimony of Officer Williams." That ended the matter and defendant then testified and was found guilty. The Public Defender exercising the discretion conferred upon him by § 27706(a), Government Code, has elected not to present the appeal on behalf of defendant.

Having received what appears to be all the information possessed by the prosecutor concerning Thomas, and having been afforded two weeks' time to locate him, appellant asserts a right to compel the prosecutor to locate and produce the witness for testimonial purposes. No cases are cited in support of this proposition, we know of none and apprehend that none can be found. Such a rule would be an unreasonable extension of the informer doctrine and we hold that it does not and should not exist. Cf. People v. Taylor, 159 Cal.App.2d 752, 756, 324 P.2d 715; Dear Check Quong v. United States, 82 U.S.App.D.C. 8, 160 F.2d 251, 253; Simmons v. United States, 95 U.S.App.D.C. 115, 220 F.2d 377, 378; United States v. Gernie, 2 Cir., 252 F.2d 664, 668–669.

Contrasted with his attorney's expressed doubts about the value of Thomas' presence, appellant now asserts: "There is no doubt that if the prosecutions witness, Lloyd W. Williams, had testified truthfully at the trial, and the said accomplice, material and principal party of prosecution had been subpoen*ed* to Court and testified, this case would have been dismissed." This obviously hinges upon the giving of different testimony by Officer Williams and hypothetical corroboration by Thomas. Pure speculation.

The assertion is made that defendant was convicted through perjured testimony known to the prosecution to be such. The reference is to Williams' testimony which the trial judge inferentially found to be true. There is nothing in the record except that bare testimony which could serve as basis for any inference that could be drawn that it was false and the police and district attorney aware of its falsity, and no such reasonable inference can be deduced therefrom.

There is no merit in this appeal.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

168 Cal.App.2d 698

Bert J. SCHUT and Winifred Schut, Plaintiffs and Respondents,

v.

B. E. DOYLE et al., Defendants,

Helen Estelle Fry and John Harold Page, as Executors of the Estate of Jennie E. Page, Deceased, Appellants.

Civ. 5967.

District Court of Appeal, Fourth District, California.

March 16, 1959.

Rehearing Denied April 15, 1959.

Action to quiet title wherein the plaintiffs sought to establish priority of their rights under a contract of sale. Judgment for the plaintiffs in the Superior Court of Orange County, John Shea, J., and the defendants appealed. The District Court of Appeal, Mussell, J., held that where lumber company had no notice of the claimed vendor's lien and was a purchaser or encumbrancer for value, it was entitled to priority over the vendor's lien, but that the judgment creditor of the purchasers was not entitled to priority over the vendor's lien.

Judgment modified and as modified affirmed.

1. Vendor and Purchaser ⇐246

One selling realty has a vendor's lien thereon independent of possession for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

2. Liens ⇐15

It is the policy of the law not to uphold secret liens and charges to the injury of innocent subsequent purchasers and encumbrancers. West's Ann.Civ.Code, §§ 3046, 3048, 3050.

3. Mortgages ⇐155

Where lumber company had no notice of claimed vendor's lien and took trust deed and note as payment of a pre-existing debt, the company parted with value and was a purchaser or encumbrancer for value and entitled to priority over the vendor's lien claimed by the executors of the vendor. West's Ann.Civ.Code, §§ 3046, 3048, 3050.

4. Judgment ⇐752

A judgment creditor has only a general lien upon the realty of the judgment defendant and such a lien is an encumbrance but the original judgment plaintiff is not ordinarily an encumbrancer for a valuable consideration; the phrase "encumbrancers in good faith and for a valuable consideration" meaning persons who have taken or purchased a lien or perhaps merely the means of obtaining one, and who have parted with something of value in consideration thereof and payment of money or the parting with something of value is essential.

See publication Words and Phrases, for other judicial constructions and definitions of "Encumbrancers in Good Faith and For a Valuable Consideration"

5. Judgment ⇐785(1)

Where vendor sold property without receiving payment from the purchasers in full therefor and without reserving any specific lien on the property and the purchasers subdivided the property and incurred indebtedness and creditor secured a judgment thereon against the purchasers and there was no evidence that the creditor extended credit to the purchasers on the assumption that the purchasers owned the property involved free of a lien of the vendors or that the creditor parted with anything of value so as to constitute it a purchaser or encumbrancer in good faith, judgment lien was not entitled to priority over the vendor's lien. West's Ann.Civ. Code, §§ 3046, 3048, 3050.

6. Costs ⇐234

Where the judgment was modified on appeal each party was required to pay their own costs on appeal.

Ferguson & Judge, Fullerton, for appellants.

McCabe & Schumacher, Fullerton, for respondents Schut.

Raymond F. Vincent, Buena Park, for respondent, Buena Park Lumber Co.

MUSSELL, Justice.

This is an action to quiet title in which plaintiffs seek to establish the priority of their rights under a contract which they entered into with the defendants B. E. Doyle and Mollie A. Doyle for the purchase of lots 7 and 8, Tract 1756, in Buena Park, Orange County.

There is no dispute as to the material facts, which are set forth in the pretrial conference order.

On January 22, 1953, Jennie E. Page sold and conveyed Tract 1756 to the Doyles without having received payment in full therefor and also without reserving any specific security or lien on said property by way of a deed of trust, or otherwise. After January 22, 1953, the Doyles subdivided the property, sold some of the lots and constructed houses on others. On October 8, 1954, the Doyles were indebted to the defendant Buena Park Lumber Company, a corporation, on an open book account in the amount of $9,215 for lumber and building materials sold and delivered to them, a portion of which was used in the construction of houses on said property. On October 8, 1954, the Doyles executed and delivered to the lumber company their promissory note for $9,215, secured by a deed of trust covering lots 7, 8 and 9 of said tract. This deed of trust was recorded on the same day and the note and deed of trust were given to and received by the lumber company as full payment of the open book account. On May 23, 1957, the balance due on said note was $7,832.50, plus interest. At the time of the execution, delivery and recording of said deed of trust and at all times prior thereto the Buena Park Lumber Company and its agents and officers had no knowledge of any kind or nature, either actual or constructive, that Mrs. Page had any claim of any kind or nature against said lots 7, 8 and 9 nor did the lumber company have any notice of any kind or nature, either actual or constructive, that the purchase price of said property had not been paid Mrs. Page by the Doyles.

On January 12, 1955, a judgment was rendered in favor of the Transcontinental Credit Service, a corporation, against the Doyles in the amount of $5,429.60, the abstract of which was recorded on January 17, 1955. This judgment had been paid down to a balance of $1,669.48 at the time of trial.

On February 11, 1955, Bert J. Schut and Winifred Schut (plaintiffs herein) entered into a written contract with the Doyles to purchase from them lots 7 and 8 of said Tract 1756 for the sum of $4,800. This agreement consisted of escrow instructions with the Orange County Title Company. The instructions were never recorded and the escrow was never closed. The Schuts paid to the Doyles as a part of the purchase price of said property the sum of $2,100, a portion of which was paid on February 11, 1955, and the remainder thereof prior to May 1, 1955. At no time prior to May 1, 1955, did the Schuts have any knowledge of any kind or nature, either actual or constructive, that Mrs. Page had any claim of any kind or nature against said lots 7 and 8, nor did they have any notice of any kind or nature, either actual or constructive, that the purchase price of the property had not been paid to Mrs. Page by the Doyles.

On August 22, 1955, the executors of the estate of Jennie E. Page, deceased, obtained a judgment against the Doyles and it was decreed that the Pages have a vendor's lien upon said Tract 1756 effective as of January 22, 1953. The judgment also provided that the vendor's lien was not binding upon purchasers of property within the tract who purchased in good faith, for value, and without notice, either actual or constructive, of the rights of the Pages.

On November 9, 1955, the Schuts brought the present action to quiet title to lots 7 and 8 in said tract. The default of the Doyles was entered and on motion of plaintiffs the action was dismissed as to Orange County Title Company and Haskell A. Kelley.

The trial was had by the court without a jury and the principal issues presented and tried were (1) Whether the respondents Bert J. Schut and Winifred Schut and the Buena Park Lumber Company took with knowledge, actual or constructive, of appellants' vendor's lien; and (2) Whether the Buena Park Lumber Company is a purchaser or encumbrancer for value so as to be entitled to priority over the vendor's lien of the Pages.

The trial court rendered judgment that the Doyles have no interest or claim of any kind or nature in and to the property involved and "that the interests of the hereinafter mentioned parties in and to said Lots 7 and 8 of Tract No. 1756 and/or the proceeds therefrom, are in the following priorities:

First: The interest of defendant Buena Park Lumber Company;

Second: The interest of defendant Transcontinental Credit Service;

Third: The interest of the plaintiffs, Bert J. Schut and Winifred Schut;

Fourth: The interest of defendants Helen Estelle Fry and John Harold Page, as executors of the estate of Jennie Elizabeth Page, deceased.

Defendants, executors of the estate of Jennie E. Page, appeal from the judgment, claiming that as a matter of law the vendor's lien of Mrs. Page has priority over the interests, claims and liens of the other parties to the action.

One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer (Civ. Code, sec. 3046), and the liens defined in sections 3046 and 3050 are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value. Civ.Code, sec. 3048.

[1] In Frey v. Clifford, 44 Cal. 335, 342, it was held that a mortgagee, in a mortgage given for the security of a preexisting debt, is to be regarded in this state as a purchaser for a valuable consideration. And in Smitton v. McCullough, 182 Cal. 530, 537, 189 P. 686, 689, the court said:

> "The law in this state on this question is well settled to the effect that not only does an antecedent indebtedness constitute a valuable consideration for a transfer in satisfaction and discharge of said indebtedness, but it is also a valuable consideration, within the protection of the equitable doctrine of *bona fide* purchase, for a transfer merely as security for a preexisting debt. 2 Pomeroy's Equity Jurisprudence, 4th ed., vol. 2, § 749. The earliest cases in this state held that an antecedent indebtedness was a valuable consideration to support the transfer of commercial paper as security, and rendered the pledgee thereof free from equities between the original parties. Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318; Robinson v. Smith, 14 Cal. 94; Naglee v. Lyman, 14 Cal. 450; Jones' Pledges and Collateral Securities, 2d ed., § 128; Pomeroy's Equity Jurisprudence, 4th ed., §§ 480, 749. While these cases dealt with a *bona fide* purchaser under the law-merchant, the reasoning there adopted for holding the antecedent debt a valuable consideration was not based upon the peculiar requirements of commerce and mercantile business, and in Frey v. Clifford, 44 Cal. 335, 342, the general rule was definitely laid down, and has never since been receded from in this state, 'that a mortgagee, in a mortgage given for the security of a pre-existing debt, is to be regarded in this state as a purchaser for a valuable consideration,' and a subsequent mortgage given in security for an antecedent debt was held to prevail over a prior unrecorded transfer."

It was further held therein that the policy of the law is against upholding secret liens and charges to the injury of innocent subsequent purchasers and encumbrancers.

[2] In the instant case the record shows that the Buena Park Lumber Company had no notice of the claimed vendor's lien. In taking the trust deed and promissory note as payment of a preexisting debt, the company parted with value and was a purchaser or encumbrancer for value, thus entitling it to priority over the vendor's lien claimed by the executors of the Page estate.

The trial court decreed that the interests of Transcontinental Credit Service, Inc., was entitled to priority over the Page vendor's lien. This we think was error. In Finnell v. Finnell, 156 Cal. 589, 594, 105 P. 740, 742, the court, in discussing the vendor's lien provided in sections 3046 and 3048 of the Civil Code, said:

> "Whatever may be said against the policy of allowing such a secret lien, not evidenced by any writing or public record, our Legislature has seen fit to look with favor upon it and to continue in force the old equity rules in regard thereto. As was said in Fisher v. Shropshire, 147 U.S. 133, 143, 13 S. Ct. 201, 37 L.Ed. 109, the principle on which such a lien rests has been held to be that one who gets the estate of another ought not in conscience to be allowed to keep it without paying the consideration. Our law, recognizing this as a just principle, gives to every vendor, in the vendor's lien declared by section 3046, security for and a means of enforcing payment of the consideration, so far as it can do so without injury to the rights of *bona fide* purchasers or encumbrancers for value."

[3] In Fulkerson v. Stiles, 156 Cal. 703, 705, 105 P. 966, 967, 26 L.R.A.,N.S., 181, it was held that a judgment creditor has only a general lien upon the real property of the judgment defendant; that such a lien is an encumbrance, but the original judgment plaintiff is not ordinarily an encumbrancer for a valuable consideration; that the phrase "encumbrancers in good faith and for a valuable consideration" means persons who have taken or purchased a lien, or perhaps merely the means of obtaining one, and who have parted with something of value in consideration thereof; and that the payment of the money, or the parting with something of value, is essential.

In 30A American Jurisprudence, Judgments, section 535, page 548, it is said:

> "The general rule is that the equitable lien of a vendor for the unpaid purchase money for land sold and conveyed is paramount to liens of judgments recovered against the vendee. Sometimes this rule is applied where the judgment lien is perfected by a judgment creditor having notice of the existence of the vendor's lien, but there are also cases in which the vendor's lien is given preference even though the creditors were without notice thereof. Moreover, this priority is not affected by the levy on the land of executions issued on the judgments."

Citing Oaks v. Kendall, 23 Cal.App.2d 715, 73 P.2d 1255. In that case the land was sold under contract with title remaining in the vendor and the court said (23 Cal.App. 2d at pages 720–721, 73 P.2d at page 1257):

> "Moreover, the plaintiffs held an express lien on the land by virtue of the contract to sell the real property to secure the payment to them of the unpaid portion of the purchase price of the land (section 3046, Civ.Code; 25 Cal.Jur. 739, §§ 208 and 209), which was prior and superior to any subsequent lien which might be acquired by a judgment creditor of the vendee of the property. 66 C.J. 1245, § 1130; 27 R.C.L. 477, § 192. In 66 Corpus Juris, supra, it is said: 'The vendor's lien is superior to the rights of all persons, except *bona fide* purchasers for a valuable consideration without notice, * * It takes precedence over claims * * and liens of judgment and attachment creditors of the purchaser, and purchasers at execution sale.'
>
> "In 27 Ruling Case Law, supra, it is said: 'The judgment or execution lien extends only to the interest of the

purchaser and is inferior to the claim of the vendor for the purchase money, and likewise the purchaser at the execution sale will take subject to the rights of the vendor.'"

[4] There was no testimony introduced at the trial on behalf of Transcontinental Credit Service other than the facts which were stipulated to at the pretrial conference. There was no evidence showing that Transcontinental Credit Service extended credit to the Doyles on the assumption or belief that they owned the property involved free of the lien of the Pages or that Transcontinental parted with anything of value so as to constitute it a purchaser or encumbrancer in good faith.

In the pretrial conference order the facts related herein were set forth and were stipulated to between the parties except as to the question whether the lumber company and the Schuts had knowledge of the Page interest at the time their liens attached to the property. The trial was confined to the determination of this issue and the court found that the lumber company had no knowledge, actual or constructive, of the Page lien at the time of the execution, delivery and recording of their trust deed and also found that the Schuts had no knowledge, actual or constructive, of the Page lien when they entered into the agreement on February 11, 1955, with the Doyles to purchase the property. These findings are supported by the record and the facts found by the court support the judgment that the interests of the lumber company and the Schuts are not subject to the Page vendor's lien.

At the trial it was stipulated "that the Lumber Company and Transcontinental Credit are ahead of the plaintiffs" (Bert and Winifred Schut); that "the first interest is that of the Buena Park Lumber Company and the second is that of Transcontinental Credit Service"; and that "the third is Mr. Schut". It was further agreed that the real issue in the trial is whether the judgment lien of the plaintiffs is first or last.

Under the circumstances shown by the record it appears that there is no controversy between (1) the lumber company, (2) Transcontinental Credit Service, (3) the Schuts as to the priority of their liens in this order.

[5, 6] Since we have concluded that the Page vendor's lien was not subject to the lien of Transcontinental Credit Service, the judgment is modified by adding thereto the phrase "subject to the Page vendor's lien" after the word "Service" in the following provision of the judgment: "Second: The interest of defendant Transcontinental Credit Service". As so modified the judgment is affirmed. Each party to pay their own costs on appeal.

GRIFFIN, P. J., and SHEPARD, J., concur.



168 Cal.App.2d 658

Matter of the Trust Created by the WILL of Aron HERSHEL, also known as A. Hershel, Deceased.

Dora ROSENTHAL, Tillie Swartt and Sophie Hoffman, Appellants,

Bank of America National Trust & Savings Association, as Trustee Under the Trust Created by the Will of Aron Hershel, also known as A. Hershel, Deceased, Respondent.

Civ. 9569.

District Court of Appeal, Third District, California.

March 12, 1959.

Appeal by objectors from an order of the Superior Court, San Joaquin County, W. G. Woodward, J., settling twelfth account and report of a testamentary trustee. The District Court of Appeal, Van Dyke, P. J., held that trustee, which made all of its records available to objectors,

would not be compelled to furnish details requested by objectors over the trustee's verification.

Order affirmed.

1. Trusts ⇐322

A trustee is required to account in sufficient detail to truly reflect income, disbursements and the condition of the trust estate. West's Ann.Prob.Code, § 1120.

2. Trusts ⇐326

Question of when a trustee's account is sufficiently detailed is one committed to sound discretion of court to which the accounting is made. West's Ann.Prob.Code, § 1120.

3. Trusts ⇐324

Trustee, which made all of its records available to objectors, would not be compelled to furnish details requested by objectors over the trustee's verification. West's Ann.Prob.Code, § 1120.

4. Trusts ⇐322

A trustee should make business books and records available to any interested party that desires to go over them and, within reason, to lend such aid in such perusal as will enable party so engaged to ascertain from original sources whether account as rendered truly reflects the acts of the trustee. West's Ann.Prob.Code, § 1120.

E. R. Williams, Stockton, for appellants.

Mazzera, Snyder & DeMartini, Stockton, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal by objectors to the order of the probate court settling the twelfth account and report of a testamentary trustee. The objectors are three of the five beneficiaries of the trust. Bank of America National Trust & Savings Association has been the trustee since 1945. The trustee filed its twelfth account and report on October 18, 1957. It was set for hearing on October 31st following. Written objections were filed by appellants on October 30th, but as then filed the only grounds of objection specified were to a requested allowance of $5,000 for the fees of the trustee, and to the proposed destruction by the trustee of a stock of canning labels. On the day of the hearing, the trustee withdrew its request for authority to destroy the labels. The notice of appeal herein specifically excepts from the scope of the appeal that portion of the order of the trial court which fixed the compensation of the trustee. We therefore are not here concerned with either of the two matters which were the subject of objections at the first noticed hearing of the account and report.

The account filed was in the customary form and was supported by vouchers. At the hearing the trust officer testified to its correctness. The account covered the period from November 7, 1956, to May 4, 1957. It appears that the Aron Canning Company, the principal asset of the trust, had been sold to Tri-Valley Packing Association on or about June 12, 1956, for the approximate sum of $1,000,000. In further support of the twelfth account there was offered and received in evidence a report by an auditing firm with certified public accountant status, covering the accounting period. At the request of objectors the court continued the further hearing of the account to permit them to make an inspection of the records of the trust and to allow them time and opportunity to file further objections. This they did and after various continuances and further hearings the court found against them and settled the account as filed.

The contention of the objectors on appeal is that the trustee has not filed a sufficiently detailed verified accounting of the operation of the trust as it relates to the twelfth accounting period. In support of their demands for more detail and of their contentions that the failure of the court upon their motion to compel the trustee to break down its account in a more detailed manner appellants rely on statements in decisions and code sections which

discuss the obligation of the trustee to account. For instance, they cite Probate Code, § 1120, which states:

"* * * For that purpose, the trustee, * * * shall present to the court his verified account and report, setting forth his accounts in detail, reporting his acts as trustee, and showing the condition of the trust estate, * * *."

[1-4] Of course, a trustee is required to account and in sufficient detail to truly reflect income, disbursements and the condition of the trust estate, but the question of when a trustee's account is sufficiently detailed is one which must necessarily be committed to the sound discretion of the court to which the accounting is made. It appears that during the time when the trustee was running the business known as the Aron Canning Company, there was being processed by that company from one million to three million dollars worth of canned products annually. In the operation of such an enterprise the books of account would reflect innumerable items. And though the physical assets of the business had been sold yet the trustee was engaged in collection of accounts receivable, adjustment and payment of accounts payable and numerous other liquidation procedures. It could not be reasonably contended that in accounting in such a situation the trustee would be required to file a complete take-off of the books of account. If the trustee should do this, the court might well reject the account and compel the trustee to summarize the contents in such a manner that going over the account as filed would not entail the laborious task of checking the detailed source material. The trustee should also, of course, make the accounting sources, that is, the business books and records, available to any interested party that desired to go over them and, within reason, to lend such aid in such perusal as would enable the party so engaged to ascertain from the original sources whether or not the account as rendered truly reflected the acts of the trustee. In this case, all this was done; that is, the trustee did make all of its records available but the objectors and their counsel adamantly refused to undergo the labor of such inspection and demanded that the court order the trustee to furnish details requested by them over the trustee's verification. This the court refused to do, and properly so.

There is no merit in this appeal.

The order appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.



168 Cal.App.2d 463

PEOPLE of State of California, Plaintiff and Respondent,

v.

Warren James LEACH and Eddie Marie Kemp, Defendants,

Warren James Leach, Defendant and Appellant.

Crim. 6437.

District Court of Appeal, Second District, Division 1, California.

March 6, 1959.

Rehearing Denied March 24, 1959.

Hearing Denied April 29, 1959.

Defendant was convicted on four counts of forgery and from a judgment and sentence and an order denying his motion for a new trial in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., the defendant appeals. The District Court of Appeal, Fourt, J., held that no appeal lies from a sentence; that evidence sustained defendant's conviction as to one count of forgery, but was insufficient to sustain conviction as to other counts.

Judgment affirmed in part and reversed in part. Attempted appeal from sentence dismissed.

1. Criminal Law ⇐1023(10)

No appeal lies from a sentence.

2. Forgery ⇐5

An intent to defraud is a necessary element of forgery, and such an "intent" means an intent to deprive another of a right either by procuring something by deception or artifice, or by appropriating something wrongfully. West's Ann.Pen. Code, § 470.

See publication Words and Phrases, for other judicial constructions and definitions of "Intent".

3. Forgery ⇐35

Proof of intention to defraud may consist of reasonable inferences drawn from affirmatively established facts as basis for conviction for forgery. West's Ann.Pen. Code, § 470.

4. Forgery ⇐44

Evidence sustained conviction for forgery where defendant obtained possession of an automobile from a dealer by signing a used car purchase order and application for credit containing information designed to defraud the dealer, where had the defendant told the truth the dealer would not have parted with the automobile. West's Ann.Pen.Code, § 470.

5. Criminal Law ⇐351(10)

Deception and falsehood as to matters under investigation are evidence of consciousness of guilt.

6. Forgery ⇐44

Evidence was insufficient to sustain conviction of defendant for forgery of checks by a codefendant, where the defendant had driven the codefendant around to various shops in which the forgeries of the checks were committed and the evidence was not sufficient to establish that the defendant knew something of the forgeries and participated therein. West's Ann.Pen. Code, §§ 31, 470.

Gilda R. Cohen, Encino, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment and "sentence," and from an order denying appellant's motion for a new trial in a cause wherein the appellant was found guilty on four counts of forgery.

In an information filed in Los Angeles county the appellant and his co-defendant Eddie Marie Kemp were charged with five counts of crime. In count I the information alleged that the defendants committed the crime of grand theft in violation of section 487, subd. 3 of the Penal Code. In count II the information alleged that the defendants committed the crime of forgery of fictitious names in violation of section 470, Penal Code. In counts III, IV and V the information alleged that the defendants committed the crimes of forgery in violation of section 470, Penal Code.

The information further set forth and alleged that the appellant had previously been convicted of the crime of "attempted robbery bank messenger" in the District Court of the United States (Southern District of California), and was sentenced to, and served a term therefor in the federal prison; and that in March, 1953, he had been convicted of the crime of bigamy in Los Angeles county, and of the crime of forgery in Los Angeles county, and was sentenced to, and served a term therefor in the state prison.

The appellant pleaded not guilty and denied the prior convictions. A jury trial was waived and the cause was heard by the judge. Appellant was found guilty of counts II, III, IV and V, and further it was found that the appellant had been previously convicted of the prior felonies as charged in the information. Count I was dismissed because the judge was of the belief that count I was but a different statement of the offense as charged in count II.

A motion for a new trial and probation was denied and the appellant was sentenced to the state prison for the time prescribed by law.

[1] The appeal is from the judgment and "sentence" and from the order denying

appellant's motion for a new trial. No appeal lies from a sentence. People v. Gallardo, 41 Cal.2d 57, 60, 257 P.2d 29.

A résumé of the facts with reference to counts I and II is as follows: On March 6, 1958, the defendants went to a second hand car lot operated by the B & G Auto Sales Company. There the appellant, with his co-defendant, negotiated with a salesman of the car sales lot for the purchase of a 1950 Oldsmobile automobile for the price of $393.60. The appellant signed a "Used Car Purchase Order" wherein, among other things, it was set forth that "[a]s the terms of this contract and the credit extended to me are predicated upon *th* correctness of my statements herein, and in my purchaser's statement, I warrant them to be true and correct."

Appellant also signed an "Application for Credit" in the car transaction, wherein he set forth that his name was "Craig James Garland" and that his wife's name was "Edyth." At the trial a police officer stated that appellant had told him, in referring to the name used in the documents, "The name Craig is the first name of my son. The second name James is my name and the last name I just got out of the air."

Appellant stated in the signed documents in the car transaction that his address was "1434 E. 121st Street" and that he had lived there two and one-half years; that his occupation was that of a roofer, that he had a salary of $600 per month and was then and had been employed by "Leader Bros." of 3847 West 108th Street for seven years. He further stated in writing that his wife's occupation was that of "housewife," that they rented a house from a Mr. Zubriski of 1434½ East 121st Street. He gave the name of a friend as George Gist of "77 St. opp. pol. sta."

By his own testimony he disclosed that he had only worked for the Leader Roofing Company a few days since his release from prison in November, 1957, and that he was not employed at the time of his dealing with the car salesman; further that he had not been steadily employed for seven years because he had been in prison, and that he did not tell the salesman of his prison record and did not want him to know the truth. He further testified that his true name was Warren James Leach and that the name he used was just made up for the transaction; that he never resided at the address he gave and that it was fictitious for the purposes of the transaction, and that he was not married.

The appellant was released from prison in November, 1957, and apparently, for the first month upon his release he lived with his mother. Thereafter he lived in a common-law relationship with the co-defendant until he was arrested in, and extradited from Texas on the present charges.

A policeman testified that the appellant told him, with reference to the car transaction, "That is a phony all the way through." Phony is defined in Webster's New International Dictionary, 2d Ed., as meaning—not straight or genuine; counterfeit, fake or faked (slang, U.S.). Based upon the information received from the appellant in the application for credit and the used car purchase order, and relying on the truth of such information, a conditional sales contract was executed and delivery and possession of the Oldsmobile car was made to the appellant.

[2] The appellant asserts, as to count II, that the judgment was not supported by the evidence and that the corpus delicti was not proved. Appellant insists that there was no showing of any element of intent to defraud the B & G Motors Company. He states that one can adopt for innocent purposes a fictitious name and not be guilty of forgery. Such is undoubtedly true, but that is not the fact situation in the present case. An intent to defraud is a necessary element of forgery. People v. Crowder, 126 Cal.App.2d 578, 585, 272 P.2d 775. Such an intent has been defined as an intent to deprive another of a right, "either by procuring something by deception or artifice, or by appropriating something wrongfully." People v. Wilkins, 67 Cal.App. 758, 762, 228 P. 367, 368, quoted in People v. Griffith, 120 Cal.App.2d 873, 881, 262 P.2d 355, 360.

[3] The proof of intention to defraud "may consist of reasonable inferences drawn from affirmatively established facts." People v. Brown, 137 Cal.App.2d 138, 143, 289 P.2d 880, 883; People v. Horowitz, 70 Cal.App.2d 675, 687, 161 P.2d 833; People v. Crowder, supra, 126 Cal.App.2d 578, 585, 272 P.2d 775.

The rule with reference to the sufficiency of the evidence has been repeated many times and was succinctly set forth in People v. Newland, 15 Cal.2d 678, at page 681, 104 P.2d 778, at page 779:

"* * * The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' * * *"

[4] Without repeating the evidence in this case, suffice it to say, from what has heretofore been set forth, that there was ample evidence to support the findings of the trial judge. It was very much as the appellant himself has indicated in his own testimony, namely, he did not tell the salesman the truth because had he done so the company would not have parted with the possession of the automobile.

With reference to counts III, IV and V the facts are as follows: The defendants drove, in the Oldsmobile car, to the T. Philips Sign Company on Melrose Avenue in Los Angeles. The appellant said that Kemp went into the store to get a sign painted. A relative, appellant's brother-in-law, owned the place of business at that time. While in the place of business Kemp took from a box a number of blank checks with which we are now concerned.

Apparently the former owner of the business, T. Philips, died August 16, 1957, and his affairs, including the matters having to do with the business, were being handled by his daughter, the executrix of his estate. The daughter stated that the checks as made out and passed were not signed by T. Philips, and the form of the checks used in this case had not been used since the death of Mr. Philips.

Mr. Nadin stated that he purchased the sign company business from the estate of T. Philips, and that the checks used in this particular case were not signed by anyone authorized to do so by him, and that the signatures were not those of T. Philips.

Each of the checks in each of the counts with which we are concerned are substantially the same. The words and letters "T. Philips Signs" are printed at the top left corner of each check, and immediately thereunder are printed the address and telephone numbers as follows: "7819 Melrose Avenue WE 4-8722 WE 9-2947." The checks were numbered in printed figures at the upper right corners. At the lower left corner the name of the bank and address of same is set forth in printing, as follows:

"Melrose & Fairfax Branch
"Security-First National
Bank of Los Angeles
"7900 Melrose Ave.
Los Angeles, Calif."

The appellant told the officers after his arrest that apparently his co-defendant took the checks from the sign company office. She, the appellant's co-defendant, told the officers that "she and Leach had been out riding and drove out there to get a sign painted. That she had gone into this company and the checks were in a red cigar box up on a shelf and she had taken the checks, taken them out to the car and taken them and written them."

Count III: In April, 1958, Kemp, appellant's co-defendant, went into the Almquist Jewelry, Inc., shop on Crenshaw Boulevard and purchased a ring. In payment thereof she presented one of the stolen checks made payable to "Warren James Leach" and signed by "T. Philips" as the maker. The check was dated March 4, 1958, and was in the amount of $65.48. On the reverse side of the check as received in evidence

there appeared the writing "Warren James Leach. Mrs. W. L. Leach. OR 2-0113. 5044 W. Imperial Hwy. L A 54 Calif.," and the following notation, "Calif. Oper. Lic. W 585291 Husband." Kemp told the salesman in the jewelry store that she was Mrs. Leach. She was given a ring and $28.15 in change in exchange for the check.

Count IV: On a Saturday in March or April appellant drove Kemp to the Young Maternity Shop. While he waited in the car she went inside the store and purchased some clothes. In payment she gave the saleslady one of the stolen checks made payable to "Warren James Leach," and signed by "T. Philips" as maker. The check was dated March 4, 1958, and was in the amount of $62.19. On the reverse side of the check as it was introduced into evidence appeared the signature "Warren James Leach" and the following figures "W. 585291." Stamped endorsements of Young Maternity Shops and the Bank of America appeared on the reverse side of the check. Kemp was given about $40 in change plus about $20 in merchandise in exchange for the check.

Count V: On Easter morning, April 6, 1958, Kemp presented a check to the Lu Arts Flower Shop on Western Avenue. Some flowers were given in exchange for the check. The check was one of the stolen checks made payable to "Warren James Leach" and signed by "T. Philips" as maker. The check was dated March 4, 1958, and was in the amount of $64.94. On the reverse side of the check appeared the signature "Warren James Leach" and also the endorsement of Joe Casprowick, the florist, and that of the Bank of America.

Neither of the defendants had authority to use the name "T. Philips" on the checks, and the signature on the checks was not that of T. Philips nor of any one authorized to sign the name.

Appellant asserts that he had nothing whatsoever to do with the checks; that he did not know that Kemp had taken the checks at the sign company office; that he did not know that she was cashing the checks, and that all that he did was to drive her around while she shopped.

Section 470 of the Penal Code reads in part as follows:

"Every person who, with intent to defraud, signs the name of another person * * * knowing that he has no authority so to do * * * to * * * any * * * check * * * or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above named false * * * matters * * * knowing the same to be false * * * with intent to prejudice, damage, or defraud any person * * * is guilty of forgery."

Section 31 of the Penal Code provides:

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission * * * are principals in any crime so committed."

Kemp was convicted of counts III, IV and V and no appeal was taken from that judgment. The question here is—was there sufficient evidence of the appellant's aiding and abetting Kemp in the commission of the crimes?

We have heretofore quoted from People v. Newland, supra, as to the rule by which we must be guided, that is, we cannot set aside the conviction unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below," and that "every fact which the jury could have reasonably deduced from the evidence" will be assumed in favor of the verdict. It is true that the police stated that the appellant had said that he drove Kemp to the sign company's place of business and that the appellant had told the police that he had driven her "around to do a lot of shopping," and that he "didn't know that she was cashing checks." Further he told the police, "'We were driving one day and she went out there to get a sign painted. She went in and, apparently, took the checks.' He said, 'I didn't know she had taken them.'"

When the defendant testified in his own behalf, at the time of the trial, he stated that he had not driven Kemp to the sign company—that he had driven her nearby and had let her out and that he had then gone to a gasoline station and gotten some gasoline for the car.

[5] The prosecution asserts that deception and falsehoods as to the matters under investigation are evidence of consciousness of guilt, and such is a correct statement of the law. People v. Farrell, 107 Cal.App. 2d 25, 29, 236 P.2d 424; People v. Kristy, 111 Cal.App.2d 695, 716, 245 P.2d 547.

[6] The fact that the appellant drove Kemp around to do some shopping, in and of itself is not sufficient to convict the appellant of participating in Kemp's forgeries, unless it can be established that appellant at least knew something of the forgeries and participated therein in some manner.

The prosecution also calls attention to the fact that Kemp used the appellant's driver's license as a means of identification in cashing the checks. Appellant, however, denied that he had any knowledge whatsoever of her using such license.

Kemp testified for the appellant at the time of the trial and the judge epitomized the whole matter when he said, "Why this fool girl wants to take the burden on herself is her affair, and not anything I can control." A police officer stated that he had talked to her and that she had told him that the appellant had not seen the checks, that the endorsements were hers and that she had cashed the checks. No one identified the appellant as being a participant in any of the dealings with Kemp.

We are convinced that under the circumstances the prosecution did not establish the essential elements of guilt as to counts III, IV and V as to the appellant.

Pursuant to the rules on appeal, we have had the original file and proceedings in this case brought to this court, and the probation officer's report therein as to Kemp discloses that she lived with the appellant for seven months in a common-law relationship and that they supported themselves mainly by writing bad checks. She stated that "Warren Leach did know about the checks I wrote * * *. He drove me to the places where the checks were cashed, and he knew I got the checks from his brother-in-law's shop and gave me his driver's license to cash them."

The probation officer's report with reference to the appellant discloses that although the appellant had falsified his parole reports as to his residence, and was living in a common-law relationship with Kemp, and engaging in writing forged checks for a livelihood from and after about thirty days following his release from prison to the date of his arrest in Texas, he was nevertheless not declared to be a parole violator and his term of parole expired without revocation on April 17, 1958.

The probation report also discloses that the appellant in the instant cases followed the same course in the case now before us as he had theretofore followed in the previous forgery cases for which he was sent to prison in 1953—namely, he had a young woman, supposedly his wife, steal business checks and then such checks were passed as being genuine while he was out on bail on the previous bigamy charge. The probation officer's report also indicates that there are many more forged checks outstanding, totaling about $900, which were passed in substantially the same fashion as the checks in the instant case. It is apparent therefore that upon a retrial of counts III, IV and V, the prosecution will be in a position, if so minded, to establish, by the co-defendant Kemp, the missing elements of the offense, if Kemp testifies as she set forth in her written statement to the probation officer.

The judgment and order denying a motion for a new trial are, and each is, affirmed as to count II.

The judgment and the order denying a motion for a new trial as to counts III, IV and V are, and each is, reversed.

The attempted appeal from the sentence is dismissed.

WHITE, P. J., and LILLIE, J., concur.

168 Cal.App.2d 709

Charlotte O. JOHNS, Plaintiff and Respondent,

Carmen De Arrivillaga, Plaintiff and Appellant,

v.

Elta G. MOORE, Western Title Insurance and Guaranty Company, a corporation, as Trustee, et al., Defendants and Respondents.

Civ. 18107.

District Court of Appeal, First District, Division 1, California.

March 17, 1959.

Rehearing Denied April 16, 1959.

Action for an accounting and injunctive relief. The Superior Court, City & County of San Francisco, Gerald S. Levin, J., rendered the judgment challenged on appeal. The District Court of Appeal, Bray, J., held that where there was a difference in total amounts of rent collected by creditor, pursuant to powers granted in deed of trust, and payments due on note secured thereby, debtor was in default.

Affirmed.

1. Mortgages ⇐199(3)

With respect to accountability for rents and profits which mortgagee in possession received or could have received, general duty of mortgagee toward premises is that of an ordinarily prudent owner, and mortgagee may be held chargeable for rents and profits not actually received where, but only where, he has failed to use reasonable diligence, or where he was guilty of fraud, gross negligence or willful default.

2. Mortgages ⇐199(3)

Absent showing that creditor had failed to use reasonable diligence or had been grossly negligent in relying upon information obtained from tenant and debtor with regard to debtor's indebtedness to tenant, creditor, which had assumed collection of rents pursuant to powers granted in deed of trust, could not be charged for rents not collected from such tenant.

3. Mortgages ⇐200(3)

Trustee or beneficiary may satisfy tax and other superior liens in order to protect security and may add sums thus expended to debt secured.

4. Mortgages ⇐199(5)

Under second deed of trust, providing that beneficiary could make payments on encumbrances and liens which trustor was required, but failed, to make, beneficiary collecting rents pursuant to powers granted in second deed of trust properly applied rents to payment of first deed of trust.

5. Appeal and Error ⇐990, 991

The completeness of an account is a question for trial court, and evidence offered should not be reweighed by reviewing court, particularly where appellants fail to specify particulars in which they claim account was not complete.

6. Mortgages ⇐194

Ordinarily, a mortgagee in possession is not entitled to any compensation for personal services for care and management of property, but where compensation is provided for by agreement, this rule is not controlling.

7. Mortgages ⇐194

Where deed of trust made provision for payment of "expenses of operation and collection", creditor collecting rents pursuant to powers granted in deed of trust was entitled to management fees.

8. Mortgages ⇐194

Allowance of $25 per month for managing property and collecting rents, pursuant to powers granted in deed of trust, was excessive where total rents collected amounted to only $150 per month; and only half that amount was allowable.

9. Mortgages ⇐338

Deed of trust provision, authorizing beneficiary to appear in and defend any action or proceeding purporting to affect security or rights or powers of beneficiary, warranted allowance of attorneys' fees in suit to enjoin exercise of power of sale.

10. Mortgages ⇐335

Where there was a difference in total amounts of rent collected by creditor, pursuant to powers granted in deed of trust, and payments due on note secured thereby, debtor was in default.

Ricardo J. Hecht, San Francisco, for appellant.

Jerome L. Schiller, San Francisco, for respondent.

BRAY, Justice.

Appellant De Arrivillaga appeals from an adverse judgment in an action brought by her and plaintiff Johns in an action for an accounting and injunctive relief.

Questions Presented.

1. Sufficiency of the accounting (a) as to rents from tenant Fox; (b) were rents properly applied on the first deed of trust; (c) was a complete account rendered?

2. Were credits allowable for attorneys' and management fees?

3. Was the notice of default premature?

Record.

In November, 1951, plaintiff Johns and her husband, W. Harry Johns, acquired certain real property in San Francisco. In January, 1953, they executed a first deed of trust on it to Home Federal Savings & Loan Association, to secure a promissory note in the sum of $6,500 with monthly payments of $65. (Home Savings is not involved in this action.) July 1, 1955, the Johns executed a deed of trust (hereafter called the second deed of trust) to defendant Western Title Insurance and Guaranty Company, as trustee, to secure payment of a promissory note to defendant Moore for $3,200 payable $60 or more per month. As additional security the Johns executed an assignment of rents to Mrs. Moore. July 13, 1955, the Johns executed to Western, as trustee, a deed of trust (hereafter called the third deed of trust) to secure payment of a promissory note to plaintiff for $1,900 payable $25 or more monthly.

In September, 1955, defendant Moore, pursuant to powers granted in the second deed of trust and to the assignment of rents, notified all tenants of the property to pay rents to her agent, Trade Center Properties, Inc. It collected all rents thereafter until December 27, 1956.[1] January 10, 1956, plaintiff Charlotte Johns obtained an interlocutory decree of divorce in which the real property was awarded to her.[2] January 17, 1956, defendant Moore recorded notice of default under the terms of the second deed of trust, and later gave notice of sale. However, further proceeding was enjoined in this action. Appellant then proceeded to foreclose the third deed of trust. December 12, 1956, the trustee, pursuant to such foreclosure, conveyed plaintiff Johns' interest in the property to appellant subject to defendant Moore's second deed of trust. At appellant's request, defendant Moore delivered an accounting of rents to appellant, which the court found was complete from September 19, 1955, to December 27, 1956, and that any errors therein were not prejudicial to plaintiffs.

The court further found that plaintiff was in default under the second deed of trust and dissolved the injunction restraining the foreclosure proceedings thereunder; also that defendant Moore had made proper accounting, except that the court reduced the amounts of certain items.

1. Sufficiency of the Accounting.

The court denied defendant Moore's contention that neither plaintiff Johns nor appellant Arrivillaga were entitled to an accounting. As said defendant is not appealing and did account we deem it unnecessary to determine the propriety of that ruling.

(a) *Rents from tenant Fox.*

1. September 27, 1955, defendant Moore filed notice of default under the second deed of trust. Apparently nothing further was done pursuant to this notice.

2. March 10, 1956, Mr. Johns was adjudged a bankrupt by the federal court. May 8, that court decreed that the bankrupt's trustee had no interest in the property.

[1, 2] Defendant Moore did not collect rent from Fox, tenant of one of the apartments. We adopt in part the statement of the trial judge, Hon. Gerald Levin, in his memorandum opinion: "The evidence is confusing on this point, but it indicates an indebtedness by Mr. Johns to Mr. Fox, which was verified by the agent of defendant Moore with plaintiff Johns and Mr. Johns; that rentals due from Mr. Fox on account of his occupancy of an apartment on the premises, termed 'The Attic,' were credited to that indebtedness and not actually collected by defendant Moore. There does not appear to be anything in the record to show that defendant Moore failed to use reasonable diligence or was grossly negligent in relying upon the information obtained by her agent from Mr. Fox and Mr. and Mrs. Johns on this subject. It does not seem fair for the Court to infer to the contrary from the evidence in the record. Accordingly the principle of law stated above again seems applicable." The principle referred to is: "With respect to accountability for rents and profits which the mortgagee in possession received or could have received, the general duty of the mortgagee toward the premises is that of an ordinarily prudent owner. The mortgagee may be held chargeable for rents and profits not actually received where, and only where, he has failed to use reasonable diligence, or where he is guilty of fraud, gross negligence, or willful default * * *" (59 C.J.S. Mortgages, § 318, p. 428; see also 33 Cal.Jur.2d 606, § 215.)

(b) *Application of rents on first deed of trust.*

[3, 4] Appellant's contention that defendant Moore had no right to apply any of the rents to payment of the first deed of trust is well answered in the above mentioned memorandum opinion: "It seems clear from the express language of the second deed of trust that defendant Moore had the right to make payments on the obligation secured by the first deed of trust; but assuming the absence of express authority in the deed of trust, asserted by plaintiffs, the law is clear in California, as stated in Stafford v. Russell (1953) 117 Cal.App.2d 326 at 332–[33]3, [255 P.2d 814]: 'Even in the absence of such authority, the trustee or beneficiary may pay taxes and other superior liens in order to protect the security and add the same to the debt secured. (Savings & Loan Soc. v. Burnett, 106 Cal. 514, 536 [39 P. 922]; San Mateo County Bank v. Dupret, 124 Cal.App. 395, 396–397 [12 P.2d 669].)"

Section A of the second deed of trust provides that the beneficiary can make payments on encumbrances and liens which the trustor was required, but failed to pay.

(c) *Complete account.*

[5] Appellant Arrivillaga, in contending defendant Moore failed to justify the account, cites alleged failure to explain uncollected rent, or the necessity or reasonableness of attorney and management fees and the failure to produce vouchers and receipts. However, there is no specification of any item not properly accounted for, other than those herein discussed.

The trial court found that a complete account was rendered and that errors, if any, were nonprejudicial to plaintiffs. The completeness of an accounting is a question for the trial court and the evidence offered should not be reweighed by the reviewing court. See Baumann v. Harrison, 1941, 46 Cal.App.2d 84, 92, 115 P.2d 530. Particularly is this so where plaintiffs fail to specify the particulars in which they claim the account is not complete. In Murdock v. Clarke, 90 Cal. 427, 435–436, 27 P. 275, 277, the court said where "the finding is challenged only in general terms, and not specifically, and the objections are addressed to the necessity or reasonableness of the expenditure, rather than to its amount, we must accept the finding as correct."

2. Attorneys' and Management Fees.

[6–8] The agent appointed by defendant Moore managed the property and collected the rents. For this service defendant Moore allowed $25 per month, or a total of $400. The court found this allowance to be excessive in view of the fact

that the total rents collected amounted to only $150 per month, but allowed $200. Ordinarily a mortgagee in possession is not entitled to any compensation for personal services for the care and management of the property. See 33 Cal.Jur.2d 610, § 218. However, where compensation is provided for by agreement, that rule is not controlling. See 59 C.J.S. Mortgages, § 318, p. 430. Although fees for management are not expressly referred to in the deed of trust, they are included in the provision for the payment of "expenses of operation and collection." Hence, the allowance made by the court was proper.

[9] The court allowed attorneys' fees in the sum of $250 for services rendered by defendant Moore's attorneys in connection with the foreclosure proceedings, and $500 (reduced by the court from $800 asked) for additional services in connection with the foreclosure and sale plus services rendered in this action which the court held were rendered for the protection of defendant Moore's security under the deed of trust.

Sections A–3, A–6 and B–5 of the deed of trust authorize the beneficiary to "appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary."

The court found that the exercise of the power to defendant Moore to collect rents, as well as the power to sell, were affected by the injunctive aspects of the action, as no sale could be made as long as the injunction remained in effect. The cited provisions of the deed of trust warranted the allowance of attorneys' fees.

3. Notice of Default Not Premature.

[10] Appellant contends that at the time defendant Moore gave notice of default plaintiff Johns was not in default. This contention is based primarily upon appellant's contentions hereinbefore discussed and found adversely to appellant. Plaintiff Johns made no payments on the note to defendant Moore at any time, and as pointed out by the trial court in its memorandum opinion, on January 17, 1956, the date of the notice, there was a difference in the total amount of the rents collected less the expenditures found proper by the court, and the payments due on the note, in the sum of $452.04. Unquestionably plaintiff Johns was then in default.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



169 Cal.App.2d 19

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Prentiss Louis COLLIER, Defendant and Appellant.

Cr. 1410.

District Court of Appeal, Fourth District, California.

March 20, 1959.

Defendant was convicted of felonious possession of a narcotic and from a judgment of the Superior Court of San Diego County, John A. Hewicker, J., the defendant appeals. The District Court of Appeal, Griffin, P. J., held that the evidence sustained conviction and that where defendant authorized the search of his apartment for loot from a robbery and the officers found narcotics therein, evidence of the narcotics was admissible as against the defendant.

Judgment affirmed.

1. Criminal Law ⇐633(1)
Poisons ⇐9

In prosecution for felonious possession of a narcotic, evidence supported conviction and established that the defendant was accorded a fair trial. West's Ann.Health & Safety Code, § 11500.

2. Searches and Seizures ⇐7(20)

Alleged fact that search of apartment of the defendant was for loot from a robbery would not establish a violation of the defendant's constitutional rights when the officers found narcotics therein. West's Ann.Health & Safety Code, § 11500; U.S. C.A.Const. Amend. 4.

3. Criminal Law ⇐394.5(3)

In prosecution for the felonious possession of narcotics where defendant granted an officer permission to search the defendant's apartment for loot from a robbery, evidence of the presence of narcotics in the apartment found by the officer was admissible against the defendant. West's Ann.Health & Safety Code, § 11500.

Prentiss Louis Collier, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Philip C. Griffin, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendant-appellant was convicted by a jury of violating section 11500 of the Health and Safety Code (felonious possession of a narcotic, marijuana).

From June 14th to June 17th, 1958, one McGill lived with defendant and one Andrews at 67–19th Street, San Diego. It was considered to be defendant's apartment. About 7 a. m. on June 15th McGill, who slept in the front room, testified he observed defendant enter the apartment carrying a little box (Exhibit 1), and he took it into his bedroom, left it there and returned to the front room where Andrews and McGill were seated. They all left for town and en route were stopped and arrested on a charge of attempted robbery. On June 17th defendant talked to an officer who sought permission from him to search his apartment. This was granted. Apparently the officer was looking for loot from a robbery committed on June 14th. At the time defendant spoke up and said: "You might find something out there but it is not mine. There is a lot of people that use that apartment." The officers and McGill went to it. McGill used his key to admit the officer. A search was made and on the floor of the bedroom closet, under a red bathrobe, was found a laundry box (Exhibit 1), inside of which was found 18 hand-rolled marijuana cigarettes, loose vegetation was found in a paper bag, as well as an empty cigarette paper box labeled "Zigzag". On June 17th defendant was informed of the find. Defendant denied knowing anything about it. The officers removed certain debris from defendant's shirt and trousers which he was wearing and which proved to be marijuana debris.

Defendant's car which had been impounded was searched. A partially consumed hand-rolled marijuana cigarette was found on the floor-board. Another search of the apartment was made. On the mantel piece was found some green botanical material and cigarette papers. On the floor of the bedroom closet was found similar material. All proved to be particles of marijuana.

Defendant testified that after he had been away for a month or so from his apartment, on his return he found McGill had moved into it and had paid the rent and the utilities. McGill testified he had to sign for and pay the utilities because otherwise they were going to be disconnected. Defendant then testified that at about 6:30 A.M. on June 16th, he and Andrews entered the apartment and he argued with McGill because McGill had been wearing his clothes. He testified further he had no box in his hand when he entered the apartment as claimed by McGill and had never seen such a box; that on that morning they were driving along in the car and the officers stopped them, found five I. D. cards belonging to McGill in the car, and also saw a large wrench in McGill's pocket; that they took them all to jail for suspicion of robbery; that he and Andrews gave fictitious names to the police; and that he had no knowledge of the presence of marijuana in the apartment, in the car, or in his pockets.

Defendant was convicted and now argues on appeal that he should not have been convicted of possession of narcotics when the other two persons with him were not so charged and convicted; that his constitutional rights were violated in searching his apartment and car without a search warrant, in violation of the Fourth Amendment to the United States Constitution; and that if he did give the officers permission to search his apartment, it was only to look for loot from the claimed robbery; that there were other prosecution witnesses who were not called; that McGill was called as a witness for the prosecution and not charged; that it was just as plausible to believe McGill was in the process of tailoring marijuana cigarettes that morning and became excited and put the box containing them in defendant's closet; that the trial judge made an erroneous assumption when he sentenced defendant by saying: "I don't think anyone that uses marijuana cigarettes has any need for 18 on hand at one time. I think he was doing something else with them besides smoking. Probation will be denied."

In an additional brief defendant reargues the facts and claims that in the interest of justice this court should afford him "his legal freedom as expeditiously as possible."

[1–3] Suffice it to say from an examination of the entire record, it appears that there was sufficient evidence to support the finding of the jury that the defendant violated section 11500, supra, and was accorded a fair trial. It is not our province to say that the jury should have believed defendant's story as opposed to other evidence. A search of defendant's apartment was authorized by his own permission. The car was impounded by the officers and apparently they had a present right of access to it. Even though the search of the apartment was authorized for one purpose, the taking of contraband found in that search would not be a violation of defendant's constitutional rights. The evidence was admissible against defendant in this action. People v. Wright, 153 Cal.App.2d 35, 40, 313 P.2d 868; People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721; People v. Lujan, 141 Cal.App.2d 143, 147, 296 P.2d 93. There is no sufficient showing of any claimed prejudicial error justifying a reversal.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.



168 Cal.App.2d 719

George GREGORY, Petitioner and Appellant,

v.

JUSTICE COURT, SOUTH SACRAMENTO JUDICIAL DISTRICT, Respondent.

Civ. 9542.

District Court of Appeal, Third District, California.

March 17, 1959.

Proceeding for a writ of prohibition to restrain justice court from proceeding to try petitioner on misdemeanor charges. From a judgment of the Superior Court, Sacramento County, Jay L. Henry, J., denying the peremptory writ the petitioner appealed. The District Court of Appeal, Warne, J. pro tem., held, inter alia, that while one may waive his constitutional right to a speedy trial, waiver must take place prior to expiration of statutory period and hence where statutory 30-day limitation for trying misdemeanor case had expired 55 days prior to purported waiver trial court erred in attempting to pursue the matter further.

Reversed.

1. Criminal Law ⇐260(12)

The remanding of misdemeanor case by municipal court to justice court had the effect of starting a new 30-day period for trial within statute requiring misdemeanor trial to take place within 30 days

after arrest unless provisions of statute were complied with, and hence unless good cause to contrary was shown, compliance with statute required that the trial should have begun within 30 days after case was remanded and delay beyond that date, in absence of waiver, would entitle defendant to dismissal. West's Ann.Pen.Code, § 1382, subd. 3; West's Ann.Const. art. 1, § 13.

2. Criminal Law ⇐576(11)

The burden is on the prosecution to show good cause for failure to try defendant charged with misdemeanor within 30 days when motion for dismissal is made on that account. West's Ann.Pen.Code, § 1382, subd. 3; West's Ann.Const. art. 1, § 13.

3. Criminal Law ⇐576(5)

While one may waive his constitutional right to a speedy trial, waiver must take place prior to expiration of statutory period and hence where statutory 30-day limitation for trying misdemeanor case had expired 55 days prior to purported waiver, trial court erred in attempting to pursue the matter further. West's Ann.Pen. Code, § 1382, subd. 3; West's Ann.Const. art. 1, § 13.

4. Criminal Law ⇐576(5)

While constitutional right to speedy trial and statutory requirement may be waived when waiver occurs within statutory period, and if defendant intends to stand upon his right to trial within statutory period he must take some action to inform court that he does not waive his right, and his failure to object is the equivalent of consent, the waiver must occur within statutory period, not long afterward. West's Ann.Pen.Code, § 1382, subd. 3; West's Ann.Const. art. 1, § 13.

Busick & Busick, Sacramento, for petitioner-appellant.

Edmund G. Brown, Atty. Gen., Lloyd Hinkelman, Deputy Atty. Gen., and George Goldsmith, Deputy Dist. Atty., Sacramento, for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment denying a peremptory writ of prohibition.

Appellant sought to restrain the respondent justice court from proceeding to try him on misdemeanor charges of assault, battery, and disturbing the peace. On May 24, 1957, the complaint was filed and on the same day appellant was arrested. On June 3, 1957, appellant entered a plea of not guilty and waived the right to be brought to trial within 30 days after his arrest as provided in subdivision 3 of section 1382 of the Penal Code. Trial before a jury was set for July 18, 1957, but prior to that date the trial judge because of his disqualification ordered the case transferred to the municipal court of the city of Sacramento, in which the trial was set for November 20, 1957. On the latter date the case was remanded by the municipal court to the respondent justice court. Thereafter, nothing further occurred until January 14, 1958, when, without reason or excuse for the delay, the clerk of the respondent court, pursuant to instructions of the judge thereof, advised the prosecuting attorney and the appellant's attorney that the case would be placed on the February 4, 1958, calendar for the purpose of being set for trial. However, prior thereto it appears that the judge of the respondent court engaged in telephone conversations with the district attorney and the appellant's counsel relative to a date for the trial of said case; and as a result of said conversation, the respondent court ordered the case set for trial on March 6, 1958 (in the absence of appellant or his attorney), and written notice thereof was mailed by the clerk of the court to counsel in the case. No objection was made to the date set for trial by appellant or his attorney until March 3, 1958, when appellant filed a motion to dismiss the case for failure to comply with section 1382 of the Penal Code. The motion was denied, and as heretofore stated, a writ of prohibition was sought to enjoin and and restrain the respondent

court from taking any further action in said cause.

Appellant contends that the Superior Court erred in denying his petition for a writ of prohibition. Section 13 of Article I of the California Constitution provides: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; * * *", and insofar as here pertinent section 1382, subdivision 3, of the Penal Code reads:

"The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:

* * * * * *

"3. Where the trial has not been postponed upon the defendant's application, if the defendant in a misdemeanor case in an inferior court, is not brought to trial within 30 days after he is arrested and brought within the jurisdiction of the court, unless by his own neglect or failure to appear in court when his presence is lawfully required, his trial must be postponed * *"

[1] Since it is agreed that the remanding of the case by the Sacramento Municipal Court to the respondent court on November 20, 1957, had the effect of starting a new 30-day period for trial unless the provisions of section 1382, subdivision 3, were complied with, it follows that unless good cause to the contrary is shown compliance with the statute required that appellant's trial should have begun on or before December 20, 1957. A delay beyond that date, in the absence of a waiver of the statutory time for trial or a showing of good cause for the delay, would entitle appellant to a dismissal. Herrick v. Municipal Court, etc., 151 Cal.App.2d 804, 312 P.2d 264.

[2] In the case of People v. Angelopoulos, 30 Cal.App.2d 538, at page 545, 86 P.2d 873, at page 877, it is said: "The burden is on the prosecution to show good cause for the delay when a motion for dismissal of the action is made on that account. Harris v. Municipal Court, 209 Cal. 55, 64, 285 P. 699." Respondent made no showing of any kind that there was good cause for the delay attributable to the condition of the calendar, the availability of witnesses and the like. This record shows that appellant's petition for a peremptory writ of prohibition was denied solely on the ground that the appellant had waived his right to have the case tried within the 30-day statutory period by not having taken some action to inform the court that he did not waive such right at the time of setting the cause for trial, although neither appellant nor his attorney was present in court at the time.

[3] While appellant concedes that one may waive his constitutional right to a speedy trial, he contends that the waiver must take place prior to the expiration of the statutory period and that since the statutory 30-day limitation in the instant case had expired 55 days prior to the purported waiver the trial court erred in attempting to pursue the matter further. We feel that there is merit in this contention. If such were not the rule, there would be no limitation of time in which one charged with a crime could be brought to trial, although the statutory time limit had long since expired. Such a rule would defeat a defendant's constitutional right to a speedy trial. Section 13, art. I, California Constitution, supra. Such is not the intent or purpose of the law.

[4] While it is well settled that the constitutional right to a speedy trial and the foregoing statutory requirement may be waived when the waiver occurred within the statutory period (People v. Tahtinen, 50 Cal.2d 127, 323 P.2d 442; Muller v. Justice's Court, 129 Cal.App.2d 570, 277 P.2d 866), and that if a defendant intends to stand upon his right to a trial within the statutory period, he must take some action to inform the court that he does not waive his right (People v. O'Leary, 130 Cal.App.2d 430, 278 P.2d 933; Ray v. Superior Court, 208 Cal. 357, 281 P. 391), and that his failure to object is the equivalent of consent (People v. Tahtinen, supra), the opinion in each of these cases shows that

the waiver occurred within the statutory period, not long afterward as in the instant case. For that reason we feel that this case is distinguishable and the authorities relied upon by respondent are not controlling here.

The judgment is reversed.

PEEK, Acting P. J., and SCHOTTKY, J., concur.



168 Cal.App.2d 744

TRAVELWORLD, INC., a corporation, Plaintiff, Cross-Defendant and Respondent,

v.

Nate MARGOLIN, Defendant, Cross-Complainant and Appellant.

Kent Harris, Cross-Defendant and Respondent.

Civ. 23357.

District Court of Appeal, Second District, Division 2, California.

March 18, 1959.

Action on a promissory note, wherein defendant filed cross-complaint for fraud against plaintiff corporation and sole owner and chief executive officer thereof. The Superior Court of Los Angeles County, Paul Nourse, J., entered judgment adverse to defendant and an order denying his motion for new trial, and defendant appealed. The District Court of Appeal, Ashburn, J., held that since trial court found that cross-defendants had made no false representations of fact and cross-complainant did not challenge the sufficiency of the evidence to support the findings, any error in excluding evidence as to alleged misrepresentations did not result in any miscarriage of justice.

Appeal from order denying motion for new trial dismissed and judgment affirmed.

1. Fraud ⇐52

In action on cross complaint for fraud which allegedly induced purchase of vessel for operation as cruise ship, evidence as to representations made after ship was purchased and incidents which occurred in operation of enterprise was properly excluded.

2. Evidence ⇐471(2)
Fraud ⇐49

In action on cross complaint for fraud, objections to questions which sought to elicit conclusions or opinions expressed by cross-defendants or which were not within scope of averments of cross complaint were properly sustained.

3. Appeal and Error ⇐1056(1)

Where trial court in action on cross complaint for fraud found that cross-defendants had made no false representations of fact and cross-complainant, by not challenging on appeal the sufficiency of evidence to support findings, impliedly conceded that such findings were supported by substantial evidence, any error in excluding evidence as to alleged misrepresentations did not result in any miscarriage of justice.

Morse & Selwyn, Los Angeles, for appellant.

Forster & Gemmill, Donald W. Crocker, Los Angeles, for respondents.

ASHBURN, Justice.

Action upon a promissory note for $25,000 brought by the payee, Travelworld, Inc. against the maker, Nate Margolin who appeals from an adverse judgment.

The answer to the complaint asserted want of consideration, conditional delivery and an agreement that the note would be paid solely out of funds realized from operation of the S.S. Mazatlan by Margo-Pacific Lines, Inc. The trial judge held that pre-trial stipulations had ruled out the defenses of want of consideration and conditional delivery and that the claim as to payment of the note solely from earnings

of Margo-Pacific Lines, Inc. was an attempt to vary by parol the terms of the note, precluded by such cases as Bank of America Nat. Trust & Savings Ass'n v. Pendergrass, 4 Cal.2d 258, 48 P.2d 659, and Oakland Medical Building Corporation v. Aureguy, 41 Cal.2d 521, 261 P.2d 249. Appellant makes no claim of error in these rulings but asserts prejudicial error in the exclusion of evidence offered in support of his cross-complaint.

That cross-complaint was directed at plaintiff Travelworld, Inc. and Kent Harris who was sole owner and chief executive officer of said corporation. It sounds in fraud, alleged to have been committed by Harris upon defendant Margolin, which induced him to purchase the S.S. Alaska, with disastrous results. Travelworld, Inc. was engaged in the travel agency business in Los Angeles, and defendant went to see Kent Harris concerning travel agency representation for a hotel which he planned to build at Mazatlan, Baja California, Mexico. Growing out of this conversation defendant caused a Liberian corporation to be organized under the name Margo-Pacific Lines, Inc., purchased for $86,000 the S.S. Alaska and transferred it to said corporation. The ship had been built for Alaskan trade and was not equipped for service in warm climates. Before purchasing it cross-complainant caused a survey to be made to determine the practicability and expense of converting it for use as a cruiser ship between San Diego and Acapulco, Mexico. It was placed in such service but met with disaster upon its first trip; was towed back to San Diego and the corporation promptly went into bankruptcy.

The cross-complaint has seven paragraphs of misrepresentations alleged to have been made by Harris and relied upon by Margolin. The trial court found that Harris made the following representations and no others: "(a) That a certain Steamship known as the S.S. Alaska was available for purchase. This representation was a true statement of fact. (b) That cross defendant Kent Harris had made a study of the prospects for tourist travel over a period of five years. This representation was a true statement of fact. (c) That he, cross defendant Kent Harris, had heard a rumor that the S.S. Alaska could be purchased for $86,000.00. This representation was a true statement of fact." Also found: "The Court finds that, except as herein otherwise specifically stated, the cross defendants made no representations of fact to the cross complainant, and that all representations of fact which were made were true statements of fact, and that cross defendants, and each of them, believed the same to be true statements of fact. The Court further finds that cross complainant did not rely upon any representations made by cross defendants. The Court further finds that the cross complainant was not damaged in any sum whatsoever by any representations made by cross defendants, or either of them." This last quoted language points to the fact that most of the representations alleged by cross-complainant were statements of opinion only.

[1–3] Appellant does not challenge the sufficiency of the evidence to support the findings but relies upon 13 assignments of error in the exclusion of proffered evidence. Most of the questions to which objections were sustained related to representations made after the ship was purchased or to incidents occurring in the operation of the enterprise. Others sought to elicit conclusions or opinions expressed by Harris or were not within the scope of the averments of the cross-complaint. Examination of the individual assignments discloses no error. The fact that the court found that the alleged representations to which the respective questions related were not made and the further fact that those findings are impliedly conceded to be supported by substantial evidence demonstrate that there was no miscarriage of justice in sustaining the objections in question, if indeed any error were to be found in any of the rulings.

Appellant also argues error in denying his motion for new trial but that conten-

tion embraces the points just discussed and nothing more.

The attempted appeal from order denying motion for new trial is dismissed; the judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.



168 Cal.App.2d 705

Helen D. FRIETZSCHE, Plaintiff and Appellant,

v.

FIRST WESTERN BANK AND TRUST COMPANY, a corporation, Defendant and Respondent.

No. 18018.

District Court of Appeal, First District, Division 1, California.

March 17, 1959.

Hearing Denied May 13, 1959.

Action for declaratory relief. The Superior Court, City and County of San Francisco, John B. Molinari, J., sustained demurrer to complaint, and plaintiff appealed. The District Court of Appeal, Bray, J., held that employee's death at age 54 did not constitute "termination of service" prior to his normal retirement date for purposes of pension plan provision that if, upon such termination of service, employee had attained age of 45 and had completed 15 years service, he should be entitled, at normal retirement date, if then living, to receive pension; and held that even though employee had designated his wife as beneficiary, under pension plan provision authorizing him to elect to receive small pension for life and have pension payments continued to beneficiary after his death, she was not entitled to pension when employee died before reaching retirement age of 55.

Judgment affirmed.

1. Master and Servant ⇐78.1(3)

Pension plans are to be liberally construed in favor of employee.

2. Master and Servant ⇐78.1(3)

As a general rule, pension plans formulated by employer are construed most strongly against employer.

3. Master and Servant ⇐78.1(3, 6)

Employee's death at age 54 did not constitute "termination of service" prior to his normal retirement date for purposes of pension plan provision that if, upon such termination of service, employee had attained age of 45 and had completed 15 years service, he should be entitled, at normal retirement date, if then living, to receive pension; and even though employee had designated his wife as beneficiary, under pension plan provision authorizing him to elect to receive small pension for life and have pension payments continued to beneficiary after his death, she was not entitled to pension when employee died before reaching retirement age of 55.

Courtney L. Moore, William A. Lahanier, San Francisco, for appellant.

Orrick, Dahlquist, Herrington & Sutcliffe, San Francisco, for respondent.

BRAY, Justice.

Plaintiff appeals from a judgment entered on an order sustaining demurrer to her complaint without leave to amend.

Question Presented.

Is plaintiff widow entitled to a pension under defendant's pension plan? In substance, this question depends upon whether the plan is for retirement benefits or death benefits.

Facts.

Plaintiff's deceased husband, Albert, was employed by defendant from 1918 until his death July 15, 1955. He was then 54 years and 6 months of age, and a vice president. Defendant's pension plan was then in effect. Albert designated plaintiff as a beneficiary under section 6(d) of the

plan, hereafter quoted. Plaintiff sued for declaratory relief and also for monthly payment of half the amount Albert would have received upon retirement after he reached the age of 55. (It will be noted that he died before reaching that age.)

Was the Plan a Death Benefit One?

An examination of it clearly shows that it was not. The sections of the plan principally involved here are sections 6(c) and 6(d).

"(c) *Deferred pension on termination of service.* If, upon termination of service prior to his normal retirement date, a member has attained the age of forty-five (45) years and has completed an aggregate of fifteen (15) years or more of credited service, he shall be entitled, at normal retirement date, if then living, to receive a pension which shall be the actuarial equivalent of that portion of his normal pension which shall have accrued at the time of termination of his service * * *"

"(d) *Optional pension.* A member desiring *continuance* of pension payments to a designated beneficiary following his death may, in writing, elect to *convert* his pension provided in Section 6(a), (b) or (c) on an actuarial equivalent basis, into a reduced pension for himself for life, and following his death a life pension for the designated beneficiary, if living at the time of his death, in the same or a lesser amount. Such written election must be filed with the Bank at least six (6) months prior to normal or early retirement date, except that a member retiring within twelve (12) months after July 1, 1954 may, at any time prior to his retirement date, file such an election or may change or withdraw any election filed prior to July 1, 1954." (Emphasis added.)

Defendant's employees remain members of the pension plan until they retire, die, withdraw or cease to be employees (§ 2). Normal retirement is at 65, but where an employee has 15 years service and is incapacitated or has 20 years service, upon written application to defendant and with the consent of the Pension Committee, he may retire prior to 65, but after he has reached 55 (§ 4). Defendant bears the costs of this plan (§ 5).

[1] Pension plans are to be liberally construed in favor of the employee. Klench v. Board of Pension Fund Commissioners, 1926, 79 Cal.App. 171, 186, 249 P. 46.

[2] The general rule is that pension plans, formulated by an employer, are construed most strongly against the employer. Sigman v. Rudolph Wurlitzer Co., 1937, 57 Ohio App. 4, 11 N.E.2d 878, 879.

Section 11 of the plan provides that no person shall have any rights in the pension plan "except as, and only to the extent expressly provided for in the Plan." See also Magee v. San Francisco Bar Pilots Benevolent & Protective Ass'n, 1948, 88 Cal.App.2d 278, 198 P.2d 933.

[3] Plaintiff contends that, as her husband was over 45 and had more than 15 years service, he qualified for a deferred pension under section 6(c) and that his death constituted "termination of service prior to his normal retirement date" (because death is not expressly excluded from the plan) and that plaintiff qualifies as a beneficiary under section 6(d). A study of section 6 shows that under the plan no one is eligible for a pension prior to age 55 and that the pension described in section 6(c) is a deferred one, payable only if an employee whose service is terminated prior to his normal retirement age (age 65) is living at such age. The plan is geared to retirement benefits. There is no language indicative of an intent to confer death or prospective retirement benefits on a deceased employee's widow. Section 1(j) defines pensions as "sums payable *after retirement* to a member, former member, or *beneficiary*." (Emphasis added.) Section 6(d) conditions a beneficiary's rights upon rights of members of the plan to a pension under section 6(a), (b) or (c). Therefore a widow must first show that her husband was entitled to a pension.

The basic pension provision is contained in section 6(a), providing for a normal pension upon retirement at age 65. Sections 6(b) and 6(c), involving retirement or termination of service prior to age 65, provide for reduced pensions calculated on the basis of what would have been the normal pension. Section 6(b) expressly refers to retirement. Since Mr. Frietzsche did not retire, he was eligible, if at all, only under section 6(c), which refers to termination of service, as opposed to retirement. Under section 6(c), one reaching 65, who was an employee for at least 15 years and was at least 45 years old when leaving defendant's employ, is eligible for a pension. It seems clear that section 6(c) expressly conditions eligibility for a pension upon reaching age 65— "* * * he shall be entitled, at normal retirement date [age 65 according to section 4], *if then living*, to receive a pension * * *" (Emphasis added.) Therefore section 6(c) actually does not contemplate a pension upon termination of service, but rather upon normal retirement as in section 6(a). Only in section 6(b) is a pension payable prior to age 65 contemplated. Therefore, on the face of the plan and, specifically, section 6(c), plaintiff's husband was not eligible for a pension. It is inferentially clear that death is not contemplated as a type of retirement where the pension in section 6(c) is payable only at normal retirement date if the one eligible for a pension is then living.

Section 6(d) does not provide for a distinct pension. Rather, it provides that a member, "desiring *continuance* of pension payments * * * following his death," (emphasis added) may convert his normal pension under section 6(a) or the reduced pension under section 6(b) or 6(c) into a reduced pension for himself for life and thereafter to a designated beneficiary for life. It is clear one must first be eligible for a pension under section 6(a), 6(b) or 6(c) in order for section 6(d) to be applicable.

There cannot be a "continuance" of payments until payments start, and for the widow to have a pension the employee husband must first be entitled to a pension.

That section merely provides a method for spreading the pension an employee is entitled to under section 6(a), (b) or (c), over the lives of two people. The written election under section 6(d) is merely procedural, not a substantive act creating a new pension in the employee plus an additional pension in a beneficiary, as plaintiff contends. Far from creating a pension, the written election may be made before an employee is entitled to any pension. Moreover, should the beneficiary predecease the employee, the employee, under section 6(d) will receive the normal pension he would have been entitled to otherwise. This negatives the concept of the creation of new pensions.

If, as contended by plaintiff, a widow was entitled to a pension by the death of her employee husband regardless of whether at the time of his death he was entitled to a pension, there would be no need for the last paragraph of section 6(d) which states: "If selection of the optional pension has been properly made as herein provided, the amount of optional pension payable to the surviving beneficiary commencing after the death of the member, shall be paid, notwithstanding such member, upon request of the Bank, remains in employment after his normal retirement date and dies prior to actual retirement."

Plaintiff urges the applicability of a general rule of construction that a pension plan must be most strongly construed against the employer. A rule is only meaningful in its application and even should this court adopt the "general rule," under no reasonable interpretation can this plan be construed in favor of plaintiff. Considering the facts and plan incorporated in the pleading most favorably to plaintiff, the plan is clear and unambiguous on its face.

The demurrer to the complaint was properly sustained.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



168 Cal.App.2d 400

P. E. O'CONNELL et al., Plaintiffs and Appellants,

v.

Leonard WEITZMAN, etc., et al., Defendants and Respondents.

Civ. 5937.

District Court of Appeal, Fourth District, California.

March 5, 1959.

Rehearing Denied March 30, 1959.

Hearing Denied April 29, 1959.

Assignees' action for specific performance by owners leasing real estate under lease containing a first opportunity to purchase clause. The Superior Court of San Bernardino County, Edward P. Fogg, J., entered judgment for property owners and assignees appealed. The District Court of Appeal, Shepard, J., held that evidence sustained finding that owners had offered to sell property to both tenants and assignees but both tenants and assignees refused to make any concrete offers and had said in effect that they did not wish to buy, and such action constituted waiver of right under the first opportunity to purchase clause of lease.

Affirmed.

1. Landlord and Tenant ⇐92(4)

Where lease gave tenants first opportunity to purchase and several times landlord offered to both tenants and assignee of lease right to purchase property and both tenants and assignee not only failed to make any concrete offer but flatly stated that they did not wish to buy, owner could accept such unequivocal statements of disinterest as a waiver of first opportunity to purchase clause in lease, and after obtaining concrete offer to purchase from third party it was not necessary for landlord to go back and state that a buyer had been found and what price had been offered.

2. Estoppel ⇐119

Unless but one inference can be drawn from evidence, waiver and estoppel are questions for the jury or trial court.

3. Specific Performance ⇐121(3)

In action by assignee of lease for specific performance of first opportunity to purchase clause contained in real property lease, there was substantial evidence to support finding that landlord had offered both to tenants and assignee right to purchase property and that both of them stated that they were not interested in buying the same.

4. Appeal and Error ⇐989, 1011(1)

Where evidence is conflicting, decision of trial court on matters of fact will not be disturbed, and District Court of Appeal will not weigh the evidence.

Oregon Smith, Ontario, for appellants.

Daniel J. Cowett and Joseph A. Katz, San Bernardino, for respondents.

SHEPARD, Justice.

This is an action for specific performance which arises out of a dispute over the rights of the lessee under a "first opportunity to purchase" clause contained in a real property lease.

The trial court, after full trial on the merits, found: that 1 January 1953 defendants James W. Harrison and Sylvia L. Harrison, his wife (hereinafter called Harrisons), as owners, leased certain realty to Helen Glasgow, which realty was a portion of a larger tract owned by Harrisons; that Paragraph Fifteenth of said lease contained the following provision: "If the Lessors should decide to sell this property the Lessee herein is to be given the first opportunity to purchase same"; that this

clause referred to the entire tract owned by Harrisons and not to the particular portion under lease; that on 6 January 1954 Helen Glasgow assigned her rights under the lease to plaintiffs without the knowledge or consent of Harrisons, but that Harrisons after knowledge of the assignment continued to accept the rent from plaintiffs without protest or objection; that Harrisons on several occasions prior to the assignment of the lease by Helen Glasgow to plaintiffs, informed said Helen Glasgow that the property was then for sale and on each such occasion said lessee, Helen Glasgow, declined the offer and was not willing to purchase said realty or any part of it; that after the assignment of the lease to these plaintiffs Harrisons also offered to sell the property to these plaintiffs "who stated they were not interested in buying this property"; that after offering the property to the plaintiffs herein Harrisons executed to defendant Weitzman an option for the sale of the entire tract of realty described in the complaint herein, which option was exercised on 9 January 1956 and a deed from Harrisons to Weitzman was recorded 11 April 1956; and that at the time the option was given to Weitzman plaintiffs were in possession of that portion of the property covered by their lease. The court further concluded from these findings that Harrisons were not obligated to advise plaintiffs of the price and terms of sale offered by defendants Weitzman after plaintiffs had rejected Harrisons' offer to sell plaintiffs the property. The court rendered judgment denying plaintiffs any relief. From this judgment plaintiffs have appealed.

Appellants submit, by their brief, two issues to this court:

> "1. *An issue of law.* Were the lessors required to notify appellants that they had received an offer at a price at which they wished to sell and were they required to notify appellants of the price and terms so offered and give them the first opportunity to purchase the property at that price and upon those terms?
>
> "2. *An issue of fact.* Whether the property was in fact ever offered to appellants even without quoting a price."

Appellants, by their opening brief, adopt most of the court's findings except the finding of an offer by Harrisons to these plaintiffs and also excepting the conclusion that Harrisons had fulfilled their obligation under said Paragraph Fifteenth.

Appellants contend that the Harrisons were required to notify appellants that they had received an offer at a price at which they wished to sell, and were required to notify appellants of the price and terms of that offer and give them the first opportunity to purchase the property at that price and upon those terms. They cite in support of that contention a wide variety of authorities. Since these authorities follow one general trend we need not discuss all of them.

Moreno v. Blinn, 81 Cal.App.2d 852, 185 P.2d 332, 333, largely relied upon by plaintiffs, involved a lease with "first right to purchase" clause to the lessee, in which case Blinn offered to sell to Moreno for $7,500 and later, without further notice to Moreno, sold to a third party for $4,500. Under this state of facts the court gave judgment for Moreno, which was affirmed on appeal. It is obvious that ordinary fair dealing required that Blinn, when he lowered the price by $3,000, reveal that fact to Moreno before selling to a third party.

Nelson v. Reisner, 51 Cal.2d 161, 331 P. 2d 17, involved a right of first refusal on a new lease. The trial court found on conflicting evidence that the lessee had fulfilled the lease conditions and that the owner entered into a new lease with a third party without the knowledge or consent of the defendant. The trial court also found that defendant had not waived his right to first refusal because plaintiff's purported offer of a new lease was exorbitant, unreasonable, and not made in good faith. Here again, we have the same situation as in the Moreno case. Clearly, the ordinary principle of fair play would require the lessor to make an offer on the new lower

figure where he at first obtained a refusal on a much higher figure.

Whiteside v. Petersen, 204 Misc. 1079, 128 N.Y.S.2d 17 (contract never consummated, no proof of owner's desire to sell); R. F. Robinson Co. v. Drew, 83 N.H. 459, 144 A. 67 (failure to inform lessee of reduced price after lessee's refusal to pay higher price); Tamura v. De Iuliis, 203 Or. 619, 281 P.2d 469 (lease renewal clause effective, owner produced no proof price he quoted had been offered him); Jurgensen v. Morris, 194 App.Div. 92, 185 N.Y.S. 386 (owner knew lessee wanted to buy, inconclusive negotiations, sale without notice of new price); De Rutte v. Muldrow, 16 Cal. 505 (knowledge by plaintiff of defendant's prior purchase rights, owner deeded to both plaintiff and defendant); Martin v. Baird, 124 Cal.App.2d 598, 269 P.2d 54 (question of whether offers and counteroffers had evolved into a contract, equity disregarding form in search for true intent of parties); Straus v. North Hollywood Hosp., Inc., 150 Cal.App.2d 306, 309 P.2d 541 (arbitration of doctor's claim of exclusive pathology work), all are cases which, like the cases of Moreno v. Blinn, supra and Nelson v. Reisner, supra, involve facts clearly distinguishable from those in the case at bar, and in which the comments of the court must be read in the light of each case's special facts.

[1] Every case that arises has slight differences from all other cases. Courts of equity particularly recognize the necessity for viewing each case on its own particular state of facts to discover which rules most aptly apply. In the case at bar, with repeated offers by the owner apprising both the original lessee and the plaintiffs herein of the owner's desire to sell, and with each of the lessees not only failing to make any concrete offer but also flatly stating they did not wish to buy, and the owner accepting such unequivocal statement of disinterest by the lessees as a waiver and executing a lease option and ultimate sale to a third party, the trial court concluded that the owner had fulfilled his duty to first offer the property to the lessee, and that it was not necessary for the owner to go back at a later time and state that a buyer had been found and the price offered. If, as was true in many of the authorities cited by plaintiffs, the owner had quoted a price to the lessee-optionee and had later sold for a lesser price, or if the lessee-optionee had offered a price and indicated continuing desire to negotiate for a price, as was true in the Jurgensen case, we could well see the necessity for a new communication and quotation of price to the lessee-optionee. However, we are satisfied that in the case at bar the flat unequivocal statement of the plaintiffs and their assignor that they were not interested "in buying this property", with no further communication on that score from lessees until after Harrisons had placed themselves in a position of danger by giving an option to Weitzman, constituted a sufficient waiver to excuse Harrisons from any further offer under the clause of "first opportunity to purchase."

[2] "'Unless but one inference can be drawn from the evidence, waiver and estoppel are questions for the jury or the trial court.'" Krobitzsch v. Middleton, 72 Cal.App.2d 804, 815(9), 165 P.2d 729, 735.

We find this case considerably similar to that of Gosselin Bros. v. Thurston, 81 N.H. 65, 121 A. 343, which was in *assumpsit* for breach of agreement to give plaintiff first chance to buy. The owner had twice offered to sell and had asked the plaintiffs to make an offer. The plaintiffs declined to make an offer whereupon the owner finally sold to a third party. In denying the optionee's plea for damages the court said: "In a word, after he offered the property to the plaintiffs and they declined to make him an offer, he was under no further legal obligation to them." To a similar effect is Chandler & Co. v. McDonald-Weber Co., 215 Mass. 365, 102 N.E. 319. As was stated by our own Supreme Court in Wilson v. Brown, 5 Cal.2d 425, 428(2), 55 P.2d 485, 486, "Appellants claimed that the lessees stated that they did not desire to

buy the dwelling house, but only the premises on which the service station was located. Had this claim been satisfactorily substantiated upon the trial of the case, it would have been a complete defense to the suit by lessees for specific performance of their option."

[3] On appellants' second proposition, that the property was never in fact offered to appellants, it is true that there was some conflict but it is also true that plaintiffs testified they knew of the lease and option to Weitzman as early as June, 1955, and made no inquiry of Harrisons about a price and made no offer to buy; that plaintiffs knew in January, 1954 that the property was for sale and that it had been offered to their assignor; that Harrisons testified they offered the property to the O'Connells several times and they said they were not interested; that William A. Godfrey testified that he told plaintiffs about their option to buy and they stated that they did not want to acquire any more property; that Jack Mangum testified he heard Harrisons make the offer to plaintiffs in February, 1954 and that in one conversation with Mrs. O'Connell she stated "she didn't think she wanted to tie herself down to that much". This and other testimony was amply sufficient to support the finding of the trial court that offers were actually made by Harrisons to these plaintiffs and that these plaintiffs stated, in effect, that they did not want to buy.

[4] As we have said many times before, where the evidence is conflicting, the decision of the trial court on matters of fact will not be disturbed. This court cannot weight the evidence (Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 163 P.2d 756; Burrows v. Burrows, 18 Cal.App.2d 275, 63 P.2d 1135; Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

168 Cal.App.2d 775

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles Lester McCOLLUM, Defendant and Appellant.

Cr. 1502.

District Court of Appeal, Fourth District, California.

March 19, 1959.

Defendant was convicted of robbery in the second degree and from the judgment and order denying a motion for new trial in the Superior Court of Orange County, Raymond Thompson, J., the defendant appeals. The District Court of Appeal, Shepard, J., held that the evidence sustained the conviction as against claim that identification was insufficient.

Judgment and orders affirmed.

1. Robbery ⇐24(3)

Evidence sustained conviction of robbery in the second degree as against claim that evidence of identification was insufficient.

2. Criminal Law ⇐829(7)

Refusing defendant's requested instruction on alibi was not prejudicial in view of the instruction given.

3. Criminal Law ⇐806(1)

Court is not required to give repetitious instructions.

Jacobs, Jacobs, Hayden & Nelson, Santa Ana, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

SHEPARD, Justice.

Defendant and a codefendant named Litterell were charged and convicted of robbery in the second degree. Defendant McCollum alone appeals from the judgment and the orders denying motions for a new trial and denying bail pending appeal.

[1] Defendant contends that the evidence of identification was insufficient to sustain a conviction and that the court erred in refusing an instruction on alibi offered by this appealing defendant.

The evidence shows that at about 7:30 p. m. or slightly thereafter on 5 March 1958, one Chester Burris was employed as a clerk at the F & M Liquor store in the city of Garden Grove, Orange County, California. At that time he was accosted in the store by a man he later identified as this defendant, who told him this was a "stick-up" or "holdup". He had a gray fabric hood on his head but it concealed only the forehead and not the face. He had his right hand in his coat pocket pointing out. He said "Give me the money or I will blow your head off." Burris gave him the money then on hand in the store. While this was going on a Mr. Jonkhoff started in the store but defendant Litterell poked some object in Jonkhoff's back just above the waistline, and when Jonkhoff turned Litterell pointed at him and said "You better get out of here." Jonkhoff left. Litterell's face was in no way concealed and Jonkhoff later positively identified him. Jonkhoff went back to his car only a few steps away, pulled out from the curb, stopped and wrote down the license number of a yellow 1956 Chevrolet, MVW 477, in which he had seen Litterell. Litterell later admitted to ownership of the car. Another witness named Randolph also saw the Chevrolet, which was the only car backed into the curb at that point, and likewise wrote down the number, the only difference being that he wrote down a "U" instead of the "V". About 8:20 or 8:30 p. m. the same evening and less than an hour after the robbery Litterell and this defendant had appeared together at a cocktail lounge named "Ming", also in the city of Garden Grove, and both were arrested about 9:00 p. m. at that place. Defendant made conflicting statements to an investigator. Defendant offered an alibi but in the alibi claimed he was with Litterell during the entire evening, including the time when the holdup took place. Burris positively identified him as the man who committed the robbery.

It will thus be seen that while the evidence was conflicting there was definite proof, if believed, that defendant was the person who committed the robbery, and there was nothing improper in the testimony of the witnesses.

> "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. (Citation.) * * * it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (Citation.)" (People v. Huston, 21 Cal.2d 690(1) (2), 134 P.2d 758, 759.

> "While the claimed weakness in the testimony of the witnesses for the prosecution as to identification, as well as other claimed weaknesses in their testimony, undoubtedly afforded ground for a forceful argument to the trier of facts, nevertheless, they cannot avail appellant as ground for reversal because the evidence identifying an accused as the perpetrator of the crime charged need not be positive and uncontradicted. (Citations.) While some of the witnesses were cautious in their identification, they expressed the belief that appellant was the person they had seen and it was for the trial judge to say what weight such evidence was entitled to. (Citation.)" People v. Arenas, 128 Cal.App.2d 594, 601, 275 P.2d 811, 815.

On the claim that the court erred in refusing to give an instruction on alibi requested by the defendant, the defendant had requested two instructions both on the same subject. One of them given by the court was as follows:

> "When one who was not at the place where a crime was committed at the time of its commission is later charged

with having been present and having committed or taken part in committing such crime, his absence from the scene of the crime, if proved, is a complete defense that we call an alibi.

"The defendant(s * * *) in this case have introduced evidence tending to prove that they were not present at the time and place of the commission of the alleged offense for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt whether or not the defendants were present at the time the crime was committed, they are entitled to an acquittal."

The one which was not given reads as follows:

"I instruct you that the term 'alibi' means 'elsewhere'. The defendants are not required to prove an alibi beyond a reasonable doubt, or even by a preponderance of the evidence. They are entitled to an acquittal if the evidence presented, in connection with any other evidence, raises a reasonable doubt as to their presence at the scene of the crime."

[2, 3] In our opinion the instruction which was refused does not cover the subject nearly as well as the one which was given, and upon analysis contains some inferences that raise questions as to its propriety. The wording speaks of other evidence as though it had not been presented, and might raise confusion in the minds of the jury. In any event, the court was not required to give repetitious instructions.

"The court was not compelled to instruct the jury in the precise language used by this defendant nor was the court compelled to give each and every instruction proposed by him, no matter how repetitious they might be. All that was required was that the jury be fully and fairly instructed on all of the material elements of the case. (Citations.)" People v. Clark, 116 Cal.App.2d 219, 224(8), 253 P.2d 510, 514.

"[S]ince the proposed instruction would have been repetitious, it was properly refused." People v. Deibert, 117 Cal.App. 2d 410, 426(34), 256 P.2d 355, 365.

We have examined the entire record and it appears that the defendant received a fair trial and the evidence was sufficient to support the conviction.

The judgment and orders appealed from are affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.



168 Cal.App.2d 716

Robert E. DELANEY and Margaret Delaney, Plaintiffs and Appellants,

v.

RALPH L. SMITH LUMBER COMPANY, a Missouri Corporation, et al., Defendants,

Ralph L. Smith Lumber Company, a Missouri Corporation, Respondent.

Civ. 9474.

District Court of Appeal, Third District, California.

March 17, 1959.

Action for damages to the property of plaintiff as result of alleged negligent logging operations of the defendants. Verdict for the plaintiff in the Superior Court, Trinity, C. A. Paulsen, J., and the trial court granted defendant's motion for a new trial and the plaintiffs appealed. The District Court of Appeal, Schottky, J., held that the trial court properly granted the new trial where the testimony offered by plaintiffs was insufficient to sustain their burden that the defendant lumber company was responsible for the damage.

Order affirmed.

1. Appeal and Error ⇐1015(1)

When a new trial is granted upon the ground of insufficiency of the evidence, the order must be affirmed unless it can be said as a matter of law that the record does not contain substantial evidence to support a contrary judgment.

2. New Trial ⇐70

In action for damages to property as result of logging operations of the defendants on the ground that defendants negligently deposited trees and logs in a stream and that they could have ascertained that such would be carried out during the usual run-off of the stream and that the logs and debris would damage the plaintiff's property, trial court properly granted defendants new trial on the ground that the probative force of the testimony by the plaintiffs was insufficient to sustain burden that the defendants were responsible for the damage.

L. C. Smith, R. P. Stimmel, Redding, for appellants.

Wallace, Garrison, Norton & Ray, San Francisco, and Edwin J. Regan and Donald R. Kennedy, Weaverville, for respondent.

SCHOTTKY, Justice.

This is an appeal from an order granting defendant Ralph L. Smith Lumber Company a new trial after a jury verdict in favor of plaintiffs in an action by plaintiffs to recover damages for injury to property as a result of allegedly negligent logging operations.

The record shows that the Delaneys operate the Trinity Alps Resort which is located in the Trinity Alps region of Trinity County. During the month of December, 1955, heavy rains in the area caused Stuarts Fork of the Trinity River to rise and to carry logs and debris down the river into and over the Delaney's property. In the process buildings on the property and the dining wing of the resort were washed away and destroyed. The location of the resort is some 2 miles below the confluence of Van Matre Creek and Stuarts Fork. The Ralph L. Smith Lumber Company had been logging the East ½ of Section 19, Township 35 North, Range 9 West, which is above the confluence of the streams. After the damage to their property, the Delaneys brought this action to recover for the loss incurred against the lumber company and the other defendants.

The complaint alleged:

"That at all the times herein mentioned, the defendants were in the possession of and chargeable with the control and operation of all that certain lot, piece or parcel of land situate, lying and being in the County of Trinity, State of California, and described as follows:

"The E ½ of Section 19, Township 35 North, Range 9 West, M.D.M.;"

The complaint alleged further that the defendants during their logging operations negligently and carelessly deposited trees and large logs in and adjacent to Stuarts Fork; that the defendants could have ascertained by reasonable diligence that the debris and logs would be carried off during the usual run-off and that the logs and debris would have damaged plaintiffs' property.

The evidence presented was sufficient to sustain a verdict in favor of the appellants, the Delaneys. The trial judge granted a new trial because the complaint alleged negligence occurring on a particular parcel of land, and in the opinion of the trial judge there was no evidence in the record to identify the place from where the log that caused the major damage came. The record discloses that logging had been done on Section 18, as well as the southeast quarter of Section 19.

[1] The order granting the new trial stated that it was granted upon the ground of the insufficiency of the evidence. It is well settled that when a new trial is granted upon the ground of the insufficiency of the evidence the order must be affirmed un-

less it can be said as a matter of law that the record does not contain substantial evidence to support a contrary judgment. The rule is well expressed in Williams v. Field Transportation Co., 28 Cal.2d 696, 698, 171 P.2d 722, 723, as follows:

"An order granting a new trial upon the ground of the insufficiency of the evidence to sustain the judgment will not be disturbed upon appeal, unless there be a clear showing of abuse of discretion. 'All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party.' Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465, 467. Even if the evidence is uncontradicted, the trial judge may draw inferences from it contrary to those made by the jury, and it is his duty to resolve such conflicts in determining whether the issues should be retried. Only when, as a matter of law, there is no substantial evidence to support a contrary judgment, may an appellate court reverse an order granting a new trial. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689; Mazzotta v. Los Angeles Ry. Corp., supra."

[2] In the instant case there was testimony that the destruction of the dining wing of the resort was caused by a sawed log coming down Stuarts Fork, which log struck the concrete abutments and took out the supports of the wing. There was testimony that logging had been done in other areas which drained into Stuarts Fork of the Trinity River. There was no direct testimony to show that the log in question came from the East ½ of Section 19 where the alleged negligence of the defendants took place. The trial court could determine that the probative force of the testimony offered by the appellants was insufficient to sustain their burden of proof that the lumber company was responsible for the damage. Under such circumstances this court cannot say that the trial court abused its discretion.

Appellants make a lengthy and vigorous argument in support of their contention that the court abused its discretion in granting a new trial on the ground of the insufficiency of the evidence. This argument would be very persuasive if the verdict of the jury had been against appellants and they were arguing a motion for a new trial, but in view of the evidence in the instant case and the broad discretion of the trial court in passing upon a motion for a new trial, we cannot hold that the court abused its discretion in granting respondent's motion for a new trial.

The order is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.



Emmett W. McFARLAND, Plaintiff and Appellant,

v.

VOORHEIS-TRINDLE COMPANY, a corporation, et al., Defendants,

Voorheis-Trindle Company, a corporation, Respondent.*

Civ. 22827.

District Court of Appeal, Second District, Division 3, California.

March 13, 1959.

Rehearing Denied April 10, 1959.

Hearing Granted May 6, 1959.

Action by tractor operator against landowner for personal injuries. The Superior Court of Los Angeles County, J. F. Moroney, J., entered judgment for landowner notwithstanding verdict and granted his motion for new trial and operator ap-

* Opinion vacated 343 P.2d 923.

pealed. The District Court of Appeal, Shinn, P. J., held that where tractor operator was furnished along with rental of earth moving equipment to be used in clearing and grading owner's land and operator worked at job site about a month during which his salary was paid by machinery owner, but he did work at and under direction of landowner's supervisor, operator was a special employee of landowner for purposes of workmen's compensation liability and was precluded from recovering damages from landowner for negligence.

Judgment notwithstanding verdict affirmed and plaintiff's appeal from order granting new trial dismissed.

Vallée, J., dissented.

1. Appeal and Error ⇐863

Where trial court granted defendant judgment notwithstanding verdict, sole question on plaintiff's appeal from that judgment was whether under an interpretation and application of the evidence and inferences most favorable to plaintiff there was substantial evidence to support each finding essential to judgment in his favor. West's Ann.Code Civ.Proc. § 629.

2. Workmen's Compensation ⇐2084

For purposes of workmen's compensation liability a special employee is deemed to be an employee within meaning of statutes specifying that right to recover compensation is exclusive remedy of employee against employer for injuries except in certain special instances. West's Ann. Labor Code, §§ 3601, 3706.

3. Workmen's Compensation ⇐2138

Upon conflicting evidence or evidence susceptible of two interpretations, question of whether injured party was a special employee for workmen's compensation liability purposes, would be one of fact. West's Ann.Labor Code, §§ 3601, 3706.

4. Workmen's Compensation ⇐2084

Where tractor operator was furnished along with rental of earth moving equipment to be used in clearing and grading land, and operator worked at job site for about a month during which his salary was paid by machinery owner but operator did work at direction of and under supervision of landowner's supervisor, operator was a special employee of landowner for purpose of workmen's compensation liability and was precluded from recovering damages from landowner based on negligence. West's Ann.Code Civ.Proc. § 1963, subd. 32; West's Ann.Labor Code, § 3601.

5. Workmen's Compensation ⇐203

In industrial accident cases an employee, at the same time, may be subject to both general and special employment and there is no inconsistency between the two relationships, nor is the existence of special employment contrary to any presumption that general employment continues to exist until it has been terminated. West's Ann.Code Civ.Proc. § 1963, subd. 32.

6. Workmen's Compensation ⇐208

Test of special employment within purview of workmen's compensation act is whether supposed special employer has some power, not necessarily complete, to direct and control actions of injured person at time of accident and relationship may be shown by evidence of right of control, whether that right is exercised or not.

7. Workmen's Compensation ⇐2082

Employer's failure to report accident or to include name of injured employee in its periodic audit submitted to insurance company could not deprive employee of his right to workmen's compensation benefits for his injuries.

Rose, Klein & Marias, Los Angeles, for appellant.

Von Herzen & Laidig, Samuel L. Laidig, Los Angeles, for respondent.

SHINN, Presiding Justice.

Action for damages for personal injuries. In a jury trial, plaintiff was award-

ed $75,000 damages. Judgment on the verdict was entered and in due time defendant made a motion for judgment notwithstanding the verdict and a motion for new trial. The motions were heard at the same time and both were granted. Plaintiff appeals from the judgment notwithstanding the verdict and the order granting defendant a new trial and he seeks reinstatement of the judgment on the verdict.

In May 1954, defendant made an oral agreement with plaintiff's employer, Los Angeles Tractor & Equipment Co., for the hiring of earthmoving equipment to be used in clearing and grading approximately 14 acres of hillside land owned by defendant. Defendant agreed to pay an hourly rental for the use of the equipment and for the services of operators to be provided by the tractor company.

Plaintiff was an experienced tractor operator. He was ordered by his employer to report for work at defendant's job site and he reported to Charles McDaniel who was defendant's superintendent in charge of the grading operations. Plaintiff worked at the job site for approximately a month until the date of his accident; during that period his salary was paid by the tractor company. His duties consisted of keeping the equipment in repair and in clearing and grading defendant's acreage with his bulldozer.

June 19th, McDaniel told plaintiff to cut a slope and remove the brush on a certain hill within stake lines marked by defendant's surveyors. Plaintiff moved downhill on his machine, and after pushing a load of dirt and brush down a bank, he found that his bulldozer had insufficient traction to enable him to move backwards. Plaintiff got off the machine and examined the ground behind and on both sides of his bulldozer. However, he could not examine the ground in front of him. His view of the terrain ahead of him was obscured by a tangle of brush as high as his machine; it was so heavy that "a mouse couldn't get through it." McDaniel was standing about 50 feet below the bulldozer and to the left. Plaintiff then signaled to McDaniel with his hands that he wanted to pivot to his right and go downhill. McDaniel signaled for him to stop and then motioned to another operator who drove up and cut a bank below the place where plaintiff's bulldozer was resting. McDaniel then gave plaintiff a signal to go straight ahead. McFarland put his machine in low gear and eased forward a few feet, whereupon its right track fell into a "sudden drop" and the bulldozer overturned, severing plaintiff's right leg and fracturing his left ankle.

The pleadings placed in issue the negligence of defendant and the contributory negligence of plaintiff. In an amendment to the answer, it was alleged that McFarland was a special employe, acting within the scope of his special employment at the time of the accident. It was also alleged that both parties were subject to the Workmen's Compensation Act; that plaintiff had applied for and obtained benefits under the Act; that under the provisions of the Act the court has no jurisdiction; and that plaintiff is barred from maintaining an action for damages against defendant and his remedy is limited to proceedings for workmen's compensation.

The verdict of the jury implies that it made findings in favor of plaintiff on the issues of negligence and contributory negligence and findings adverse to defendant on its defense of special employment.

[1] Under section 629 of the Code of Civil Procedure, the order granting defendant's motion for a new trial would be operative only in the event the judgment notwithstanding the verdict should be reversed. Our attention will be directed first to the judgment notwithstanding the verdict. Under well-established principles, our sole question on the appeal from that judgment is whether under an interpretation and application of the evidence and inferences most favorable to plaintiff there was substantial evidence to support each finding essential to a judgment in his favor. 28 Cal.Jur.2d 678.

As we have said, the jury found that McFarland was not in the special employ of defendant. This finding was indispensable to his recovery, for as we shall see, if he was a special employe, the court was without jurisdiction to award him damages.

[2] Under section 3601 of the Labor Code, where the conditions of workmen's compensation exist, the right to recover such compensation is the exclusive remedy of the employe against his employer for injury, except where, as provided in section 3706, the latter fails to secure the payment of compensation by being insured against liability for the same. A special employe is deemed to be an employe within the meaning of these statutes. Wessell v. Barrett, 62 Cal.App.2d 374, 144 P.2d 656.

[3, 4] Our question is therefore whether the relationship between the parties was one of a special employment. Upon conflicting evidence or evidence susceptible of two interpretations, the question would be one of fact and the jury's implied finding having support in the evidence would be binding on us on the present appeal. But in our opinion it was an inescapable conclusion from the evidence that McFarland was a special employe.

We have already mentioned that plaintiff remained on the payroll of the tractor company until June 19th. McFarland was skilled in repairing tractors and other earth-moving equipment and was classified as a master mechanic. He was in charge of maintaining and repairing the equipment loaned by the tractor company and he received no instructions from defendant regarding the maintenance and repair work, which he performed at the job site whenever repairs were necessary. The tractor company did not send its own superintendent to the job site. McDaniel gave instructions to plaintiff and his fellow workmen respecting the grading and clearing work. Although he testified he had no authority to "discharge" them but could send them back to the tractor company, which could discharge them or put them on another job, he also testified that he did discharge operators who had been furnished by Tractor with the equipment. On June 19th, McDaniel told plaintiff to discontinue other work he was doing and to cut a slope on the hill where the accident occurred. He told plaintiff that he wanted a road built before actual removal of dirt started and told him where he wanted the road. It was established that McDaniel did not tell the workmen how to operate their machines but he outlined the work and told them where to go and what he wanted done. McFarland testified that when he signaled McDaniel for instructions, just before the accident, and received a signal from McDaniel, he considered the signal to be an order.

McFarland contends that he was not a special employe because his primary duties consisted of maintenance and repair work over which defendant had no control and respecting which McDaniel gave him no instructions. He argues that complete relinquishment of control is essential to the creation of a special employment, citing Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241 and Lowell v. Harris, 24 Cal. App.2d 70, 74 P.2d 551. Each was an action against an employer for the alleged negligence of an employe who had been hired by another to operate an instrumentality owned by the employer. The question involved was whether the latter was to be excepted from the rule of *respondeat superior* by reason of the hiring. In the Lowell case, the court stated, 24 Cal.App.2d at pages 76–77, 74 P.2d at page 555: "An employee may be in the general service of one person, and may be lent or hired to another for some special service; and if in that service he is subject wholly to the direction or control of that other person, the latter, and not the general employer, is the master *pro hac vice,* and is liable for injuries caused by negligent or wrongful acts of the employee, while engaged in the performance of duties pertaining to such special service. * * * The existence of the right of control over the employee is the critical test of liability for his acts. It is the *right* to exercise control

rather than the *mere fact* of its exercise which is decisive."

[5] However, the rule of undivided control set forth in Billig, Lowell and other *respondeat superior* cases is not germane to the question whether McFarland was defendant's employe for the purpose of establishing workmen's compensation liability. Entremont v. Whitsell, 13 Cal.2d 290, 296, 89 P.2d 392. It has been recognized in the industrial accident cases that an employe may at the same time be subject to both a general and a special employment. Stewart & Nuss, Inc. v. Industrial Accident Comm., 55 Cal.App.2d 501, 506, 130 P.2d 985, and cases cited. There is no inconsistency between the two relationships, nor is the existence of the latter contrary to any presumption that the former continues to exist until it has been terminated. Code Civ. Proc., § 1963, subd. 32.

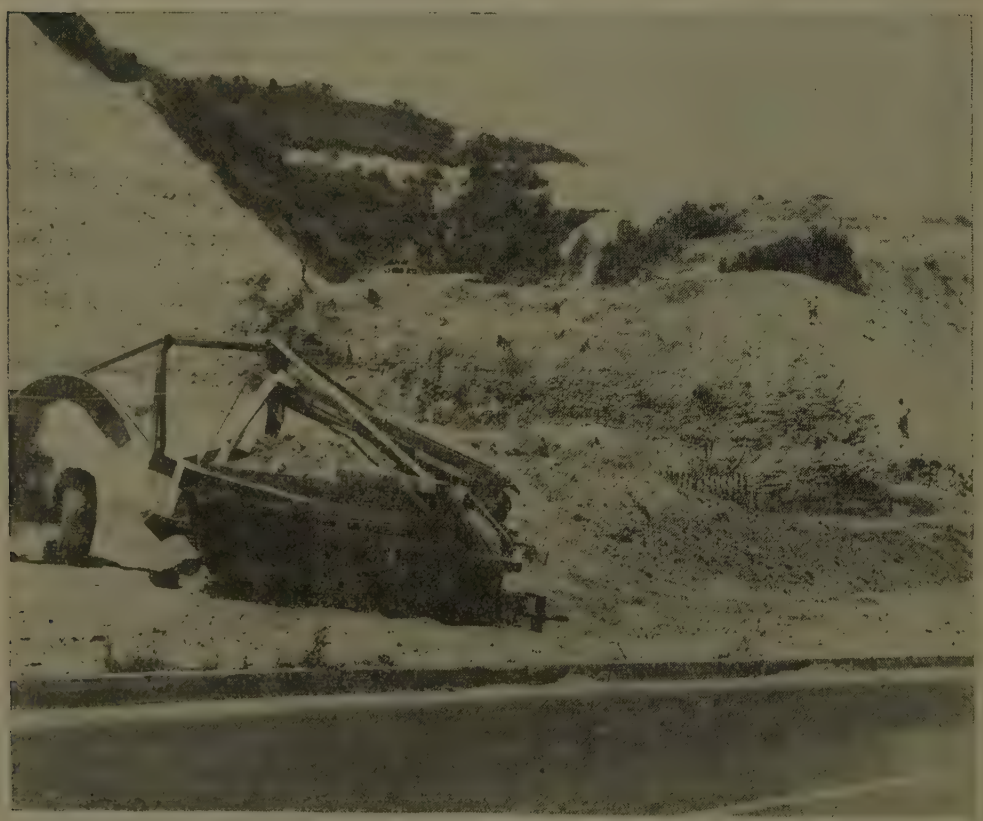
[6] The test of a special employment within the purview of the Workmen's Compensation Act is whether the supposed special employer has some power, not necessarily complete, to direct and control the actions of the injured person at the time of the accident. Industrial Indemnity Exchange v. Ind. Acc. Comm., 26 Cal.2d 130, 135, 156 P.2d 926, and cases cited; Wessell v. Barrett, supra, 62 Cal.App.2d 374, 376, 144 P.2d 656. The relationship may be shown by evidence of the right of control, whether that right is exercised or not. (Guarantee Ins. Co. Limited Mutual v. Ind. Acc. Comm., 22 Cal.2d 516, 519, 139 P.2d 905, and cases cited; National Automobile Ins. Co. v. Ind. Acc. Comm., 23 Cal.2d 215, 219, 143 P.2d 481), or by evidence of the actual exercise of control. Industrial Indemnity Exchange v. Ind. Acc. Comm., supra, 26 Cal.2d 130, 138, 156 P.2d 926; Department of Water and Power of City of Los Angeles v. Ind. Acc. Comm., 220 Cal. 638, 32 P.2d 354.

[7] In his closing brief, McFarland calls our attention to testimony by one Cotter, defendant's general manager, that Voorheis-Trindle did not report his accident to its workmen's compensation insurer and did not list him among its employes in a periodic audit submitted to the insurance company. Plaintiff contends that since defendant did not then consider him to be an employe it may not now adopt an inconsistent position. A sufficient answer to this contention is that defendant's failure to report the accident or to include McFarland in its audit could not have deprived him of his right to workmen's compensation benefits for his injuries. American Motorists Ins. Co. v. Ind. Acc Comm., 8 Cal.2d 585, 67 P.2d 103; Hartford Accident & Indemnity Co. v. Ind. Acc. Comm., 8 Cal.2d 589, 67 P.2d 105.

Plaintiff also relies upon a recent decision in Miller v. Long Beach Oil Development Co., 167 Cal.App.2d 546, 334 P.2d 695, 699, in which the court reversed a judgment for the defendant notwithstanding the verdict upon facts which plaintiff asserts were substantially the same as those of the instant case, from which the court concluded that it could reasonably have been determined from the evidence that Miller was not a special employe of Long Beach. We are in agreement with that decision in every particular. The facts in Miller were not substantially the same as those in our case; they were substantially different. Miller was a foreman for Industrial Suppliers Company. He was injured while his crew was cleaning out a trench on the defendant's property. For a number of years, Industrial had been doing small jobs of construction and maintenance work for Long Beach. It operated as an independent contractor and Miller's crew was assigned generally for the performance of "relatively unskilled manual labor such as cleaning the concrete foundations of oil-well pumping units, digging ditches and small construction jobs." Industrial supplied the tools and paid the crew's wages. Industrial had undertaken the job in which Miller was injured under a written contract which provided that Industrial, as contractor, was acting as an independent contractor and not as an employe of Long Beach. The court stated: "From the record there can be no question but that In-

dustrial Suppliers Company was an independent contractor. * * * Respondent did not have the power to discharge appellant; if dissatisfied respondent might have asked for another foreman, but it had no power to terminate appellant's employment. (Citation.) At the time of the cave-in, Mr. Smith, respondent's construction foreman was not present overseeing the trench cleaning operation, nor was appellant under his direct supervision and control. (Citation.) As the foreman of the crew performing services for respondent, appellant presumably would direct and supervise the activities of his subordinates. The jury might reasonably conclude that Mr. Smith's directions dealt with the results to be accomplished by the group labor of the crew and not with appellant's activities in supervising their performance. * * * Thus the jury might reasonably have inferred that the directions given plaintiff by respondent's construction foreman '* * * were merely directions as to the result to be accomplished, such as required in the nature of things to be given to independent contractors in any case.' Umsted v. Scofield Engineering Const. Co., supra, 203 Cal. 224, 230, 263 P. 799, 801."

Significant facts are present in the instant case which were absent in the Miller case. Defendants were subdivision engineers specializing in preparing land for builders. They owned the 12 or 14 acres which were being prepared for subdivision; it was hillside property and the terrain was exceedingly rough as shown by an exhibit which we incorporate. Before a



permit could be obtained from the city for the subdivision it was necessary to have approval of a map and plans showing the various grades and slopes. A map and plans were submitted and approved. Although the city had approved the plans it was not necessary to have specifications for the work, which had to be done in accordance with the city's standard specifications. When McDaniel was employed by defendant he was known to be a well-qualified man. His duties were "to see that the work was executed in accordance with the requirements of the City of Los Angeles, and in accordance with the plans and specifications that had been set forth to represent our company, as to reimbursing Hawthorne to dictate as to the efficiency of the job, as to how many pieces of equipment were necessary to perform the work, and the general duties of a superintendent to oversee the job in our [defendant's] interests." One of these duties was to see that the tractor operators removed the brush so that the work would be consistent with survey stakes which were set by surveyors as directed by McDaniel.

Tractor was not an independent contractor. It had not undertaken to grade the land. No plans were turned over to McFarland with instructions to do the work in accordance with them. It does not appear that he had even seen them or that he was informed as to the city's specifications. He was not his own boss, nor a free lance with authority to use his own judgment and determine for himself what would constitute performance of the work in accordance with the plans and specifications. He was not subject to instructions of Tractor, which had nothing to do with the manner in which the work was done. McDaniel had the duty to see that the work was done in accordance with the plans and specifications. That was precisely what he was hired to do. He, and not McFarland, was the one to decide, and if he gave instructions it was McFarland's duty to obey them. It is clear that if McDaniel had been dissatisfied with McFarland's work he could have removed him from the job and called on Tractor to supply another operator. McDaniel so testified. If this had occurred, McFarland's duties for defendant would have been ended. He would have been discharged from a special employment. One of Tractor's operators was Barnett. McDaniel testified that he became dissatisfied with Barnett's services and discharged him and that he discharged others of Tractor's operators. This, of course, he would have had no right to do if the men had been working for an independent contractor. Defendant furnished four Cat Tractors, two Carryalls, a Ripper and a Cow Dozer, with operators. On the day of McFarland's accident there were at least four pieces of equipment working simultaneously. These were all under the supervision of McDaniel.

Plaintiff testified that there were five or six different pieces of equipment used on the job and that McDaniel would tell him which one to use; there were times when a certain area needed an additional cut or an additional fill and this would be directed by McDaniel who usually outlined the work. When such additional work was required McDaniel would tell him where to do it but not how to do it; McFarland was an experienced operator. Defendant had a man on the job, named Achilles, who would check a particular slope for correctness and accuracy, but McDaniel would give the directions for the additional work.

If McFarland was not a special employe of defendant neither was any one of the operators of the seven other pieces of Tractor equipment who were engaged in the same work. Under the theory that no one was in a special employment each of a half dozen operators was working independently of the others, moving earth from one place to another as he saw fit and using his own independent judgment as to how the land should be graded to make it conform to plans he had never seen; meanwhile defendant's superintendent, McDaniel, would be standing by with no au-

thority to give directions, having only authority to remove a workman from the job if he disapproved of his work. A most unreasonable and untenable theory, and yet the only one upon which the existence of a special employment could be denied. And how applicable was the theory of want of control in Miller's case in which both Miller and the defendant's foreman, Smith, testified that Smith would merely tell Miller where clean-up work was to be done and leave it to Miller to determine how it was to be done; he did not tell Miller how it should be done. Thus, the right to control the manner in which the work should be done was exclusively in Industrial, the independent contractor, and there was lacking the element of the right of control in Long Beach which was necessary to create a special employment relationship. The Miller decision is not in point.

The evidence clearly established a special employment entitling plaintiff to workmen's compensation benefits supplied by defendant, and it was irreconcilable with any other conclusion. A holding to the contrary would be inconsistent with the settled law and practice in the application of the Workmen's Compensation Law in situations involving special employment.

The evidence having established as a matter of law that McFarland was a special employe of defendant and was injured within the course of his employment, his exclusive remedy was under the Workmen's Compensation Act. Labor Code § 3601; 27 Cal.Jur. 262–63; Scott v. Pacific Coast Borax Co., 140 Cal.App.2d 173, 177–178, 294 P.2d 1039, and cases cited. The court did not commit error in ordering judgment to be entered in favor of defendant.

The judgment notwithstanding the verdict is affirmed and plaintiff's appeal from the order granting defendant a new trial is dismissed.

PARKER WOOD, J., concurs.

VALLÉE, J., dissents.

Rehearing denied; VALLÉE, J., dissenting.

168 Cal.App.2d 661

Archie W. JONES, Plaintiff and Appellant,

v.

SAN BERNARDINO REAL ESTATE BOARD, et al., Defendants and Respondents.

Civ. 5928.

District Court of Appeal, Fourth District, California.

March 12, 1959.

Hearing Denied May 6, 1959.

Action by part-time real estate salesman for wrongful expulsion as salesman member of defendant real estate board. The Superior Court of San Bernardino County, R. Bruce Findlay, J., entered judgment that plaintiff take nothing by reason of his complaint, and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that where plaintiff was employed as a part-time real estate salesman by broker member of real estate board and plaintiff became salesman member of board and board adopted by-law denying membership to salesmen not employed on full-time basis by broker members and plaintiff's employment as part-time salesman did not terminate until some six months after effective date of by-law and plaintiff was free to seek employment with other brokers who were nonmembers of board, plaintiff was not deprived of right to work by board.

Affirmed.

1. Corporations ⇐456

Real estate board, a nonprofit organization with five classes of membership, including brokers and salesmen, had corporate power to require salesmen to be employed on a full-time basis in order to qualify for membership on the board.

2. Brokers ⇐4

Where plaintiff was employed as a part-time real estate salesman by broker member of real estate board and plaintiff became salesman member of board and board adopted bylaw denying membership to salesmen not employed on full-time basis

by broker members and plaintiff's employment as parttime salesman did not terminate until some six months after effective date of bylaw and plaintiff was free to seek employment with other brokers who were nonmembers of board, plaintiff was not deprived of right to work by board.

3. Damages ⇐6

Damages are speculative when probability that circumstance will exist as element for compensation becomes conjectural.

4. Associations ⇐19

In action by part-time real estate salesman for damages for loss of commissions, contacts, business associations and clientele alleged to have been occasioned by his wrongful expulsion as a salesman member of defendant real estate board after board adopted bylaw denying membership to salesmen not employed on full-time basis by broker members, there was no substantial evidence from which it could be determined with any degree of certainty the amount of damages, if any, suffered by part-time salesman as result of action of board.

5. Associations ⇐19

Where part-time real estate salesman was not member of real estate building board association and membership in association was not restricted to broker members of real estate board and association did not participate in any way in the proceedings of the real estate board denying membership to salesmen not employed on full-time basis by broker members and did not interfere in any way with part-time salesman's employment, no liability could be imposed on association in respect to loss of commissions, contacts, business associations and clientele alleged to have been occasioned by part-time salesman's wrongful expulsion as salesman member of board.

Marshall L. Miles, San Bernardino, for appellant.

Lonergan & Jordan, San Bernardino, for respondents.

MUSSELL, Justice.

This is an action in which plaintiff, a part-time real estate salesman, sought to recover damages for loss of commissions, contacts, business associations and clientele alleged to have been occasioned by his wrongful expulsion as a salesman member of the San Bernardino Real Estate Board. The San Bernardino Real Estate Building Board Association was joined as a defendant on the theory that it was the alter ego of defendant San Bernardino Real Estate Board. The cause was tried by the court without a jury and plaintiff appeals from the judgment that he take nothing by reason of his complaint.

The San Bernardino Real Estate Board is a non-profit corporation with five classes of membership, including brokers and salesmen. A real estate salesman to be eligible to membership therein must be licensed and employed by a broker member. Plaintiff Jones during December, 1953, obtained employment as a part-time real estate salesman with Robert Mudge, a broker in San Bernardino, and thereafter applied for membership and became a salesman member of the San Bernardino Real Estate Board. At this time there was no requirement that he be employed as a real estate salesman on a full-time basis. He was and continued to be employed on a full-time basis in the newspaper business at Corona, California, working for Mudge Saturdays, Sundays and evenings from December, 1953, until July, 1955, when he was discharged by Mudge.

On June 21, 1954, the issue of part-time employment was submitted to the membership of the Real Estate Board for action, after notices had been sent out to the members, including plaintiff, that there be a vote on the question. On the last mentioned date Section 2 of Article III of the by-laws were amended to provide as follows:

"Broker members of this organization shall not employ salesmen or bro-

ker associates as salesmen, on a part-time basis.

"A part-time salesman or broker associate is one who is engaged in a line of work other than real estate, or a line not allied to real estate, for financial gain and for a major part of his time.

"A broker maintaining his own office shall not be on a part-time basis as herein defined."

On July 16, 1954, the Real Estate Board notified all members, including plaintiff, that any salesman not employed on a full-time basis as of January 1, 1955, would be ineligible to renew his membership. Plaintiff's membership automatically terminated as of January 1, 1955, because of his ineligibility to renew it. He was not present and did not participate in the meeting at which the full-time rule was adopted. He ignored this rule and tendered his dues for 1955.

On March 17, 1955, the Board, acting through its president, notified plaintiff by letter of his ineligibility for membership, as follows:

"In accord with the ruling concerning part-time members (Article 3, Section 2 of the By-Laws) which was adopted by a vote of the general membership on June 21, 1954 and became effective January 1, 1955, you are not eligible for membership in the Board and Multiple as you are engaged in a line of work other than real estate, and for a major part of your time.

"Your employing broker has been notified that he must notify the Board as to disposition of your license within ten (10) days, in order to abide by the 100% membership rule of the Board.

"Enclosed please find check in the amount of $17.00 refund in full payment of 1955 dues."

Plaintiff protested his loss of membership and demanded reinstatement, and on March 23, 1955, was advised by the Board as follows:

"If you can certify to the Board of Directors of the San Bernardino Real Estate Board that you are engaged in real estate on a full-time basis and not employed elsewhere for a major part of your time, it would then be your privilege to present this information to the Board of Directors for their consideration."

Plaintiff did not accept this offer and continued to work part-time for Mudge until discharged by him in July, 1955. On March 27, 1955, Mudge was suspended from membership in the San Bernardino Real Estate Board for reasons independent of and other than those involved in this action and plaintiff's alleged expulsion from the Board. Under the provisions of the by-laws of the Board, Mudge's suspension had the effect of suspending from the membership of the Board all salesmen employed by him on a part-time basis, including the plaintiff. Mudge was reinstated as a member of the Board in July, 1955, and one of the conditions of his reinstatement was that all of his salesmen be employed on a full-time basis. Since plaintiff was not employed on this basis, Mudge terminated his employment in July, 1955. Thereafter plaintiff did not seek employment as a real estate salesman for several months and since January 1, 1956, he has been employed continuously as a real estate salesman on a part-time basis for other real estate offices in San Bernardino.

[1] We find nothing unreasonable or contrary to the corporate powers of the San Bernardino Real Estate Board in requiring salesmen to be employed on a full-time basis in order to qualify for membership on said board. In this connection the trial court found as follows:

"The enactment of the full-time rule was a proper exercise of the corporate powers of Board and was in furtherance of the purposes for which it was organized. Where said rule established a standard of performance designed to increase the quality of real estate sales service, it was not unrea-

sonable to require existing members of Board to conform to the standard. A reasonable length of time was allowed to the existing members to conform."

This finding is supported by the evidence. Plaintiff was notified of the amendment to the by-laws and was given ample opportunity to comply therewith if he so desired. He was not compelled to be a member of the Board in order to work as a part-time salesman. In fact, the record shows that he has been so employed since January 1, 1956.

[2, 3] It cannot be said (as claimed by appellant) that the Board deprived him of the right to work. The record shows that plaintiff's employment as a part-time salesman did not terminate until July, 1955, when he was discharged by Mudge. His own testimony is that he "slackened" his real estate activities "purposely" from March 17, 1955, to July, 1955. The record shows that he made no sales and earned no commissions during that time; that although he was free to seek employment with other brokers in the area who were non-members of the Board, after being discharged by Mudge in 1955, he did not attempt to do so for the balance of the year. He claims damages for loss of commissions in the sum of $2,000 and in the sum of $3,000 for loss of contacts, business associations and clientele. Damages are said to be speculative when the probability that a circumstance will exist as an element for compensation becomes conjectural. 25 C.J.S. Damages § 2, p. 460.

[4] In the instant case there was no substantial evidence in the record upon which the trial court could determine with any degree of certainty the amount of the damages, if any, suffered by plaintiff as a result of the action of the real estate Board.

[5] The record shows that plaintiff was not a member of defendant San Bernardino Real Estate Building Board Association; that membership therein was restricted to broker members of the Real Estate Board; that the Association did not participate in any way in the proceedings of the Real Estate Board and did not interfere in any way with plaintiff's employment. Under these circumstances no liability could be imposed upon the Building Association.

There is substantial evidence herein to support the findings and judgment of the trial court.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.



169 Cal.App.2d 40

Lecil J. SLABACK et al., Plaintiffs and Appellants,

v.

Carlos WAKEFIELD, Defendant and Respondent.

Civ. 5978.

District Court of Appeal, Fourth District, California.

March 23, 1959.

Action for damages resulting to plaintiffs' adjoining land from defendant's improvements to roadway which had been dedicated for use and benefit of adjoining lot owners such as parties to the action. The Superior Court, Orange County, John Shea, J., entered judgment adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, Griffin, P. J., held that, where, although complaint for damages resulting to plaintiffs' adjoining land from defendant's improvements to roadway had been filed on February 2, 1956, alleged damage or injury to the land occurred and was known to plaintiffs about December 23, 1952, three year statute of limitations on action for trespass upon or injury to realty was applicable.

Judgment affirmed.

1. Trespass ⇐61

Code of Civil Procedure provision allowing treble damages for trespass for cutting or carrying away wood or timber on land of another or in street or highway is not applicable to the cutting of poison oak growing on public highway in front of land of complaining party. West's Ann.Code Civ.Proc. § 733.

2. Dedication ⇐35(1)

Where recorded map showed that certain roadway had been dedicated to and for use and benefit of owners of lots in subdivision and specifically dedicated to owners the necessary slope easements for cuts and fills adjoining portions dedicated for road purposes, and board of supervisors were not shown to have approved map or accepted any dedication set forth therein, there was no acceptance by board of such roadway for public highway purposes.

3. Dedication ⇐44

In action for damages resulting to plaintiffs' adjoining land from defendant's improvements to roadway which had been dedicated for use and benefit of adjoining lot owners such as parties to the action, evidence failed to establish acceptance of roadway for public highway purposes by long adverse public use.

4. Easements ⇐53

In action for damages resulting to plaintiffs' adjoining land from defendant's improvements to roadway which had been dedicated for use and benefit of adjoining lot owners such as parties to the action, evidence sustained finding that defendant's work on roadway was necessary and reasonable and was duly authorized and that plaintiffs had not suffered any material damage thereby.

5. Limitation of Actions ⇐32(1)

Where, although complaint for damages resulting to plaintiffs' adjoining land from defendant's improvements to roadway was filed on February 2, 1956, alleged damage or injury to the land occurred and was known to plaintiffs about December 23, 1952, three-year statute of limitations on action for trespass upon or injury to realty was applicable. West's Ann.Code Civ.Proc. § 338, subd. 2.

Miller, Nisson, Kogler & Wenke, Santa Ana, for appellants.

Webb & Lee; Wm. P. Webb, Anaheim, for respondent.

GRIFFIN, Presiding Justice.

Plaintiffs-appellants, husband and wife, brought this action against defendant-respondent for claimed damages as a result of certain improvements to a roadway (designated as Lots A and B) in a tract of land laid out and dedicated by the owner-subdivider for the use and benefit of adjoining lot owners in the tract located in the foothills of eastern Orange County and used primarily for mountain homes. The general terrain was rough, wooded and brushy. Silverado Creek flowed through this tract and lands owned by plaintiffs which are designated as parcels 1, 2, and 3, on a map marked plaintiff's Exhibit 3 in evidence. Defendant owned lots 24 to 33, inclusive, designated on said Exhibit, which are located south of plaintiffs' lots on a higher level. They sloped toward the intersecting roadway across plaintiffs' lots located at a lower level to the level of the said Silverado Creek. Lots A and B (the tract roadway) were unimproved at the time the events occurred which are the basis of plaintiffs' complaint. Each owner of lots in the tract were given the right to use said tract roadway for road purposes, including necessary slope easements for cuts and fills adjoining said roadways. Lot A (the roadway) extended over Silverado Creek and connected with Silverado Canyon Road, a paved public highway, at the time the tract map was filed, and no bridge crossed over said creek.

In 1952, defendant, desiring to make his lots available for sale, improved the roadway on Lot A, to which his lots adjoined, and erected a bridge over said creek, on Lot A, making his and other lots, including plaintiffs, accessible to Silverado Canyon Road. He made certain necessary cuts

and fills in grading the roadway for general use and built a small bridge over said creek, all on Lot A. The fill that approached the bridge was about 4 feet at its highest point above the surface of plaintiffs' lot and was about 30 feet south of the bridge. Plaintiffs' adjoining lot has two levels, the lower level being that part affected by the fill. This fill forms the basis of plaintiffs' first claimed cause of action based on the theory that defendant barred plaintiffs from the free use of egress and ingress to their property.

The second cause of action arises out of claimed damages by reason of change of natural drainage waters flowing over a cliff located on the rear of one of defendant's lots and thence traveling northerly in a well-defined channel across it to Lot A (the roadway) and thence across plaintiffs' lot to the creek. It appears that defendant, as an addition to the improvements to the roadway, laid pipe in the bed of this channel, on his land, from a point below the waterfall to a standpipe in front of defendant's lot and near the southerly edge of Lot A (the roadway) thus protecting his land from open flow of floodwaters and allowing him to level his lot for a building site. Later he laid a pipeline under the roadway to plaintiffs' land and plaintiffs, by arrangements with defendant, and with full knowledge of the size of the pipe used and improvements installed, connected his pipeline to it and ran the water across plaintiffs' land to the creek, thus eliminating any surplus flow of the water over plaintiffs' land to the creek.

According to plaintiffs' complaint the filling of the natural channel by defendant on his own property and under Lot A (the road easement) caused plaintiffs to construct pipelines and ditches for the protection of their own property, and that they were accordingly damaged to the extent of $3,000.

A third cause of action alleges that during October, November, and December, 1955, defendant did, *on the public highway* in front of plaintiffs' property, destroy certain trees, shrubs and underbrush growing on the edge thereof. An additional sum of $1,000 is claimed for this alleged damage. There is an additional allegation that defendant claims an interest in some form of easement or right of way for ingress and egress over Lot A adverse to plaintiffs and it is prayed that the defendant be required to lower the surface of Lot A to the level of plaintiffs' property.

The court, after finding generally in favor of defendant and against the claims of plaintiffs, specifically found that both plaintiffs and defendant, as owners of lots in said tract, had the right, in common with other owners, to use said Lots A and B (roadways) for road purposes, including necessary slope easements for cuts and fills adjoining portions of said lots; that defendants raised the surface of Lot A adjoining the southeasterly portion of his property but it was reasonably necessary to make said Lot A usable as a roadway; that defendant claims no interest in said easement adverse to plaintiffs and that defendant has not barred plaintiffs from the use of said easement; that it was true that defendant, prior to three years before the filing of plaintiffs' original complaint herein, installed on the bed of the natural water course channel, a pipeline over his property, as indicated, and changed the natural flow of water without the consent of plaintiffs; and that none of the work was done on plaintiffs' property. The court concluded that the alleged cause of action was barred by section 338, subdivision 2 of the Code of Civil Procedure, as pleaded in the answer.

[1] As to the third cause of action, it found that defendant did destroy certain *shrubs* (apparently poison oak) growing on the public highway in front of plaintiffs' land; that defendant's land was in the hills in the country and no actual compensatory damage was suffered. Judgment was entered accordingly. Section 733 of the Code of Civil Procedure, upon which plaintiffs rely for a recovery on this last

count, would have no application to property of this description.

Plaintiffs, on this appeal, now claim the court erred in failing to find whether Lot A was dedicated to public use, and whether it was accepted by a public user, the claim being that where a verified map has been recorded by the owner of the property showing lots and streets, this is an offer of dedication, and if the map is accepted, either by formal resolution of the governing body, or by the use of the roadway by the public generally, it becomes a public street, citing 15 Cal.Jur.2d 298, sec. 30, and cases cited. The argument is that although there apparently was no acceptance of this roadway by the Board of Supervisors as a public roadway, it was in fact used as such and accordingly plaintiffs were entitled to rights flowing therefrom, and that no private individual has a right to take away another abutting property owner's right to egress and ingress, citing Beals v. City of Los Angeles, 23 Cal.2d 381, 144 P.2d 839; 15 Cal.Jur.2d 366, sec. 67, and cases cited.

[2, 3] It affirmatively appears from the recorded map itself that Lots A and B (the roadway) was dedicated only to and for the use and benefit of the owners of lots in the subdivision, and it specifically dedicated to them the necessary slope easements for cuts and fills adjoining portions dedicated for road purposes. It does not affirmatively appear that the Board of Supervisors approved this map or accepted any dedication set forth therein. The form of certificate thereon, not signed by the clerk of the Board, did affirmatively state that there may be an acceptance on behalf of the public of Silverado Canyon Road, but did not accept Lots "A" and "B" for highway purposes. It is clear therefrom that there was no acceptance by the Board of Lots A and B for public highway purposes. Any evidence of user by the public prior to the construction work done by defendant is only slight compared to the evidence opposed to it and would probably not support a finding of public acceptance. The testimony relied upon by plaintiffs came from plaintiff's father that "There was a road, well defined tracks in there, that had been there evidently—I don't know how long, but for a long time, and we followed those tracks". It appears that a jeep and trailer did travel to some extent over this road on occasions. The evidence opposed to it was from a long-time resident of that area. He said, speaking of Lot A, "That whole area down there was just brush. There was no roads —You could see tracks where a car had gone a few times, but there was no road developed." Plaintiffs' evidence falls far short of showing an acceptance of Lot A or B by long adverse public use. Crimmins v. Gould, 149 Cal.App.2d 383, 389, 308 P. 2d 786; City of Santa Clara v. Ivancovich, 47 Cal.App.2d 502, 508, 118 P.2d 303; Laux v. Freed, Cal.App., 334 P.2d 988.

[4] The trial court found against plaintiff on all issues raised by the pleadings and specifically found any allegation of claimed rights of plaintiffs thereunder to be untrue. The findings of the trial court sufficiently cover the issues as pleaded. A finding that there had been a public user sufficient to support a finding of dedication to public highway purposes would not have been supported by the evidence. Accordingly, plaintiffs could not complain because the court failed to find on this claimed issue although not directly raised by the pleadings. The evidence fully supports the finding that the road work done by the defendant on the roadway, under the dedication authority, was necessary and reasonable, and that the work done by him thereon was duly authorized. It does not appear that any additional burden was cast on plaintiffs' property or that plaintiffs suffered any material damage. In fact, it affirmatively appears that by the improvements here made plaintiffs were greatly accommodated and their property was, no doubt, enhanced in value by it. Zimmerman v. Young, 74 Cal.App.2d 623, 169 P. 2d 37; Noel v. Capobianco, 218 Cal. 481, 23 P.2d 511; Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., 70 Cal. App. 283, 284, 233 P. 370; Eastman v. Piper, 68 Cal.App. 554, 569, 229 P. 1002.

It further appears from the evidence that some 50 or 60 lots were being served by this roadway, including those of plaintiffs, and apparently it was constructed at the expense of defendant. It likewise appears that defendant discussed with plaintiff the cut and fill that defendant contemplated making and that plaintiff agreed that defendant could do the work as he had contemplated. The roadway was graded and filled as earlier authorized by plaintiff and he then stated that all he wanted was room for a driveway so he could gain access to the roadway (Lot A). It likewise appears that the former road by which plaintiffs gained egress and ingress from Lot A to their property was feasible by means of a ramp which defendant offered to construct for plaintiffs without cost to them; and that by cutting certain overhanging limbs from an oak tree access could be obtained to plaintiffs' property at another level without a ramp; that the question of a bridge to accommodate all persons in the tract was discussed with plaintiffs and that a community project was agreed upon; and that later plaintiff said he was withdrawing from it and told defendant he wanted all fills removed.

[5] As to the second cause of action, from the pleadings, the evidence and findings, it affirmatively appears that the pipe and sump were installed by defendant, with plaintiffs' full knowledge and consent about December 23, 1952. At that time plaintiff wrote defendant he was worried about the drain they were planning; that he wanted to do his part and suggested he bring up his pipe and he would order work done which would connect it to the drain pipe installed by plaintiff and run the water across plaintiffs' property to the creek. Apparently plaintiffs could not claim damages for the cost of pipe where he consented to the improvement in general and agreed to furnish the pipe to run the water across his property. At any rate, any action commenced for damages to an easement or the real property would be barred by the statute of limitations if it could be construed that this was plaintiffs' alleged cause of action. The complaint was filed February 2, 1956, and the alleged damage or injury to their real property occurred and was known to plaintiffs about December 23, 1952. Under those circumstances section 338, subdivision 2 of the Code of Civil Procedure was applicable. In addition, the court found that all the allegations of plaintiffs in each cause of action, contrary to other findings, were untrue, which might well indicate plaintiffs consented to the work being done in the manner it was done, and that no damage resulted to plaintiffs by reason of any acceleration, rather than diversion, of the flow of water. The only testimony of any damage was that plaintiffs' property was worth $13,000 before the installation and $10,000 thereafter. There was no claim of any subsequent flooding of plaintiffs' property after the installation of the pipes. Youngblood v. City of Los Angeles, 160 Cal.App.2d 481, 325 P.2d 587; Roth v. Cottrell, 112 Cal.App.2d 621, 246 P.2d 958; Archer v. City of Los Angeles, 19 Cal.2d 19, 24, 119 P.2d 1.

After careful examination of the entire record we are convinced that the findings of the trial court are amply supported and the judgment based thereon was authorized.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.

168 Cal.App.2d 686

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Perry COBB, Defendant and Appellant.

Cr. 2902.

District Court of Appeal, Third District, California.

March 13, 1959.

Prosecution for narcotic violations. The Superior Court, Solano County, Harlow V. Greenwood, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Peek, J., held that evidence sustained conviction.

Affirmed.

Poisons ⇐9

Evidence sustained conviction of narcotic violations. West's Ann.Health & Safety Code, § 11500.

Margaret H. Howard, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

PEEK, Justice.

By an information defendant was charged with three counts of violation of section 11500 of the Health and Safety Code. Following his plea of not guilty he was tried by a jury and convicted on all three counts. From the judgment which was thereafter entered he has now appealed. In accordance with his request this court appointed counsel to represent him on appeal. Thereafter counsel informed the court she could find no merit in the appeal, and, although no briefs have been filed, we have examined the entire record and conclude as did counsel.

The pertinent facts shown by the reporter's transcript, which is less than 75 pages, are that the prosecution's major witness, one Hector Ryena, a special investigator for the State Bureau of Narcotics, purchased quantities of marijuana from the defendant on each of the three dates charged in the information, and in his testimony outlined in detail the circumstances of each sale. The substance he purchased on each occasion was identified by the state's expert witness as marijuana. Defendant's testimony was in effect a categorical denial of the testimony given by the investigator and further that he had been mistakenly identified as the person who made the alleged sales. Such testimony did no more than raise a conflict in the evidence, which conflict the jury by its verdict resolved against defendant. The record amply supports the judgment.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



169 Cal.App.2d 4

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jesus Victor LOPEZ, Defendant and Appellant.

Cr. 3514.

District Court of Appeal, First District, Division 2, California.

March 20, 1959.

Hearing Denied May 13, 1959.

Defendant was convicted in the Superior Court, City and County of San Francisco, Walter Carpeneti, J., for assault with a deadly weapon and for robbery in the first degree, and he appealed. The District Court of Appeal, Kaufman, P. J., held that presumption as to adverse nature of evidence not produced applies only to evidence wilfully suppressed rather than to all evidence not produced in court.

Affirmed.

1. Criminal Law ⇐1158(4)

Credibility of witnesses is matter for trier of fact, and if result reached below is supported by substantial evidence it cannot be disturbed on appeal, unless testimony is inherently impossible or improbable.

2. Criminal Law ⇐553

Minor discrepancies did not raise suspicion that witnesses were lying or that their stories were inherently improbable.

3. Criminal Law ⇐1144(15)

It is generally presumed on appeal that jury has properly exercised its functions and acted according to instructions.

4. Criminal Law ⇐317

Presumption as to adverse nature of evidence not produced applies only to evidence wilfully suppressed rather than to all evidence not produced in court.

5. Criminal Law ⇐317

Prosecution is not compelled to call any particular witness so long as there is fairly presented to court material evidence bearing upon charge for which defendant is on trial.

6. Criminal Law ⇐24

An unlawful intent is logically inferred from the doing of an unlawful act. West's Ann.Pen.Code, § 20.

7. Criminal Law ⇐728(2)

No objection having been made to alleged misconduct of prosecuting attorney, point was waived.

Nicholas Schoonbrood, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

Defendant Jesus Victor Lopez was charged by Information with three counts of assault with a deadly weapon with intent to commit murder (Pen.Code, § 217). Count I, on Leola Wells on or about September 2, 1957; Count II on Ruth Briggs on the same date; Count III on Alton Hawkins on the same date. Count IV charged robbery from the person of Leola Wells. The information also alleged a violation of section 12022 of the Penal Code (being armed with a deadly weapon at the time of the commission of a felony) and three prior convictions. Defendant appeals from a judgment of conviction entered on a jury verdict finding him guilty of assault with a deadly weapon on Counts I, II and III, and of robbery in the first degree on Count IV. He also appeals from the order denying his motion for a new trial. He contends that he was denied a fair and impartial trial because: (1) He was prevented from bringing to the attention of the jury the fact that the three complaining witnesses were involved in illegal narcotics traffic; and that their testimony was therefore false and untrue; (2) The jury obviously ignored the presumption of innocence in his favor by finding him guilty in the face of the many inconsistencies in the testimony of the complaining witnesses; (3) There was insufficient evidence to show the required union between act and intent; (4) He was denied effective representation of counsel as the public defender appointed to represent him was inadequately prepared for trial; (5) The district attorney during the trial of the case and in her final argument to the jury committed prejudicial error.

The circumstances of the crime were related at the trial by the complaining witnesses as follows: At about 5:30 p. m. in the afternoon of September 2, 1957, Mrs. Wells was in her apartment at 428 Lily Street in San Francisco, with two of her friends, Alton Hawkins and Ruth Briggs. They were interrupted by the ringing of the front door bell. Mrs. Briggs went to see who was there. When she opened the door, she saw the defendant. He asked for Mrs. Wells' daughter, Jocelyn. After Mrs. Briggs replied that Jocelyn was not at home, defendant took a gun from his pocket and ordered Mrs. Briggs back upstairs, forcing her to walk ahead of him.

Defendant entered the Wells' apartment with his gun drawn. He first announced

that he was a policeman and had come to find Jocelyn. He told Mrs. Wells that Jocelyn talked too much because he had heard Jocelyn say that she had just purchased a new car and had some money left over. He had come up to the apartment to get this money. Defendant searched the apartment for the money he thought was there and took $1 from Mrs. Wells' purse, which was all he could find. Mrs. Wells tried to convince him that she only had about $6 in her purse and begged the defendant to leave and not harm them. Defendant insisted that he was going to kill all of them, and that they hurry up and give him the money as he had three or four more houses to "turn over". Defendant had Mrs. Briggs obtain a piece of rope from a clothesline so he could tie up Mr. Hawkins' feet. Then, the defendant terrorized the two women and Mr. Hawkins for the next hour and a half.

Finally, Mrs. Wells jumped on the defendant and struggled to disarm him. During the struggle, the defendant fired his gun and wounded both Mrs. Wells and Mr. Hawkins. After they succeeded in disarming him, the defendant ran from the apartment. Mrs. Briggs' son called the police and an ambulance. Mrs. Briggs turned the gun taken from the defendant over to the police when they arrived about twenty minutes later. Defendant was subsequently arrested in his room at the YMCA on Turk Street.

Defendant's version of the circumstances is somewhat different. He testified that the evening of September 1, he and some friends had gone to the Fillmore district as his friends wanted to buy narcotics. They made a purchase through one William Campbell and returned to their hotel. The narcotics purchased turned out to be of low quality and his friends asked him to return with them to the Fillmore District and find Mr. Campbell and get their money back. In a bar they found Mr. Campbell who introduced them to a lady named Jocelyn and indicated she would "fix up the prior business." Defendant's friends purchased a new supply which also turned out to be a dud. Then defendant and his friends made a third trip to the Fillmore district in an unsuccessful attempt to find Jocelyn. Defendant then agreed to get the money back for his friends the next day, in order to keep them from beating up Campbell.

The next evening, September 2, the defendant met Jocelyn. She drove him to the apartment at 428 Lily Street and told him to wait there until she ran another errand. When defendant entered the apartment, Mrs. Wells and Mrs. Briggs were there. While he was waiting for Jocelyn, he saw Mrs. Wells sell two papers of narcotics to a woman he knew as "Tina Baby". Mrs. Wells and Mrs. Briggs tried to get him to accept some more narcotics as satisfaction for the money he was trying to collect. While the defendant was talking to Mrs. Wells and Mrs. Briggs, the telephone rang. He assumed the call came from Jocelyn, as Mrs. Wells' attitude changed. He was suddenly struck from behind by Mr. Hawkins who had just entered the apartment. While the defendant fought Hawkins, he was assaulted by Mrs. Wells and Mrs. Briggs. During the struggle, Mrs. Wells' gun went off several times. Finally, he escaped and returned to his room where a friend tried to care for his wounds until his arrest several days later. Defendant denied the ownership of the gun, that he had assaulted any one in the room, or searched for and taken any money.

On cross-examination, the defendant admitted three prior felony convictions for attempted grand larceny, attempted assault and armed robbery. Defendant's witness, Clarence Pike, testified that he had seen the defendant arguing with Jocelyn Wells, and William Campbell on September 2, 1957, and that shortly thereafter he saw Jocelyn and Mr. Hawkins talking together. On cross-examination, Pike admitted two prior felony convictions; that he had been confined in the county jail with the defendant. In rebuttal, Mrs. Wells denied that she had ever sold narcotics to any one; Mrs. Briggs denied discussing narcotics

with the defendant; Mr. Hawkins denied conversing with Jocelyn on September 2.

[1, 2] The above statement of facts clearly indicates that the defendant's first contention is patently devoid of merit. The record reveals that the defendant testified at length about the involvement of the prosecuting witnesses in the sale of narcotics, and the series of events which led to his presence in the apartment. The jury had a right to disbelieve defendant's version of the facts. The credibility of witnesses is a matter for the trier of fact and if the result reached below is supported by substantial evidence, it cannot be disturbed on appeal unless the testimony is inherently impossible or improbable. People v. Ashley, 42 Cal.2d 246, 267 P.2d 271; People v. Wilder, 151 Cal.App.2d 698, 312 P.2d 425; People v. Villarico, 140 Cal. App.2d 233, 295 P.2d 76; People v. White, 115 Cal.App.2d 828, 253 P.2d 108; People v. Mason, 130 Cal.App.2d 533, 279 P.2d 621. The testimony of the complaining witnesses here is not inherently impossible and improbable. There are minor discrepancies, but this is normal under the circumstances here presented, and does not raise a suspicion that the witnesses are lying or that the stories are inherently improbable. People v. Moore, 137 Cal.App. 2d 197, 290 P.2d 40.

[3] Nor is there any merit in defendant's argument that the jury ignored the presumption of innocence in his favor. The record indicates that the jury was instructed about the presumption. It is generally presumed on appeal that a jury has properly exercised its functions and acted according to instructions. People v. Scaggs, 153 Cal.App.2d 339, 314 P.2d 793; People v. Foote, 48 Cal.2d 20, 306 P.2d 803; People v. Cobb, 45 Cal.2d 158, 287 P.2d 752; People v. Drake, 151 Cal.App. 2d 28, 310 P.2d 997; People v. Grimes, 113 Cal.App.2d 365, 248 P.2d 130.

[4–6] Defendant next contends that there was insufficient evidence to show the requisite union between act and intent, as the prosecution never disproved his claim that he was in the apartment at Jocelyn's invitation and for the purpose of awaiting her return, as Jocelyn was never called as a witness. This argument relies on the presumption about the adverse nature of evidence not produced. In the first place, this presumption applies to evidence wilfully suppressed rather than evidence not produced in court. People v. Washington, 113 Cal.App. 352, 298 P. 121. In the second place, under both versions of the facts, Jocelyn was not present when the crime was committed. The prosecution is not compelled to call any particular witness so long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial. People v. Parry, 105 Cal.App. 2d 319, 232 P.2d 899. Furthermore, the jury chose to believe that the defendant, rather than the complaining witnesses, committed the unlawful act of assault. An unlawful intent is logically inferred from the doing of an unlawful act. People v. McLaughlin, 111 Cal.App.2d 781, 245 P.2d 1076. Therefore, the requirement of union of act and intent (Pen.Code, § 20, referred to in the court's instruction), was met.

The record does not support defendant's contention relating to ineffective representation by his counsel. There was nothing in the record to indicate that the public defender was not conscientious and adequate. People v. Wren, 140 Cal.App.2d 368, 295 P.2d 54. As this Court (Division I) recently said in People v. Mosley, 164 Cal. App.2d 829, at page 833, 331 P.2d 65, at page 68, "* * * the courts are uniform in holding that the claimed absence of effective representation will not be sustained unless the circumstances surrounding the trial indicate a representation so lacking in competence that it becomes the duty of the court to observe and to correct it." Furthermore, defendant's specific complaint about a lack of investigation before trial was denied and disproved by his counsel.

[7] Defendant's final contention is that the prosecuting attorney committed prejudicial misconduct during defendant's

cross-examination of Mrs. Wells and in the closing argument to the jury. The record does not support the substance of this contention and also reveals that no timely objections were raised by defendant or his counsel. No objection being made, the point is waived.

We conclude that the record before us amply supports the judgment of conviction and order denying a new trial.

Judgment and order denying a new trial affirmed.

DOOLING and DRAPER, JJ., concur.



169 Cal.App.2d 14

Serge SAN MARTIN, Petitioner,

v.

SUPERIOR COURT of State of California IN AND FOR COUNTY OF SAN BERNARDINO, Respondent,

Carole Jean San Martin, Real Party in Interest.

Civ. 6220.

District Court of Appeal, Fourth District, California.

March 20, 1959.

Husband brought prohibition proceeding against Superior Court of the State of California in and for the county of San Bernardino for writ of prohibition to restrain the Superior Court from taking any further proceedings in action of wife for annulment. The District Court of Appeal, Griffin, P. J., held that where husband's action for separate maintenance against wife in Los Angeles County and wife's action for annulment in San Bernardino County was filed on same date, but copy of summons in husband's Los Angeles County action was served on wife before summons was served on husband in the San Bernardino action, but husband submitted to jurisdiction of San Bernardino Superior Court and stipulated that it could enter a pendente lite order fixing custody, attorney's fees and support payments, and he filed a cross-complaint in the San Bernardino Superior Court requesting it to grant him a decree of separate maintenance, husband was in no position to avoid effect of the San Bernardino Superior Court's pendente lite order by moving to abate it or the San Bernardino action, on ground that Los Angeles Court acquired exclusive jurisdiction because it was the first court to assume and exercise jurisdiction.

Writ denied.

1. Abatement and Revival ⇐8(2)

Where claim sued on in first action, which is sought to be abated, is such that a final judgment in the first action could be pleaded in bar as a former adjudication, the actions are substantially identical.

2. Husband and Wife ⇐299(1)

A decree of separate maintenance may be pleaded in bar of a later suit for annulment, since it necessarily includes a determination that a valid marriage exists.

3. Abatement and Revival ⇐79

Where husband's action for separate maintenance against wife in Los Angeles County and wife's action for annulment in San Bernardino County were filed on same date, but copy of summons in husband's Los Angeles County action was served on wife before summons was served on husband in San Bernardino action, but husband submitted to jurisdiction of San Bernardino Superior Court and stipulated that it could enter a pendente lite order fixing custody, attorney's fees and support payments, and he filed a cross-complaint in San Bernardino Superior Court requesting it to grant him a decree of separate maintenance, husband was in no position to avoid effect of San Bernardino Superior Court's pendente lite order by moving to abate it or San Bernardino action, on ground that Los Angeles court acquired

exclusive jurisdiction because it was first court to assume and exercise jurisdiction.

4. Pleading ⇐106(1)

A plea in abatement is dilatory in nature and not favored.

5. Abatement and Revival ⇐78

Grounds for abatement may be waived.

6. Prohibition ⇐10(2)

Though equity abhors a multiplicity of suits, District Court of Appeal would not restrain Superior Court of San Bernardino County from continuing to exercise jurisdiction over wife's annulment action, in which husband submitted to jurisdiction, and in which husband stipulated that order might be issued for payment of attorney's fees and costs for wife, and in which husband filed a cross-complaint for separate maintenance, though Los Angeles court had first assumed jurisdiction in husband's action for separate maintenance and therefore allegedly acquired exclusive jurisdiction.

David Horn, Los Angeles, for petitioner.

No appearance for respondent.

Richard J. Weller, San Bernardino, for real party in interest.

GRIFFIN, Presiding Justice.

Petitioner, Serge San Martin, claimed husband of Carole Jean San Martin, aged 17, real party in interest, filed this petition for writ of prohibition against respondent court to forever restrain it and Carole (through her guardian ad litem) from taking any further proceedings in said court involving the action for annulment filed therein on September 30, 1958, by Carole. The grounds of annulment are alleged to be on account of her being married under the age of consent. It appears that on the same day, September 30, 1958, petitioner filed an action for separate maintenance against Carole in Los Angeles County, alleging that the parties were married in Las Vegas, Nevada, on March 5, 1958. A copy of the summons in the Los Angeles action was served on Carole at Fontana, in San Bernardino County on November 2, 1958, and summons was issued out of the San Bernardino Court in that action, and was served on petitioner in Los Angeles County on December 6, 1958. An order to show cause why petitioner should not pay her attorney's fees, costs and support money and why custody of the minor child should not be awarded to her was, at the same time, issued out of the San Bernardino court and served on petitioner. It was noticed for hearing on December 9, 1958. Petitioner's attorney appeared at that time in San Bernardino County and it was there stipulated between respective counsel that the San Bernardino court might make its order, in the agreed amounts and in reference to custody of the minor child and its support, including attorney's fees and costs. Such an order was made on December 18, 1958, and it became final.

On December 18th, petitioner appeared in the San Bernardino County action and moved for an order abating the proceedings therein and dismissing the action on the ground that the Los Angeles court first obtained jurisdiction of the subject matter set forth in the San Bernardino action and thereby it obtained exclusive jurisdiction to adjudicate said controversy because the wife was served first with summons and complaint. No affidavits were filed in opposition to said motion. It was heard on December 24, 1958, and on December 30, it was denied with the following notation: "The existence of the order *pendente lite* to which defendant stipulated gives this action priority".

It appears from the petition herein filed that since the making of the order in San Bernardino denying the motion to abate, Carole filed an answer to the complaint for separate maintenance in Los Angeles County, and also filed a cross-complaint for annulment; that petitioner here filed in San Bernardino County an answer to the complaint for annulment and also a cross-complaint for separate maintenance. The respective dates of these filings is not indicated. It does not appear that Carole

sought attorney's fees, costs, or temporary custody of the child in the Los Angeles action.

An order to show cause why the writ should not issue was duly issued by this court and a date set for hearing. There was no appearance of respondent court or the real party in interest and no reply was made to said order. It was submitted for decision on the records on file.

The chief contention of petitioner is that where several courts have concurrent jurisdiction over a certain type of proceeding the first one to assume and exercise such jurisdiction in a particular case acquires exclusive jurisdiction; that thereafter another court, although it might originally have taken jurisdiction, is wholly without power to interfere, and may be restrained by prohibition, citing Browne v. Superior Court, 16 Cal.2d 593, 597, 107 P.2d 1, 131 A.L.R. 276; and Gorman v. Superior Court, 23 Cal.App.2d 173, 72 P.2d 774; that the county in which the action was filed and where summons is first served thereby assumes jurisdiction of the entire controversy, and the action in the other county is subject to abatement, citing Burch v. Slamin, 137 Cal.App.2d 1, 3, 289 P.2d 498.

[1, 2] The general test applied to determine the identity or nonidentity of causes of action is the rule that where the claim sued on in the second action is such that a final judgment in the first one could be pleaded in bar as a former adjudication, the actions are substantially identical. Lord v. Garland, 27 Cal.2d 840, 848, 168 P.2d 5. A decree of separate maintenance might be pleaded in bar of a later suit for annulment since it necessarily includes a determination that a valid marriage exists. Garcia v. Garcia, 148 Cal.App.2d 147, 306 P.2d 80. However, there is authority holding that an action by a wife for divorce on the grounds of nonsupport is not for the same cause and is not abated by the husband's prior pending action for annulment on the ground of duress. Simpson v. Simpson, 5 Cal.Unrep. 139, 41 P. 804.

At the time petitioner's motion was presented to the San Bernardino court it might have been represented that the parties did not occupy the same relative positions as plaintiff and defendant in the two actions. 1 Cal.Jur.2d, Abatement and Revival, 48, 50, sec. 21. This question may be eliminated by the filing of the cross-complaint in the two actions. Western Pipe & Steel Co. of California v. Tuolumne Gold Dredging Corp., 63 Cal.App.2d 21, 146 P.2d 61.

[3] To preclude unnecessary relitigation of this issue we prefer to base our decision on a third objection which we believe justified the retention of said action in the San Bernardino Superior Court. Petitioner submitted to the jurisdiction of that court and stipulated that the respondent court could enter a *pendente lite* order fixing custody, attorney's fees and support payments. He thereafter filed a cross-complaint requesting the respondent court to grant him a decree of separate maintenance. Petitioner is not in a position to question the finality of the support and custody order, or to avoid its effect by now moving to abate it or the action upon which the order was made.

In DeBrincat v. Mogan, 1 Cal.App.2d 7, 36 P.2d 245, a somewhat similar situation arose. There concurrent jurisdiction of the action was in San Francisco and San Mateo counties. Service of summons was first had in the San Mateo action. Thereafter, petitioner DeBrincat applied to the Superior Court of San Francisco County for an order staying proceedings in that county since service of summons had first been made in the action in San Mateo County. After denial of that motion Whitfield applied for a similar stay of proceedings in the San Mateo court. That motion was granted. See DeBrincat v. Swart, 1 Cal.App.2d 756, 36 P.2d 247. In denying the writ in DeBrincat v. Mogan, supra [1 Cal.App.2d 7, 36 P.2d 246], seeking to stay proceedings in the San Francisco court, the appellate court cites the general expression in the several decisions to the effect that "the court which first acquires

jurisdiction * * * retains its jurisdiction and may dispose of the whole controversy"; and that "in actions of this character the court in which process is first served has jurisdiction over the whole litigation and has full power to require the parties to come into that court for a complete adjudication of the controversy." However, it held that it does not follow from this that the writ of mandate should issue. It said: "This writ is ordinarily one of discretion, and does not issue as a matter of absolute right when not necessary to prevent an injustice to the parties." (Citing cases.) "Here the showing is that both parties reside in San Francisco; that but four days elapsed between the service of process in both cases, and no proceedings detrimental to the petitioner have been taken in either case; and that the entire controversy may be determined in the San Francisco court without prejudice to either side. Hence, though the court in San Mateo county had full power to assume jurisdiction over the whole controversy, we cannot say that, under the circumstances here shown, it abused its discretion in refusing to do so. Conversely, until *full* jurisdiction was assumed by the San Mateo court, the San Francisco court had jurisdiction to proceed with the trial." (Italics ours.)

In the instant case it does not appear that the Los Angeles court assumed full jurisdiction for the purpose of trial; and that an injustice would result if, by the issuance of this writ, the order fixing attorneys' fees and costs of trial in that court would be set aside. It does not appear that a trial in that county would operate as an injustice to the respective parties. We therefore conclude that the Superior Court of San Bernardino County has jurisdiction to hear the entire cause.

In Harlan v. Harlan, 70 Cal.App.2d 657, 161 P.2d 490, 493, the court said:

> "* * * one who has invoked the exercise of a jurisdiction within the general powers of the court cannot seek to reverse its orders, upon the ground of lack of jurisdiction. The principle opposing such action is one of estoppel in the interest of a sound administration of the laws whereby the regularity or even validity of an act procured by one himself cannot be raised—not that the act is valid, for it may not be, and estoppel does not make valid the thing complained of but merely closes the mouth of the complainant."

See also Kirk v. Rutherford, 137 Cal.App. 2d 681, 290 P.2d 883; and Schulze v. Schulze, 121 Cal.App.2d 75, 262 P.2d 646, 650, where it is said:

> "Having relied on the validity of the judgment of divorce on the first motion, he is estopped from thereafter claiming it is void. One to whom two inconsistent causes of action are open and who elects to pursue one of them is afterward precluded from pursuing the other."

[4, 5] A plea in abatement is dilatory in nature and not favored and grounds for abatement may be waived. Kadota Fig Ass'n of Producers v. Case-Swayne Co., 73 Cal.App.2d 796, 167 P.2d 518; 1 Cal. Jur.2d, Abatement and Revival, Sec. 49, p. 78.

[6] Thus, although equity abhors a multiplicity of suits, in this case we are not disposed to restrain the respondent court from continuing to exercise jurisdiction over the action therein filed by the wife in which action the husband has submitted to the jurisdiction of that court, and stipulated therein that an order may be issued for the payment of attorneys' fees and costs for the wife, which sum was apparently ordered for the trial of the action in that county, particularly where a cross-complaint has been filed therein seeking affirmative relief.

Writ denied.

MUSSELL and SHEPARD, JJ., concur.

168 Cal.App.2d 670

Matter of the ESTATE of Jessie McGEE, Deceased.

Anna BRENNAN, Petitioner, Contestant and Appellant,

Mary Smith, Patrick McDyre, Sarah Anne McDyre and James McDyre, Mary Agnes McGee, Mary McGee Sprout, Theresa McGee Callahan, Sallie McGee, Ann McGee, Francis McGee, Thomas McGee and Clare McGee, Contestants and Appellants,

v.

Mary E. SEELIG, Arthur McArdle, Beverly McArdle Garbacki and Rose Ann Butler, Legatees and Respondents,

Mary E. Seelig, Administratrix and Respondent.

Civ. 22708.

District Court of Appeal, Second District, Division 1, California.

March 13, 1959.

Action by heirs of predeceased spouse claiming interest in estate of surviving spouse on ground that her estate had been acquired with community funds during her marriage to predeceased spouse and prior to his death. The Superior Court of Los Angeles County, Philbrick McCoy, J., entered decree determining that estate of surviving spouse was her separate property and heirs of predeceased spouse appealed. The District Court of Appeal, Lillie, J., held that there was evidence to support trial court's finding that there existed no community property to which surviving spouse had succeeded and all the property owned by her upon her death had its origin in and was her separate property, and vested in her heirs.

Affirmed.

1. Husband and Wife ⇐274(1, 4)

Where husband died and then wife died intestate and without children, heirs of predeceased husband became statutory heirs of wife's estate if any part of her estate was in fact community property of predeceased husband and wife, and proof of that fact was condition precedent to recovery by them and they had the burden of showing such additional facts. West's Ann.Civ. Code, § 164; West's Ann.Prob.Code, § 228.

2. Husband and Wife ⇐249

In determining character of property for purpose of application of statutes, respecting distribution of community and other property acquired from predeceased spouse where there is no surviving spouse or issue and distribution of former separate property of previously deceased spouse where there is no surviving spouse or issue, it is the source of acquisition and not the nature of its ownership immediately before death which is controlling, and separate property does not lose its character as such by reason of a change in form or identity. West's Ann.Civ.Code, § 164; West's Ann. Prob.Code, § 228.

3. Husband and Wife ⇐249

For purposes of applicability of statutes respecting distribution of property acquired from predeceased spouse, fact that separate property is placed in joint tenancy with other spouse does not affect its character as separate property of granting spouse when joint tenancy terminates upon death of grantee's spouse. West's Ann.Civ.Code, § 164; West's Ann.Prob. Code, § 228.

4. Husband and Wife ⇐264

In proceeding by heirs of predeceased husband to be determined to be statutory heirs of estate of deceased's wife, there was evidence to sustain trial court's finding that property of wife consisting of bank account and apartment house originally deeded to husband and wife as joint tenants had its origin in and was the separate property of wife and vested in her relatives upon her death without children. West's Ann.Civ.Code, § 164; West's Ann.Prob. Code, § 228.

5. Husband and Wife ⇐249, 262(1, 2)

When separate property is intermingled with community funds, the respective properties or funds remain unchanged in character so long as they can be clearly ascertained, but presumption in favor of community property applies to commingled

property so that burden of proof rests with party claiming the property to be separate. West's Ann.Civ.Code, § 164.

6. Appeal and Error ⇐1010(1)

Where separate property of one of the spouses is intermingled with community funds, quantum of proof necessary to overcome presumption in favor of community property is generally a matter for trial court whose determination is conclusive on appeal unless evidence is so weak and improbable that finding is without substantial support.

7. Husband and Wife ⇐262(1)

Presumption that property acquired during marriage is community is controlling only when it is impossible to trace the source of the specific property.

8. Husband and Wife ⇐264

In action by heirs of predeceased husband to be determined to be statutory heirs of deceased wife's estate on ground that property owned by wife at time of her death was community property acquired during marriage of predeceased husband and wife, there was substantial evidence to support finding of trial court that separate property of wife which apparently had been commingled with community funds had retained its character as wife's separate property. West's Ann.Prob.Code, §§ 225, 228; West's Ann.Civ.Code, § 164.

9. Husband and Wife ⇐249

Where separate property of spouse is commingled with community funds but community interest is inconsiderable in the property with which it has been intermingled, community will not draw to itself a separate estate.

10. Husband and Wife ⇐262(1)

There is a presumption that expenses of the family come from community earnings, and conversely there is no presumption that spouse supported other spouse out of separate funds and preserved intact the community estate.

Martin S. Ryan, Guy F. Bush, James H. Lyons and Warren M. Goodwin, Los Angeles, for appellants.

Julius A. Leetham, Los Angeles, for respondents.

LILLIE, Justice.

Jessie McGee died intestate and without children on November 19, 1955. Thereafter, the relatives of her predeceased intestate husband, Denis, filed a petition in the probate proceedings claiming an interest as statutory heirs under Section 228, Probate Code. They contended that all of Jessie's estate had been acquired with community funds during her marriage to Denis and prior to the latter's death; and Jessie having died witthout issue, one-half of her estate wase distributable to them by force of the statute. The petition was opposed by contestants, all of whom are Jessie's next of kin. The trial court found that at the time of Denis' death there existed no community property to which Jessie succeeded, that all property owned by Jessie upon her death had its origin in, and was, her separate property and vested in the contestants under Section 225 of the Probate Code; and issued its decree accordingly. This appeal therefrom involves solely the sufficiency of the evidence to support the trial court's findings.

The evidence as to the general financial arrangements of Jessie and Denis, including the source of the funds used to purchase the principal asset of the estate, is somewhat meager. As a consequence, the parties rely upon and discuss various inferences and presumptions without the aid of which a finding either way might have been difficult to support.

The following appears from the record: Jessie, a native of England, came to Los Angeles about 1920. She was approximately 30 years of age and unmarried. On March 14, 1922, with savings accumulated from some employment, she acquired an interest, as a single woman, in a three-bedroom house on 91st Street. The total price under the contract of purchase was

$3,000, payable $500 down and $35 monthly, commencing April 14, 1922, with interest at 7% annually. The following February (1923) she married Denis. At that time, being neither employed nor possessed of funds or property, he moved into the 91st Street house with Jessie. Following the marriage, Jessie was never again gainfully employed and her income appears to have been derived exclusively from rentals and the sale of various real properties. Denis worked for about a year between 1933 and 1934, and for some ten years during the 1940's. Neither he nor Jessie acquired any property by gift, devise or inheritance.

On March 25, 1925, by quitclaim deed executed by both Denis and Jessie, the interest in the 91st Street property was disposed of and title taken by them by way of grant deed to a ten or twelve-room house on Stanford Avenue, referred to hereinafter as the Warner transaction. In 1938, Jessie and her husband conveyed away the Stanford Avenue house and acquired by deed to "Jessie McGee, a married woman," an apartment building situated at 624 Towne Avenue. Subsequently, in 1944, Jessie alone transferred title to the Towne Avenue building and received a deed, in her name only, to a seventeen-room rooming house on West 2nd Street. Shortly thereafter, she disposed of this property and title was taken to the remaining real property in the estate, an apartment house on West 4th Street, in the names of Jessie, Denis and Mary E. Seelig, Jessie's sister and one of the contestants herein, as joint tenants. Later, and prior to Denis' death, Mrs. Seelig conveyed her interest to Denis and Jessie, also as joint tenants. Another property was purchased by Jessie alone in 1950 and sold some two years later for a substantial profit.

Denis died intestate in 1953, predeceasing Jessie by two years. There was no administration of his estate. During his eleven years of employment out of 31 years of marriage, he kept his own separate bank account which was closed in 1950. Upon Jessie's death, her estate had a total inventoried value approaching $118,000, represented mainly by about $12,500 cash on deposit and the 4th Street apartment building appraised at $90,000.

There can be no doubt that the estate thus accumulated came about, as both sides observe, from a process of parlaying profit upon profit from a beginning that was both modest and obscure. The question before us concerns the sufficiency of the evidence to sustain the finding that Jessie's original investment could thus multiply in value over a span of thirty-odd years and still retain its separate property status. Appellants assert that the trial court's determination in this regard was unsupported by fact and unsound in law. They argue that the burden of proof was on the respondents to establish by clear and convincing evidence that the property in Jessie's estate was separate property, citing In re Estate of Jolly, 196 Cal. 547, 238 P. 353; In re Estate of Duncan, 9 Cal.2d 207, 70 P.2d 174; Wilson v. Wilson, 76 Cal.App. 2d 119, 172 P.2d 568, and In re Estate of Kane, 80 Cal.App.2d 256, 181 P.2d 751. Those decisions all hold, being aided by the pertinent portion of section 164, Civil Code, declaring certain property acquired during coverture to be community, that property in the possession of one spouse at the close of a long marital relation must be presumed to be community absent the establishment of a better right by the spouse claiming it as separate property.

[1] Appellants are relatives of the predeceased Denis. By Section 228, they became statutory heirs of Jessie, provided they could prove that any part of her estate was in fact the community property of Jessie and Denis. Such proof was a condition precedent to recovery by them. As declared in Re Estate of Rattray, 13 Cal.2d 702, 706, 91 P.2d 1042, 1045: "Since their right to inherit depended not merely upon the fact of that certain relationship, but upon the fact of such relationship plus the fact that property claimed by them as heirs had formerly been the community property of the decedent and her predeceased spouse, the burden of showing such

additional fact rested upon them." To the same effect are In re Estate of Doran, 138 Cal.App.2d 541, 549, 292 P.2d 655, and In re Estate of Adams, 132 Cal.App.2d 190, 203, 282 P.2d 190. Appellants profess their cognizance of the foregoing rule and further concede that it is primarily a factual question whether the disputable presumption arising from section 164, Civil Code, and accorded additional sanction in Re Estate of Jolly, supra, 196 Cal. 547, 238 P. 353; In re Estate of Duncan, supra, 9 Cal.2d 207, 70 P.2d 174, and Wilson v. Wilson, supra, 76 Cal.App.2d 119, 172 P. 2d 568, has been sufficiently overcome. Likewise recognized by appellants is the principle that a finding will not be disturbed if there is substantial evidence or reasonable inference to support it. The instant case, appellants nevertheless argue, presents a situation where "there was neither substantial evidence nor reasonable inference to support the finding that the property herein involved was the separate property of Jessie" and that "such finding was in hasty and flagrant disregard of the evidence and of the applicable law as well."

In support of the foregoing thesis there follows a purely partisan evaluation of the facts, various items of testimony being enumerated which might well have sustained the conclusion contended for. Thus, appellants point out that the only separate property of Jessie directly traceable to her present estate consisted of an equity in the 91st Street property which could not have exceeded $850 (ten monthly payments being included) at the time of her marriage to Denis; that the place produced no income save and except rent of an undetermined amount paid by her brother; that the possession of money or a bank account by Jessie is left to mere surmise and that, although unemployed after her marriage, the decedent apparently did not default under the contract of purchase and thus was able to dispose of her equity at the time of the Warner transaction some three years later and secure in exchange the rooming house on Stanford Avenue. Appellants argue in effect that Denis must then have been working or otherwise contributing to the community's support, failing which they would have been dispossessed in the interim.

There is no evidence that Denis was employed at the time in question or at any subsequent time until 1933 when he worked for approximately one year for wages of an undisclosed amount. Opposed to the conclusion which appellants would have us draw is the testimony of Mrs. Seelig, the only witness who knew the parties at the time of their marriage and thereafter. She testified that she did not know "the exact amount of money" Jessie had when she married Denis; that Jessie was "the brains of the family," handled all the business transactions and all the money and that the couple's living habits were moderately frugal. Undoubtedly the trial court, accepting as true the testimony of this witness despite her interest, had in mind the inference, reflected by its finding, that the parties must have been principally maintained out of the income, commencing initially with Jessie's original venture in the Los Angeles real estate market, and that the estate of which she died possessed resulted from the income and profits growing from that first modest investment. Appellants vigorously criticise the trial court's analysis of the Warner transaction three years later, pointing out that there was absent any evidence that payments were kept up by Jessie on the 91st Street contract and that she therefore had no equity to offer in return for the Stanford Avenue property. True, revenue stamps were not affixed to the quitclaim deed tendered by Jessie and Denis and the grant deed to Katherine Warner was in fact executed by the vendors of the 91st Street premises and bore stamps indicating a consideration of $6,500. As we see it, there was a basis for the trial court's analysis that the 91st Street premises increased in value during the three years it was held and was disposed of at its increased value.

[2–4] No purpose would be served by further elaboration on the several transactions which followed and added to the value of decedent's estate. "In determining the

character of property for the purpose of applying §§ 228 and 229 of the Probate Code, it is the source of its acquisition, and not the nature of its ownership immediately before death, which is controlling" (In re Estate of Reizian, 36 Cal.2d 746, 749, 227 P.2d 249, 250). Separate property does not lose its character as such by reason of a change in form or identity (10 Cal.Jur. 2d 680, Sec. 18). Additionally, the fact that separate property is placed in joint tenancy with the other spouse does not affect its character as the separate property of the granting spouse when the joint tenancy terminates on the death of the grantee spouse (In re Estate of Rudman, 85 Cal. App.2d 270, 193 P.2d 39). Appellants contend, reasserting such contention upon oral argument, that proper consideration was not given to the fact that title to the 4th Street apartment building stood in the parties' names as joint tenants. If we understand appellants' argument correctly, it is similar to that rejected in Re Estate of Abdale, 28 Cal.2d 587, 170 P.2d 918, wherein the property was originally separate property of the intestate, thereafter placed by him in joint tenancy with his wife and on her death reacquired by him as surviving joint tenant. The court held that if the property had its source as separate property of the surviving spouse, it was distributable under section 225 and 226 of the Probate Code to the kin of the surviving spouse. 28 Cal.2d 591, 170 P.2d 921. In the last analysis, there seems to be no escape from the conclusion that this phase of the appeal involves factual questions which were determined adversely by the trial court with an apparent full understanding of the rule that then guided its decision. Thus, summing up, the court stated: "I am satisfied that the heirs of the predeceased husband have not met the burden imposed by the Rattray case * * *." Contrary to appellants' assertions, the record does not disclose that the court's conclusion was "hastily" and "precipitantly" arrived at—indeed, every exhibit material to the controversy was received in evidence and it is not contended that sufficient time was denied counsel for the presentation of closing arguments.

[5–10] There remains for consideration appellants' further point that if Jessie's holdings constituted separate property, its identity as such was lost by commingling. When separate property is intermingled with community funds, the respective properties or funds remain unchanged in character so long as they can be clearly ascertained (Faust v. Faust, 91 Cal.App.2d 304, 309, 204 P.2d 906); but the presumption in favor of community property (Civil Code, section 164) applies to commingled property (In re Estate of Smith, 86 Cal.App.2d 456, 473, 195 P.2d 842) so that the burden of proof rests with the party claiming the property to be separate (Fountain v. Maxim, 210 Cal. 48, 50–51, 290 P. 576). "This burden," appellants argue, "respondents have failed to meet." Disputable presumptions, and this is one of them, have been said to be the weakest and least satisfactory character of evidence (Savings & Loan Soc. v. Burnett, 106 Cal. 514, 529, 39 P. 922) and "are allowed to stand, not against the facts they represent, but in lieu of proof of them" (Simonton v. Los Angeles Trust & Sav. Bank, 205 Cal. 252, 258, 270 P. 672, 675). Appellants declare that "clear and satisfactory" proof is required to overcome the presumption of commingling; however, the *quantum* of proof is generally a matter for the trial court and that court's determination is conclusive on appeal unless the evidence is so weak and improbable that the finding is without substantial support. In re Estate of Ades, 81 Cal.App.2d 334, 337, 184 P.2d 1. Furthermore, the presumption only applies in the absence of other evidence; for example, where it is impossible to trace the source of the funds in view of the commingling (Thomasset v. Thomasset, 122 Cal.App.2d 116, 124, 264 P. 2d 626). Stated otherwise, the presumption that property acquired during marriage is community is controlling only when it is impossible to trace the source of the specific property (Gudelj v. Gudelj, 41 Cal.2d 202, 210, 259 P.2d 656). If we apply the fore-

going rules to the facts at bar, we must only conclude that appellants' present point is untenable. Here the trial court found, upon sufficient evidence, that Jessie's estate upon her death was traceable to her original investment with her separate funds prior to marriage and the accumulations therefrom over the years as the result of shrewd business judgment, coupled with the frugality of her mode of living. Implicit in the court's finding, furthermore, is the fact that any contribution by Denis' earnings was of an undisclosed amount and disproportionate to Jessie's; hence, the principle is applicable that "where the community interest is inconsiderable in the property with which it has been intermingled, the community will not draw to itself a separate estate" (Cline v. Cline, 4 Cal.App.2d 626, 629, 41 P.2d 588, 590). Also, any suggestion that Jessie's income, or some of it, should be attributed to her services and regarded as community property, lends no assistance to appellants' cause. There is the presumption that expenses of the family come from community earnings (Huber v. Huber, 27 Cal.2d 784, 792, 167 P.2d 708), or conversely, there is no presumption that she supported Denis out of her separate funds and preserved intact the community estate (Thomasset v. Thomasset, supra, 122 Cal.App.2d 116, 126, 264 P.2d 626).

Appellants stress the claim that this was not a situation involving the natural enhancement of property unaided by the efforts of its owners, contending in that regard that the parties' lifelong operation of rooming houses was a "business" and that a large portion of the income therefrom was necessarily expended on amortization payments on notes secured by various trust deeds. However, assuming the care and maintenance of income properties to be in that category, it is not the profits of the business but only the ascertained earnings of the intestate from her individual efforts in managing and caring for such property, in the nature of salary, wages, or the equivalent thereof, which would be community property (Seligman v. Seligman, 85 Cal. App. 683, 687, 259 P. 984). Even if it be further assumed that Denis devoted all his time, when he was not gainfully employed otherwise, in assisting Jessie in caring for the property, no evidence has been called to our attention appraising the value of such earnings, or to what proportion of the income they should be properly allocated. True, Jessie's bank balance declined some $25,000 following Denis' death, but that fact standing alone is not conclusively determinative of the problem. "It has frequently been held that a proper method of making such allocation is to deduct from the total earnings of the business the value of the husband's services to it. The remainder, if any, represents the earnings attributable to the separate property invested in the business" (Gilmore v. Gilmore, 45 Cal.2d 142, 149–150, 287 P.2d 769, 773). We are unable to say that the court committed error in impliedly finding for respondents on this particular issue.

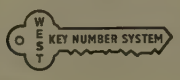
Appellants place great reliance on In re Estate of Brenneman, 157 Cal.App.2d 474, 321 P.2d 86, in which it was held that the burden of proving that some portion of the decedent's estate had its source in his separate estate rested with the decedent's heirs following proof by the heirs of the predeceased spouse that all of said property had been acquired during marriage or had its source in property so acquired. Unlike the situation involving Jessie and Denis, and as the decision points out, "there is no independent evidence as to the source of the property in the estate of a surviving spouse other than the fact that it was acquired during coverture" (157 Cal.App.2d 480, 321 P.2d 90, supra); and again, "the evidence is to the effect that all of the property in the estate of decedent was acquired during marriage or had its source in property so acquired, and there is no evidence that any part of such property was acquired with separate property of the decedent" (157 Cal. App.2d 481, 321 P.2d 91, supra), the court thereafter observing that certain funds, concededly separate property in the form of an inheritance, were not traced into the property owned at the time of the husband's death. The case is thus dissimilar factually

and no authority for the point appellants seek to make.

From the limited evidence before it, we believe the trial court, basing its decision upon the resolution of conflicting inferences with which we are powerless to interfere, made a proper order of distribution in the matter at bar.

For the foregoing reasons the decree is affirmed. The attempted appeal from the order denying a new trial is dismissed.

WHITE, P. J., and FOURT, J., concur.



168 Cal.App.2d 747

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Nicholas Carman RUSSO, Defendant and Appellant,

Nick Carmen Russo, Defendant and Appellant.

Cr. 6334.

District Court of Appeal, Second District, Division 2, California.

March 18, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., for burglary and statutory rape, and he appealed. The District Court of Appeal, Ashburn, J., held that 14-year-old prosecutrix' testimony with regard to defendant's having brought her home to bed in presence of his family was not so inherently improbable that it should have been rejected as a matter of law.

Affirmed.

1. Criminal Law ⇐1144(13)

Question of reasonable doubt is for trial court, not appellate tribunal, and upon appeal all evidence and all inferences tending to support finding of guilt are to be accepted as true and sufficiency of evidence tested upon that assumption.

2. Larceny ⇐64(1, 7)

Mere possession of stolen property will not sustain conviction for its theft, but such possession plus slight corroborative evidence of other inculpatory circumstances will suffice.

3. Burglary ⇐41(1)

Burglary conviction was sustained by evidence. West's Ann.Pen.Code, § 459.

4. Criminal Law ⇐412(1)

That defendant was under influence of a narcotic, if he was, did not per se render his voluntary statements inadmissible.

5. Rape ⇐52(1)

14-year-old prosecutrix' testimony with regard to defendant's having brought her home to bed in presence of his family was not so inherently improbable that it should have been rejected as a matter of law in rape prosecution.

Gladys Towles Root, Eugene V. McPherson and Robert Barnett, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Norman H. Sokolow and Philip C. Griffin, Deputy Attys. Gen., for respondent.

ASHBURN, Justice.

Appellant was tried contemporaneously upon one charge of burglary (Pen.Code § 459) and two charges of statutory rape (Pen.Code § 261, subd. 1). Convicted on all counts and committed to the Youth Authority for the terms prescribed by law defendant appeals from the judgments. Counsel attack sufficiency of the evidence in each instance.

[1] The case was presented somewhat casually on both sides. Evidence supporting the convictions is weak, but settled rules of review forbid interference on our part. Upon appeal all evidence and all inferences tending to support the finding of guilt are to be accepted as true and the

sufficiency of the evidence tested upon that assumption; the question of reasonable doubt is for the trial court, not the appellate tribunal. People v. Newland, 15 Cal. 2d 678, 681, 104 P.2d 778; People v. Poindexter, 51 Cal.2d 142, 330 P.2d 763; People v. Jackson, 167 Cal.App.2d 270, 334 P.2d 114.

[2, 3] The burglary charge. The evidence shows without dispute that the apartment of Mr. Guy Gambaro at 310 South Bunker Hill Street, Los Angeles, was burglarized between 6:00 p. m. and 10:45 p. m. on October 8, 1957. An electric clock, a radio, a suit of clothes, a pair of shoes and a Gillette razor were stolen. The question now presented is whether defendant was connected with the crime by substantial evidence, direct or circumstantial. Defendant's possession of the electric clock and radio is admitted. He sold them to Louis Stephan about the middle of October, 1957, for $6.50. Their values are not established by the evidence but they were before the trial judge as exhibits and it is a fair inference that this sale was at a price substantially below their real value; if that were not the case the defense doubtless would have shown the true situation. This sale was made at about 1:30 a. m. to 2:30 a. m. in front of a hotel at Third and Hill Streets, where defendant lived. He had known Stephan for about six months and on this occasion accosted him and offered to make the sale; neither one of them mentioned the source from which defendant got the articles. The clock, radio, etc., were found by the police in Stephan's apartment on December 9, 1957. After defendant's arrest, which was on that day, the officers talked with him. He initially denied the charge of burglary and when shown the clock and radio said he had never seen them before. Later on the same day he retracted this denial and said that he had gone to the apartment at 310 South Bunker Hill with Nick Hust and Gerald Zalcowski; he and Nick had forced the door to Apartment 3 and had taken the radio and clock, also a suit of clothes and a pair of shoes; he sold the radio and clock to Louis Stephan for $6 or $7. At the trial defendant testified that he got the radio and clock from Nick (last name unknown to him), paid him $4 for them and re-sold to "this other guy called Lou" for $6.50. Of course the trial judge was entitled to reject the testimony that he bought the articles from Nick while believing and accepting the statement that he sold them to "Lou" for $6.50. See, Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 291, 105 P.2d 984; Nevarov v. Caldwell, 161 Cal.App.2d 762, 327 P.2d 111; In re Estate of Pelton, 140 Cal.App. 2d 512, 516, 295 P.2d 483.

While mere possession of stolen property will not sustain a conviction for its theft, it is also true, as stated in People v. Wissenfeld, 36 Cal.2d 758, 763, 227 P.2d 833, 836, that "such possession plus 'slight corroborative evidence of other inculpatory circumstances' will suffice." People v. Citrino, 46 Cal.2d 284, 288, 294 P.2d 32, 35: "Possession alone of property stolen in a burglary is not of itself sufficient to sustain the possessor's conviction of that burglary. There must be corroborating evidence of acts, conduct, or declarations of the accused tending to show his guilt. [Citations.] When possession is shown, however, the corroborating evidence may be slight [citations], and the failure to show that possession was honestly obtained is itself a strong circumstance tending to show the possessor's guilt of the burglary. [Citations.] Defendant's explanation that Cotelli gave him the property was not contradicted by any witness, but in view of defendant's own use of that name and the fact that he did not know where Cotelli was at the time of the trial, the jury could reasonably conclude that Cotelli and his gift were both fictitious. [Citation.] Other corroborative evidence was his false statement to Astengo that he received the property from his father [citations], his selling tools and equipment worth more than $150 for $25."

In the present instance there appears at first evasive conduct, then express admission of guilt on the part of defendant; also a failure to show that his possession

was honestly obtained (because that part of his testimony was rejected by the trier of facts); sale of the stolen property in the middle of the night for a price which was itself suggestive of "hot" merchandise. As previously stated the evidence is sufficient to support the burglary conviction.

[4, 5] As to the two counts of rape. June Marie Schaefer was 14 years of age. She and another girl, Linda King, as they walked along San Fernando Road in North Hollywood, sought and accepted a ride in defendant's automobile on the morning of January 17, 1958. Defendant had with him a friend named Ernie Torres. The four juveniles (defendant was aged 19 years) drove around for awhile and then went to defendant's home at about 4:00 p. m. According to June's testimony Linda and Ernie left and went to a motel. June stayed there the night of the 17th and the following night. After defendant's parents had retired June and defendant went to bed together in the adjoining bedroom, spent the night there and had sexual intercourse; the same thing happened the next night. Defendant testified that June arrived at the house about 2:00 p. m. and stayed about four hours on that first day; she was not there at night and did not sleep or at any time have sexual intercourse with him; his mother, stepfather, sister and brother were at home that night. He also said that although June came to the house the next morning she did not stay until night or sleep or have intercourse with him.

Officer Charles E. Eberling, of the Los Angeles Police Force, testified that on January 22nd he talked with defendant who said he had taken a couple of "goof" balls earlier in the evening and the officer was not sure whether he was under the influence of a narcotic; he said "it could be just that he was scared." However, defendant talked voluntarily, asserting that he was innocent of burglary, but added that he had a difficult problem, "that he had been sleeping and having sexual intercourse with a girl by the name of June Schaefer, and that he didn't know how he was going to handle this, and he also stated at the time that he had a hotel room in downtown Los Angeles, and he had seen this girl at his own residence, I believe on Blix in North Hollywood. * * * He stated that he was very perplexed over the fact that there were several Lesbians had taken his girl friend away from him. * * * Well, there was one other statement he made. He said that he felt he should have some type of mental doctor or something, counsel with him on his own problems, but I would say that he was referring to this sexual situation." The fact that defendant was under the influence of a narcotic, if he was, did not *per se* render his voluntary statements inadmissible (People v. Waack, 100 Cal.App.2d 253, 257, 223 P.2d 486), and appellant's counsel make no such contention.

It is argued that the testimony of the girl June is inherently incredible and should be rejected on that ground as a matter of law. Counsel say in their brief: "Then we find that the bed the prosecutrix slept in was in the appellant's bedroom, next door to the bedroom of Appellant's parents, while the parents were there; that she stayed in that bed and bedroom all night on two occasions, two succeeding nights; and when she got up in the morning she saw Appellant's mother. In no normal family would anything of such a nature have occurred. In no normal family would a boy of Appellant's age have brought a girl home to bed in the presence of his family. It is utterly fantastic to believe that the events occurred as they were testified to by the prosecutrix. The prosecution presented no evidence, other than the girl's testimony, that she stayed at the Appellant's house on either night. The prosecution did not produce either June's girl friend or Appellant's boy friend to show that they went away and left June at Appellant's house. The prosecution did not seek to introduce any evidence that Appellant's was other than a normal family." We quite agree that the picture is not one of a normal family, but the evidence of the prosecutrix, as well as defendant's statement to Officer

Eberling, show an abnormal family home as well as an abnormal witness. We cannot reject June's testimony on that ground, however, for the rule of People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759, prevails: "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" See, also, People v. Wein, 50 Cal. 2d 383, 399, 326 P.2d 457. For comparable situations see, People v. Bartol, 24 Cal. App. 659, 661, 142 P. 510; People v. Whitney, 34 Cal.App. 737, 738, 168 P. 1052.

The defense of alibi put mother to the test, as is so often the case. The stepfather, sister and brother were not called as witnesses nor was their absence explained. But defendant's mother, Mrs. Lucille Balteskolis, testified that June Schaefer left the house after lunch on the 17th and did not return until the next morning when she stayed only a few hours. On that first night Mrs. Balteskolis, so she said, went into defendant's room, saw him sleeping and alone. The witness also added by way of good measure that June told her on the following day that she was 18 years old. The alibi testimony was rejected by the veteran trial judge (there was no jury). As we said in People v. Baserto, 162 Cal. App.2d 123, 327 P.2d 558, 560: "[T]he court was not required to accept the alibi testimony though not directly contradicted by another witness. In other words, the judge had the prerogative of disbelieving defendant and his witness. Odenthal v. Lee, 113 Cal.App.2d 666, 669, 248 P.2d 937; Huth v. Katz, 30 Cal.2d 605, 608–609, 184 P.2d 521."

Each judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.



168 Cal.App.2d 723

Robert MAULHARDT, Richard Maulhardt, John Maulhardt, Alma M. Murphy and Marie M. Minor, doing business as Maulhardt Leasing Co., a copartnership, Plaintiff and Respondent,

v.

CALIFORNIA DIRECTOR OF PUBLIC WORKS, Phoenix Assurance Company, Ray Reed Company and Conrad Construction Company, a joint venture, and L. B. Conrad, Defendants.

Phoenix Assurance Company of New York, Appellant.

Civ. 23119.

District Court of Appeal, Second District, Division 1, California.

March 18, 1959.

Action by lessors of road construction equipment, which was subject to chattel mortgage and conditional sales contracts assigned with recourse to bank, and which, when repossessed at bank's request, was leased to road construction contractors, against contractors, Director of Public Works, surety on contractors' labor and material and faithful performance bonds for sums withheld by director pursuant to verified stop order and notice to withhold, in which cause of action surety intervened, and for equipment rental, repairs, and attorney's fees as provided in the bonds. The Superior Court, Ventura County, E. Perry Churchill, J., entered judgment adverse to surety, and surety appeal-

ed. The District Court of Appeal, White, P. J., held, inter alia, that, where Superior Court's other findings were sufficient in themselves to support the judgment, addition of an uncertain, catch-all finding that all allegations of pleadings on file consistent with such findings were found to be true and that all allegations inconsistent therewith were found to be not true did not constitute reversible error.

Judgment affirmed.

1. Appeal and Error ⇐1071(1)

If findings on one count are sufficient to support the judgment, faulty findings on an unsupported count may be disregarded.

2. Appeal and Error ⇐1071(1)

Where trial court's other findings were sufficient in themselves to support the judgment, addition of uncertain, catch-all finding that all allegations of pleadings on file consistent with such findings were found to be true and that all allegations inconsistent therewith were found to be not true did not constitute reversible error.

3. Appeal and Error ⇐1071(6)

Trial court's failure to make a finding on any material issue pleaded by either party may be grounds for reversal of the judgment, but, to justify such reversal, issue upon which no finding was made must be one necessary to the decision and one upon which, from evidence before court, a finding favorable to appellant could have been made.

4. Estoppel ⇐90(1)

Where one road construction contractor, which was engaged in a joint venture with another such contractor, expressly consented to constructive repossession of road equipment by original owners of chattel mortgage and conditional sales contracts covering such equipment and, as agent of the joint venture, entered into leasing agreement with original owners, contractor waived any rights under the chattel mortgage and conditional sales contracts, and the joint venture waived any right it might have had to assert that money paid by its surety as rental was to be applied on past-due payments on chattel mortgage and conditional sales contracts.

5. Highways ⇐113(5)

Road construction equipment lessors who had been required to engage an attorney and to prosecute action upon road construction contractors' bond to recover amounts due them under bond would be entitled to a reasonable fee for such services. West's Ann.Gov.Code, §§ 4200–4208.

6. Highways ⇐113(5)

In action by road construction equipment lessors against road construction contractors, contractors' surety, and others, evidence established that reasonable fee to be allowed attorney for lessors was $2,000.

7. Account Stated ⇐19(3)

In action by road construction equipment lessors against road construction contractors, their surety, and others, evidence failed to establish an account stated between lessors and surety.

8. Appeal and Error ⇐1071(6)

In action by road construction equipment lessors against road construction contractors, their surety, and others, court's failure to find that obligation of surety's bond included payment by it of repairs did not mislead or otherwise prejudice surety or result in a failure to find upon a material issue thereby requiring reversal of judgment against surety, in view of facts that court found that designated sum was due from surety to lessors for repairs, that judgment included such sum, and that condition of the bond was quoted. West's Ann.Gov.Code, §§ 4200–4208.

9. Highways ⇐113(5)

In action by road construction equipment lessors against road construction contractors, their surety, and others, for equipment rental, repairs, and attorney's fees, finding that "immediately" after lessors had repossessed the equipment on designated date a leasing agreement was entered into between them and contractors was not insufficient, even though there was

evidence that the leasing contract had been made on such date or about a week later, in view of fact that the material fact in issue was the making of the agreement, not the exact time thereof. West's Ann.Gov. Code, §§ 4200–4208.

10. Highways ⇐113(5)

Where road construction contractors, who were engaged in a joint venture, agreed to pay rental for use of road construction equipment, contractors' surety stood in place of the joint venture bailee and, therefore, could not question joint venture bailors' title.

11. Highways ⇐113(5)

Where, in action by road construction equipment lessors against road construction contractors, their surety, and others for equipment rental, repairs, and attorney's fees, funds in surety's hands and amount held by Director of Public Works pursuant to lessors' stop order would more than cover amount of lessors' judgment, findings would not be deemed insufficient despite contention that surety could not ascertain what, if any, balance of its labor and materials bond remained in its hands after expenditures had been made and recorded, without segregation, against its labor and materials bond and its faithful performance bond. West's Ann.Gov.Code, §§ 4200–4208.

12. Evidence ⇐450(5)

In action by road construction equipment lessors against road construction contractors, who were engaged in a joint venture, their surety, and others, for equipment rental, repairs, and attorney's fees as provided in labor and material and faithful performance bonds, admission of testimony that one contractor was acting as agent of joint venture when he agreed to pay the rentals in order to retain possession of the equipment in joint venture was not erroneous admission of parol evidence to vary terms of written instrument, in view of fact that partial reduction to writing of oral rental agreement was ambiguous as to whether such contractor intended to obligate the joint venture or just himself. West's Ann.Gov.Code, §§ 4200–4208.

13. Evidence ⇐418

It is not a violation of the parol evidence rule to prove by extrinsic evidence identity of parties to an agreement, and parol evidence is competent to show whom parties intended should be bound or benefited.

Dally, Saulque & McGovern, Los Angeles, for appellant.

Neil D. Heily, Ralph E. McCarthy, Oxnard, for respondents.

WHITE, Presiding Justice.

Phoenix Assurance Company of New York, as defendant, appeals from the portions of a judgment against it for "the sum of $11,791.87 together with interest thereon at the rate of seven percent per annum from the 15th day of February, 1956, and together with the sum of $2,000.00 attorney's fees and cost of suit herein * * *"; and, as plaintiff in intervention, said Phoenix Assurance Company, appeals from the remainder of the judgment, which provides that plaintiffs "recover from the defendant Frank B. Durkee, Director of the Department of Public Works, * * * the sum of $11,791.87 together with interest thereon * * * (as above) and plaintiffs' cost of suit herein fixed at the sum of $216.02 * * * that the defendant Frank B. Durkee, * * * is hereby instructed to pay out of funds now in his hands and withheld in this action pursuant to the stop notice of the plaintiffs heretofore filed with him the sum of $50.00 as and for the attorney's fees for his attorney and the sum of $——— as and for his costs of suit incurred herein and the balance remaining out of the total of $14,739.84 so withheld by him he shall pay to the plaintiffs in partial satisfaction of the judgment hereby rendered against the defendant Phoenix Assurance Company and in full satisfaction of the judgment hereby rendered against said Frank B. Durkee * * * and that the Phoenix Assurance Company take nothing by its complaint in intervention."

The Director of Public Works and the other defendants, who were the contractors

on a road construction job near Julian, have not appealed.

The first cause of action is for the recovery of certain sums being held by the California Director of Public Works pursuant to a verified stop notice and notice to withhold filed by the plaintiffs. In that cause of action Phoenix intervened.

The second cause of action is for the recovery of equipment rental, repairs and attorneys fees as provided by Phoenix' bond.

The third cause of action alleged an account stated, which was found by the court not to have been proved and with which this appeal is not concerned.

An epitome of the facts which appear without conflict from the evidence follows.

Prior to April 18, 1955, the State of California, through its Department of Public Works, entered into a contract with defendant Ray Reed Company and Conrad Construction Company, a joint venture, for the grading and surfacing of three miles of state highway near Julian.

April 18, 1955, defendant Phoenix Assurance Company of New York executed, as surety, its labor and material bond in the penal sum of $116,043.56, and its faithful performance bond in the same amount, relative to such work with said joint venture as principal. Said bond was executed, delivered, approved and filed in accordance with the provisions of Sections 4200 through 4208 of the Government Code of the State of California.

The labor and materials bond is in evidence and is expressly conditioned upon the failure of the joint venture to pay "for any materials, provisions, provender or other supplies or teams, implements or machinery used in, upon, for or about the performance of the work contracted to be done, or for any work or labor thereon of any kind", up to the full penalty but not exceeding such amount. Said bond further provided that if suit were brought upon the bond the surety would pay a reasonable attorney's fee to be fixed by the court.

May 1, 1955, said joint venture commenced work constructing the road. It was part of the joint venture agreement of Ray Reed Company and Conrad Construction Co. that each would furnish certain equipment for use on the said job and that each would be paid a fair rental for the equipment so furnished. Conrad Construction Company furnished to the joint venture certain equipment, including the D8 Caterpillar Tractor, International TD 24 Tractor, and D12 Motor Grader involved in this action. All of said equipment was used on said job from June, 1955 (or before) until February 15, 1956.

In August, it appeared that the joint venture lacked money and would not be able to complete the contract without help. Appellant Phoenix, through its Attorney Dally, set up special funds and special accounting procedures, took from the joint venture its assignment dated August 24, 1955, of "all of their right, title and interest in and to any and all payments due or to become due" in connection with the contract for such highway construction, and left the joint venture to continue the work under the contract.

Prior to that time Conrad, individually and with another individual not a party to the action, purchased the equipment involved in the instant action subject to chattel mortgage and conditional sales contracts executed in 1953 and 1954, showing unpaid balances of the purchase prices totaling over $35,000.00. Plaintiffs were the original owners of said chattel mortgage and conditional sales contracts. They assigned them to the Bank of America with recourse. Conrad failed to make the payments required by said chattel mortgage and conditional sales agreements. There were personal and telephone conversations between the various parties to the action. The Bank demanded payment. Conrad said he could not pay. Conrad asked Phoenix to pay the amounts due the Bank and was told that its bond did not cover payments on the purchase price of equipment. The Bank demanded that plaintiffs pay to them the balance of Conrad's obligations theretofore assigned to the Bank with recourse, and, by its letter dated August 26,

1955, authorized plaintiffs to repossess the equipment. At the bottom of the Bank's said letter, L. B. Conrad, under date of August 27, 1955, signed an acknowledgment that said equipment was repossessed on the 26th day of August, 1955 "and that they now have possession of same under rental agreement".

September 16, 1955 Maulhardt Leasing Company by letter advised Attorney Dally, who was then acting as the representative of Phoenix in connection with the completion of the highway construction contract here involved, as follows: "In my office on the eighth of September, Mr. Reed and Mr. Conrad both agreed to rent the following of the equipment that has been repossessed by the bank from Mr. Conrad". In that letter it was stated that the rates "monthly for the month of September" are: for the TD24 International Tractor $1,250; for the D8 Tractor $1,000; and for the Model 12 Motor Grader $400 to $600. The letter was received in the office of Dally and Salque September 19, 1955. According to testimony of Reed, Conrad and Maulhardt, the rental for the Model 12 Motor Grader was finally set at $500.

October 13, 1955 is the date of the check signed by Henry E. Dally as "Trustee for Reed-Conrad Joint Venture on Julian Road Job", payable to Maulhardt Leasing Company and Bank of America, Oxnard Branch for $2,000, bearing a notation in the lower left hand corner "Payment on Equipment of L. B. Conrad", and endorsed by both payees October 17, 1955. Said check was mailed to Maulhardt Equipment Company in a letter signed by Mr. Dally, stating that it is a payment "made on behalf of L. B. Conrad for amounts due to the co-payees" and requesting "a complete description of the property that is being purchased by Mr. L. B. Conrad".

Phoenix' Exhibit C is a chattel mortgage to it executed under date of October 25, 1955, by Conrad Construction Company and L. B. Conrad, to secure payment of a promissory note for $10,000, payable on demand. The note was executed by Conrad Construction Company and Ray Reed Company and by both L. B. Conrad and Ray Reed, as individuals. The chattel mortgage covered all the equipment for the rental of which this action was prosecuted by Maulhardt.

October 26, 1955, L. B. Conrad, on the letterhead of Conrad Construction Co., wrote Maulhardt Equipment Co., in compliance with their recent telephone conversation and in an effort to clarify the status of said equipment, that said equipment "is in the custody of, and is currently being used by L. B. Conrad, and is at present leased to the Ray Reed Co. and Conrad Construction Co., a joint venture, on a bare rental agreement.

"The above named joint venture is operating a highway job at Julian, California, for the California Division of Highways, * * * where the equipment is presently located.

"You are authorized to make claim against the Joint Venture referred to above for any equipment rental money accruing to the benefit of L. B. Conrad and the Conrad Construction Co., and the said Joint Venture is authorized to pay such rental money to the Maulhardt Equipment Co. as soon as the same becomes available. Any money so paid to the Maulhardt Equipment Co., shall be credited to the account of L. B. Conrad and the Conrad Construction Co. and is for the purpose of liquidating past due accounts under our existing leasing agreement."

Said letter of October 26th indicates that a copy was sent to Attorney Dally.

Under date of November 4, 1955, L. B. Conrad signed a request addressed to Phoenix, approved by Ray Reed, that "any payments now due or to become due for any equipment or personal property loans or conditional sales contracts with Bank of America, Oxnard Branch and/or Maulhardt Equipment Co. and/or Maulhardt Leasing Co." be made out of the joint venture funds or progress payments "or from such funds as you may advance for the operation of the Julian Road Job, and expressly approved "the payment of $2,000

you have made to Maulhardt Leasing Co. and Bank of America, Oxnard Branch". Said request of November 4th is a handwritten document, apparently in the writing of neither of the signers, Conrad and Reed.

November 20, 1955 is the date of Phoenix' Exhibit D, which is another mortgage, by the same mortgagors to the same mortgagee and of the same equipment, to secure payment of a demand note for $54,731.87, executed in the same manner as the $10,000 note.

Under date of November 28, 1955, Maulhardt rendered a statement showing balance due from Reed-Conrad for parts and repairs to the rented equipment.

January 3, 1956 is the date of the check for $2,000 payable to Maulhardt Leasing Company and Bank of America, Oxnard Branch, signed by Thomas W. McNally and Henry E. Dally, bearing a notation in the lower lefthand corner "Julian Road Job Special Account", and endorsed by said payees January 6, 1956. Mr. Dally's letter dated January 5, 1956, transmitted said check to Maulhardt Equipment Co., and stated that "This payment is made on behalf of L. B. Conrad for amounts due to the co-payees".

January 10, 1956, John Maulhardt, as manager of Maulhardt Equipment Company, wrote Mr. Dally regarding the Reed-Conrad Joint Venture, thanking him for a $2,000 check "payable to Maulhardt Leasing Company and Bank of America, Oxnard Branch", stating that he would like future checks made to the Leasing Company only, mentioning their telephone conversations stating that "to date" only $4,000 had been received to apply on the "rental agreement with Reed and Conrad", that the rental from September 1, 1955 to January 1, 1956 was $11,000, leaving a balance due of $7,000, and requesting a written verification of the above sums due and payable to Maulhardt Leasing Company.

March 1, 1956 Maulhardt Equipment Company mailed a letter and statement to Mr. Dally showing $11,125 balance owing to it from Reed-Conrad Joint Venture for rentals from September through February 15th, when the equipment was returned to Maulhardt, and again asking that the money be paid to "Maulhardt Leasing Company only".

May 8, 1956 stop notice showing balance due to plaintiffs of $11,791.87 for rentals and repairs of said equipment, was served upon the Department of Public Works.

Appellant urges that the judgment should be reversed because "the findings do not support the judgment". In its Opening Brief, appellant quotes Finding X, "That all allegations of the pleadings on file herein consistent with the foregoing are found to be true and all allegations inconsistent with the foregoing are found to be not true". In this respect, appellant cites and relies upon decisions wherein findings similar to the one above quoted were discussed. Andrews v. Cunningham, 105 Cal.App.2d 525, 233 P.2d 563; Krug v. F. A. Lux Brewing Co., 129 Cal. 322, 61 P. 1125; Kling v. Gustason, 101 Cal.App. 58, 281 P. 407; In re Estate of Ramsey, 107 Cal. App.2d 372, 237 P.2d 20; McKannay v. McKannay, 68 Cal.App. 709, 230 P. 218; Hall v. Mitchell, 59 Cal.App. 743, 211 P. 853; and Holt Mfg. Co. v. Collins, 154 Cal. 265, 97 P. 516.

The cases last above cited, however, hold in effect that such an omnibus finding is ineffective for any purpose. It must be entirely disregarded and, if the other findings are sufficient to support the judgment, it should be affirmed. Hall v. Mitchell, supra, 59 Cal.App. at page 747, 211 P. at page 855.

[1] If the findings on one count are sufficient, faulty findings on the unsupported count may be disregarded. Peterson v. Lang, 144 Cal.App.2d 466, 472, 301 P.2d 397; Baird v. Ocequeda, 8 Cal.2d 700, 703, 67 P.2d 1055; Crogan v. Metz, 47 Cal.2d 398, 403, 303 P.2d 1029.

[2] If, in the instant action, other findings are sufficient in themselves, the addition of the uncertain catchall finding above quoted lends no support to appellant's position. Mercurio v. Dept. of Alcoholic

Beverage Control, 144 Cal.App.2d 626, 635, 636, 301 P.2d 474; Cirlincione v. Cirlincione, 104 Cal.App.2d 35, 40, 230 P.2d 642; and Roloff v. Hundeby, 105 Cal.App. 645, 650, 288 P. 702.

[3] A failure of the court to make a finding on any material issue pleaded by either party may entitle an appellant to a reversal of the judgment. Fairchild v. Raines, 24 Cal.2d 818, 830, 151 P.2d 260; Saracco Tank & Welding Co. v. Platz, 65 Cal.App.2d 306, 320, 150 P.2d 918; Taylor v. Taylor, 192 Cal. 71, 80, 81, 218 P. 756, 51 A.L.R. 1074. In order to justify such reversal, however, the issue upon which no finding was made must be one necessary to the decision, and one upon which, from the evidence before the court, a finding favorable to appellant could have been made. Krum v. Malloy, 22 Cal.2d 132, 136, 137 P.2d 18.

With these rules in mind, we have examined the findings in the instant action, which include the following.

Conrad was, at all times mentioned in the complaint, the duly authorized representative of and agent for the Reed-Conrad Joint Venture. The State of California, before September 1, 1955, entered into the contract with said joint venture. Plaintiffs have not been paid the amount due them, and there is now "a balance due and owing on such rental agreement and repair work of $11,791.87, which amount the said defendants, and each of them, have wholly failed and refused to pay to the plaintiffs." Plaintiffs duly filed with the Director of Public Works notice to withhold said sum.

Prior to August 26, 1955, Conrad Construction Co. had possession of the equipment involved in this action; said equipment was subject to chattel mortgage and/or conditional sales contracts which had been entered into with plaintiffs and by plaintiffs assigned to the Bank of America; payments were on said 26th day of August, 1955, several months in default, entitling the holder of said mortgage and contracts to repossess said equipment; on said date the Bank of America "authorized the plaintiffs to repossess said equipment"; plaintiffs did repossess it on the highway job at Julian and "at the same time and place and immediately thereafter" entered into an agreement leasing the said equipment to the Reed-Conrad Joint Venture.

[4] Thereafter and pursuant to said leasing agreement there became due to plaintiffs $15,125 for rental of said equipment up to February 15, 1956, and $666.87 for repairs thereto; any rights of Conrad under said chattel mortgage and/or conditional sales contracts prior to August 26, 1955, were waived by Conrad's expressly consenting to the plaintiffs' constructive repossession and the entering into the new leasing agreement as the agent of the joint venture.

The $4,000 paid by Phoenix to the plaintiffs "was paid to and accepted by the plaintiffs as rental on said equipment and was by the plaintiffs paid to said Bank of America and applied by the Bank on the obligations of plaintiffs to the Bank; said joint venture by consenting to the constructive repossession and making the leasing agreement with plaintiffs waived any right it might have had to assert that the $4,000 was to be applied upon the past due payments on Conrad's chattel mortgage and/or conditional sales agreements.

The defendant Phoenix did not prove that it had paid out more than its obligation under its labor and materials bond; its two bonds aggregated $232,087.12; it paid out moneys totaling $226,770.87 "without in any way apportioning the same on its own books as between the two bonds, such contributions going toward the completion of the work of said job"; defendant Director of Public Works holds on plaintiffs' stop order $14,739.84 due from the State to the Joint Venture under the terms of their contract; defendant Phoenix has an assignment of those funds from said joint venture "which assignment cannot operate to impair the plaintiffs' right to the funds".

Defendant Joint Venture and L. B. Conrad have failed to pay for the rental and

repairs; demand has been made therefor from said defendant Joint Venture and from said defendant Phoenix; said debt has not been paid and there is now due from said defendants to the plaintiffs $11,791.97, together with interest thereon from February 15, 1956.

[5–7] Plaintiffs have been required to engage an attorney to commence and prosecute this action upon the bond of defendant Phoenix and a reasonable fee should be allowed to plaintiffs for such services; a reasonable fee to be allowed to the attorney for the plaintiffs is $2,000; and plaintiffs have failed to prove an account stated between themselves and the defendant Phoenix.

The findings hereinbefore epitomized are followed by Finding numbered X, heretofore quoted as a portion of appellant's specification of reversible error. We consider the findings in the instant action sufficient to render any uncertainty arising from the omnibus finding entirely immaterial.

[8] Appellant urges that the court's failure to find that the obligation of its bond was such as to include payment by it of repairs is the failure to find upon a material issue which requires reversal of the judgment against it. There is a finding that $666.87 is due from appellant to respondents for repairs, and the judgment includes $666.87 for repairs. The condition of appellant's bond is hereinbefore quoted. The rentals and repairs included in the judgment, under the facts found, were a part of the necessary cost of providing implements and machinery used in the performance of the contract for road construction, which contract is referred to in said bond. Sherman v. American Surety Co., 178 Cal. 286, 289, 173 P. 161. We are convinced that appellant was not misled, or in any other manner prejudiced, by any failure to find in this respect.

[9] Appellant complains that Finding Number III is insufficient in that, from its language, that "immediately" after plaintiffs repossessed said equipment on August 26, 1955 a leasing agreement was entered into by the plaintiffs with the defendant joint venture, it is uncertain whether the court found that said leasing contract was made on August 26th or on September 1st. There is evidence as to such an agreement on each of those dates, and the material fact in issue was the making of the agreement, not necessarily the exact time thereof, since, according to all the evidence the rental was to start on September 1, 1955.

Appellant's further specification of insufficiency of said Finding Number III is that it is uncertain as to who was the holder of the chattel mortgage and conditional sales agreements at the time of the repossession of the equipment. The finding is that Conrad was in default, that the holder of the instruments was entitled to repossess the equipment, that the Bank authorized plaintiffs to so repossess the equipment and that plaintiffs did repossess it on August 26th. The evidence is that the equipment had been in the possession of Conrad, one of the joint venturers, who was furnishing it to the joint venture for use on said Julian road construction, and that Conrad was in default; that originally plaintiffs were the owners of said chattel mortgage and conditional sales contracts; that plaintiffs had assigned said papers "with recourse" to the Bank of America and that the Bank, in the event of Conrad's default, had the right to and did look to plaintiffs for payment in full of the unpaid balances thereof.

Appellant, in its Opening Brief, states that "Uncertainty of the finding of fact in this regard is prejudicial to the appellant because one of its defenses to the action, both as defendant and plaintiff in intervention, was based on the theory and ultimate fact that the plaintiffs never had any right, title, interest or possession in and to the equipment for which they claimed rent".

[10] The court found that the joint venture did on or about August 26th agree to pay a rental to plaintiffs for the use of said equipment from and after September first. The appellant Phoenix, as surety, stands in the place of the joint venture bailee, and Phoenix may not question the

title of the bailor of the joint venture. In the instant action, as in Triggs v. Zicovich, 117 Cal.App.2d 768, 771, 257 P.2d 60, which was an action to recover truck rentals, the bailee, having taken possession of said property pursuant to a rental agreement, neither such bailee, nor his surety (except under certain additional circumstances not here present), is concerned with the bailor's title or lack of title.

[11] Appellant further contends that the findings are insufficient in that it cannot be ascertained therefrom what if any balance of its labor and materials bond remained in its hands. Under the findings, however, it appears that appellant's accounts showed that expenditures had been made and recorded against its two bonds (one for labor and materials and the other for faithful performance of the same job) without segregation; that there remained not only over $5,000 in its own hands, but also the $14,739.84 held by the Director of Public Works pursuant to plaintiffs' stop order. Manifestly, said funds will more than cover the amount of the judgment in this action.

The reasoning upon which appellant bases its argument that the $2,000 attorney's fee awarded by the court is excessive is that there is no finding that any certain portion of the bond under the terms of which said attorney's fee was granted remained unexpended, and consequently only such portion not so expended could be collected, which unexpended portion (appellant states) might not exceed $100, for the collection of which the fee of $2,000 awarded would be exorbitant and an abuse of discretion. Since, according to the findings, it seems clear that the surety is still obligated in an amount ample for the payment of the judgment, we need not be concerned with the court's failure to so find in exactly the words sought by appellant.

[12] Appellant urges that the trial court committed prejudicial error in admitting parol evidence to vary the terms of a written instrument. This claim is made with respect to the rental agreement, which, without conflict in the evidence, was shown to be an oral agreement fully performed by plaintiffs, and which was partially reduced to writing signed by Conrad only. As observed by the court during the trial, the terms of the first two paragraphs of said writing appeared to refer to an obligation of the joint venture, while the third paragraph cast some doubt upon that interpretation and made it seem possible that Conrad's intention was to obligate himself alone. The testimony in the record from which it appears that it was the joint venture which needed the equipment and used the equipment during the time for which the instant action seeks to recover rentals is without conflict. Testimony that Conrad was acting as the agent of the joint venture when he agreed to pay the rentals in order to retain possession of the equipment in the joint venture was heard over appellant's objection and is now cited as prejudicial error requiring the reversal of the judgment.

[13] It has been held repeatedly, that it is not a violation of the parol evidence rule to prove by extrinsic evidence the identity of the parties to an agreement, or, as said in Escondido Oil & Development Co. v. Glaser, 144 Cal. 494, 499, 77 P. 1040, 1041, quoting from Southern Pacific Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 371, 50 P. 650, "parol evidence is competent to show whom the parties intended should be bound or benefited".

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

168 Cal.App.2d 642

Mary WARD, Plaintiff and Respondent,

v.

Dalton C. WRIXON, also known as Dalton Clarence Wrixon, Defendant and Appellant.

Civ. 9437.

District Court of Appeal, Third District, California.

March 12, 1959.

Rehearing Denied April 10, 1959.

Hearing Denied May 6, 1959.

Action by deceased's housekeeper for judgment that she was entitled to life estate in certain of decedent's real property on basis of alleged oral contract. The Superior Court, Sacramento County, Albert H. Mundt, J., rendered judgment for housekeeper and surviving joint tenant of deceased appealed. The Third District Court of Appeal, Schottky, J., held that where deceased had agreed with woman that if she rendered services as housekeeper during his lifetime she would be given use of certain property during her lifetime so long as she remained single, and woman acting in reliance on assumption that arrangements had been completed to carry agreement into effect performed services of extraordinary or exceptional nature that enriched decedent's estate and that were not compensable in money, woman was entitled to life estate in property so long as she remained single.

Affirmed.

1. Frauds, Statute of ⇐152(1), 158(1)

In action by housekeeper of decedent for judgment that she was entitled to a life estate in certain of decedent's real property on basis of alleged oral contract, it was necessary for housekeeper to prove and plead facts which would give rise to an estoppel in view of fact that otherwise enforcement of contract would be barred by statute of frauds. West's Ann.Civ. Code, § 1624; West's Ann.Code Civ.Proc. § 1973.

2. Frauds, Statute of ⇐144

Doctrine of estoppel is applied to prevent unconscionable injury that would result from refusal to enforce oral contract in situations where one party has been induced to change his position seriously in reliance on contract or in the unjust enrichment that would result if contract were not enforced, and where no unconscionable injury exists or where remedy of quantum meruit for services is adequate, courts will not find an estoppel.

3. Estoppel ⇐52

Whether or not elements of estoppel exist depends on particular factual context.

4. Specific Performance ⇐45

The mere rendition of personal services is not sufficient to take a contract from operation of statute of frauds in an action for quasi-specific performance unless services are of such peculiar, extraordinary, or exceptional character that it is impossible to estimate their value in money.

5. Frauds, Statute of ⇐144

Fact that woman gave up her home with her son to enter home of man and perform household services for man was not sufficient to give rise to an estoppel such as would take alleged oral contract by man to leave woman a life estate in certain real property from operation of statute of frauds. West's Ann.Civ.Code, § 1624; West's Ann.Code Civ.Proc. § 1973.

6. Frauds, Statute of ⇐158(4)

In action by housekeeper of decedent for decree that she was entitled to life estate in certain real property of decedent on basis of alleged oral agreement, evidence sustained findings that decedent agreed with housekeeper that if she would render services during his lifetime she, in consideration thereof, would be given use of certain property during her lifetime so long as she remains single, that services performed by housekeeper were of an extraordinary or exceptional nature, that services enriched decedent's estate, that services were not compensable in money and that unconscionable injury and unjust enrichment would result from refusal to enforce such agreement. West's Ann.Civ.

Code, § 1624; West's Ann.Code Civ.Proc. § 1973.

7. Frauds, Statute of ⇐144

Where man and woman entered into oral agreement to effect that if woman rendered services as housekeeper to man during man's lifetime she would be given use of certain property during her lifetime so long as she remained single and woman acting in reliance on assumption that arrangements had been completed to carry agreement into effect performed services of extraordinary or exceptional nature that enriched man's estate and that were not compensable in money, and unconscionable injury and unjust enrichment would result from refusal to enforce agreement upon death of man, an estoppel arose taking the oral contract from operation of statute of frauds and woman, so long as she remained single, was entitled to a life estate in property, which decedent had placed in joint tenancy with another. West's Ann. Civ.Code, § 1624; West's Ann.Code Civ. Proc. § 1973.

W. I. Follett, Oakland, for appellant.

Horace E. Dunning, Sacramento, for respondent.

SCHOTTKY, Justice.

Respondent above-named commenced an action against defendant praying judgment that it be decreed she was entitled to a life estate in certain real property. The amended complaint alleged in substance that on or about February 14, 1953, Perry A. Snideman verbally agreed with Mary Ward, respondent, that if she lived with him until his death, rendered to him services as a housekeeper, and contributed her pension of $59 a month, he would, in the event he predeceased her, give her a life estate in a two-story apartment-residence in Sacramento, California, together with the rents and profits therefrom; that Mary Ward relied on the promise of Snideman, performed all the agreed stipulations, and continued the relationship until Snideman's death on December 17, 1955; that Snideman assured Mary Ward and falsely represented to her that he had effected the transfer of a life estate to her; that Snideman, on March 11, 1955, transferred the property in question into joint tenancy with Dalton Clarence Wrixon, appellant. The complaint alleged that no property or estate Snideman's of any appreciable value remained at the time of his death.

Appellant in his answer denied the material allegations of the complaint and also pleaded the statute of frauds.

Upon the conclusion of the trial, the trial court found that the agreement existed; that respondent performed her part of the agreement in reliance upon decedent's promise to convey the promised life estate; that the services rendered were not measurable by pecuniary standards and were not intended to be so measured; that decedent violated his oral agreement by transferring the property in joint tenancy with appellant; that respondent never received any compensation for her services; that decedent assured respondent he had arranged his affairs in accordance with the verbal agreement, and respondent relied upon this assurance. It was further found that respondent was without adequate remedy at law and that unconscionable injury would result to respondent and unjust enrichment would result to appellant unless decedent's oral promise was enforced.

The court concluded that appellant was estopped to assert the statute of frauds, that respondent was entitled to a life estate in the property so long as she remains single, and that she receive the rents and profits therefrom.

Judgment was entered in accordance with said findings and this appeal is from said judgment.

The record shows that respondent was 65 years old at the time of the alleged oral agreement. She was not acquainted with the decedent until the day the agreement was first discussed. The decedent, then approximately 75 years of age, told re-

spondent, "I will give you a home the rest of your life. This will be your home as long as you live, but I won't pay no wages but I will see you will have a home for the rest of your life if you make agreement on this." Respondent then stayed all night, and in the morning they got up and respondent got breakfast. Decedent told respondent, "Now, you think this over. I will get in touch with this other lady, and I will let you know." Nine or ten days later decedent called respondent over to his house and told her, "I guess you have a job. * * * [A]s long as I got you to keep house, why this will be your home. The basement is rented now. I am getting $45.00 a month for it. You keep that and rent it. That is your pay for all utilities. You collect the rent, you pay all the utilities and whatever repairs has to be done on the house, and then anywheres reasonable will be yours. We will have to pay it out of that rent money, and the balance goes in the bank, but after you are gone the home belongs to my stepson and stepdaughter which isn't more than right because their mother helped me to make it."

On March 1, 1953, or thereabouts, Snideman sold his Sacramento business and suggested moving to the country, and Mrs. Ward expressed a desire to go with him. She accompanied Snideman in his search for a suitable building site until River Pines was decided upon.

The new homesite was unimproved and Mrs. Ward assisted Snideman in clearing it. She then assisted Snideman and a carpenter in the erection of a garage on the premises. She helped erect a rock wall on the homesite.

They lived in a neighbor's bunkhouse, and Mrs. Ward cooked their meals in the garage which had been built on the homesite. Then Mrs. Ward assisted in the construction of the home at River Pines by driving nails, laying the floor, "oiling and stuff on the porch that had to be for the casing and all that there, and I done all the painting, and papered and put linoleum tile in around the kitchen and the bathroom, and I done all that, and we laid the linoleum in the kitchen."

In constructing the rock wall she used two spades, "* * * I was pulling on and he had a big crowbar and he was pushing on and I was guiding." She helped haul dirt and helped level off the yard. Mrs. Ward worked from 7:00 a. m. until dark when constructing the home, and she cooked all the meals in the garage on an electric plate until the home was completed the 1st of July, 1953.

During the first year at River Pines, Mrs. Ward "helped clean up, fix up, painting and one thing inside, and I done a lot of canning. I canned over 500 quarts of fruit and things that he bought. He was a very good provider." In addition, Mrs. Ward did "* * * all the cooking and all the washing, and kept the house up. I took care of him. I shaved him and trimmed his hair up. He didn't want to go to any barber, * * *".

Snideman never paid Mrs. Ward for any of her services, and she never expected any pay on account of the agreement that she would receive no wage "but he would see that home was mine in Sacramento as long as I lived, but after I was gone it would go to his step children." Mrs. Ward continued to live at River Pines throughout 1953 and 1954.

Most of the conversation about the arrangement with Snideman was had in Sacramento. After coming to River Pines, the only thing he said was, "You have your home in Sacramento. Anything happens to me you move back to Sacramento." She discussed with decedent the fact that she should have "something in writing" when the agreement was first made, but "he said his word is good. I said, 'That is true, your word might be good, if anything happens I wouldn't have anything to show for it.' He said, 'My stepson is honest. You don't have to worry about him.'"

In February of 1954, Snideman's health began to fail and respondent had more work to do in caring for him. On October 15, 1955, at a time when Mrs. Ward became

concerned because Snideman refused to take his heart medicine, and inquired of him what she was going to do if anything happened to him, he said, "You have nothing to worry about. You have your home in Sacramento there. Everything is taken care of." He said, "You have nothing to worry about. I don't know what you are worrying about."

Snideman was taken to the hospital in Sacramento on the 26th of November, 1955, and except for the time spent by Mrs. Ward taking care of the domestic duties up at River Pines, she was with Snideman "every day from early morning to late in the evening every day from that time until he passed away."

In the deposition of John T. Snideman, decedent's brother, it was disclosed that at River Pines in October of 1955, Perry Snideman stated that "Mary is provided for the rest of her days, providing she stays single, in the home at Sacramento on 'J' or 'I' Street." "There is papers in my lock box, a will to that effect. It is locked up. And when the right time comes, why it is all there." John Snideman stated that decedent had told him what kind of work Mrs. Ward was doing for decedent, namely, "Housekeeper and taking care of him and working like a horse helping build the house and place."

Cross-examination of appellant disclosed that Mrs. Ward was treated "as one of the family;" that his step-father, decedent, was very fond of her, and that he himself, "thought very much of her," and that "We all liked Mary, took quite a liking to her."

Appellant was a tenant of the safe deposit box decedent had at the Bank of America at Twelfth and K Streets, Sacramento. Both the River Pines property and the Eye Street property are in joint tenancy and do not include Mary Ward as a tenant. The only other property owned by decedent at the time of his death was the automobile (a 1952 Chevrolet, the pink slip to which had theretofore been signed over to appellant), four rooms of furniture at the River Pines house (excepting a "nominal amount" of this furniture claimed by Mrs. Ward). Appellant testified the only estate of decedent he had accumulated since decedent's death had been the two houses (held in joint tenancy), the automobile, a ring and a wrist watch.

In support of his contention that the evidence does not support the findings and judgment, appellant relies strongly on several cases.

The first is Murdock v. Swanson, 85 Cal. App.2d 380, 193 P.2d 81, in which a demurrer to the complaint was sustained. The first cause of action alleged that in September, 1941, the plaintiff and the decedent, who was then 74 years of age, entered into an oral agreement whereby it was agreed that the plaintiff would care for the decedent, render personal services to her and furnish her with certain goods during the remainder of her lifetime; that she would assist her in caring for her property to the extent that might be necessary to preserve the property and prevent its sale; and that, if necessary, she would care for the decedent in her own home or in plaintiff's home to the end that she should not be sent to an institution. It was further alleged that in consideration of all these things the decedent agreed to make and leave at her death a will leaving her ranch and all her other real and personal property to the plaintiff; and that, in making this agreement, both parties understood and agreed that the things to be done by the plaintiff would not be susceptible of pecuniary compensation and that it would be impossible to compensate plaintiff except in the manner agreed upon.

It was also alleged that in September, 1941, the plaintiff commenced to fulfill her part of this agreement; that she made trips from her home to the home of decedent, a distance of many miles, on the average of twice a day; that she performed various personal services for the decedent and worked on her ranch; that she furnished laborers from time to time to construct fences and do other work on the ranch; that she furnished decedent with food, clothing, drugs and medicine and other ar-

ticles, including a milk cow and other animals for her ranch; that she acted as sole companion to the decedent; and that these various services continued until the decedent died. It was further alleged that plaintiff gave up a business because it became necessary to spend so much time with the decedent in order to comply with the agreement. It was also alleged that she neglected many of her marital duties because of carrying out the agreement, and that she did not receive any compensation for the services. She asked for specific performance of the oral agreement. In affirming the judgment, the court said at page 385 of 85 Cal.App.2d, at page 84 of 193 P.2d:

"There is no merit in the further contention that the services rendered by the appellant were not susceptible of pecuniary compensation and that, as alleged, this situation was recognized and agreed upon by the parties to the oral agreement. The allegation to that effect is merely a conclusion and the facts alleged clearly show that they were all personal services and articles furnished, and that they are not of so extraordinary or exceptional character 'as in contemplation of law, cannot be compensated for in money.' "

Also cited by appellant is Tompkins v. Hoge, 114 Cal.App.2d 257, 250 P.2d 174, in which one of the grounds of decision was that equity denies relief when the services are compensable in damages or in quantum meruit. In reversing a judgment in favor of plaintiff the court said at page 265 of 114 Cal.App.2d, at page 179 of 250 P.2d:

"* * * Plaintiff here alleged she gave up a salary of $2,500 per year and that she could have retired as a school teacher upon a pension of about $50 per month when she had attained the age of 70 years, or in 1947, and that defendant was aware of that fact. The detriment suffered by plaintiff in resigning her position, with respect both to loss of salary and pension rights, would have been proper elements of damage in an action to recover for the value of plaintiff's services. The fact that plaintiff gave up association with her friends and relatives in New York was comparable to the neglect of marital, social and household duties and absence from her home and husband, alleged by the plaintiff in the Murdock case. There was no finding that by reason of the facts found plaintiff suffered detriment in coming into the home of defendant that could not be compensated for in money. We think such a finding would have had no basis in the evidence. Anyone who goes into the home of another, there to reside permanently, gives up associations and ways of life for others that may turn out to be less desirable. Inability to be restored to the former status is not a good ground for equitable relief unless to deny it would operate as a fraud upon the party seeking relief. This is not such a case and was not considered by the trial court to be one. Such detriment as plaintiff suffered was compensable in damages and her claim therefor was one to be prosecuted at law and not in equity. See Zaring v. Brown, supra, 41 Cal.App. 2d 227, 106 P.2d 224."

Also cited by appellant is Chahon v. Schneider, 117 Cal.App.2d 334, 256 P.2d 54, which was an action for quasi-specific performance of an oral contract to transfer property by will. Defendant's demurrer to the complaint was sustained and plaintiff appealed from the judgment entered. Plaintiff alleged in her complaint that (1) in 1943, she made an agreement with Marcelin Berge, then 60 years of age, to take him into her home and furnish him with board, room, and laundry, for $40 per month. In addition to caring for her nine-room home, taking care of Berge's personal needs and acting as housekeeper in his personal room, plaintiff worked in a laundry and returned from work each noon to prepare Berge's lunch. Berge continued payment of $40 per month and remained in plaintiff's home until July, 1947, when her husband died. Shortly after moving into her home, Berge became demanding, attempted to dictate the menu for guests of plaintiff and her husband, and resented intrusions in plaintiff's home which he came to consider his own.

(2) In 1946 Berge fractured his leg, was hospitalized for about six months, and submitted to extended bone grafts and surgery. He returned to plaintiff's home and went through an additional six months' period of convalescence. During this period plaintiff was required to furnish him with extensive nursing care in addition to room, board, and laundry. Because of the increased burden plaintiff and her husband desired to terminate the relationship, but did not do so, and agreed to continue the relationship, because Berge orally promised plaintiff that if she would continue to care for him until his death he would compensate her in his will, in that he would leave her a certain bank account, which then contained approximately $46,000, and would leave the remainder of his estate, consisting of two other bank accounts, to the defendant. Plaintiff agreed to permit Berge to remain and to care for him and render said services for him upon the terms proposed by him. In making this agreement the parties did not contemplate that the services appellant was to perform were to be compensated by the $40 monthly payments or other pecuniary compensation; that the services were so personal and unusual in character that the parties did not intend they should be compensated on a basis of any specific amount in monthly payments. Pursuant to the agreement, and in reliance upon Berge's promise, plaintiff performed the following services until Berge died: washing, ironing, cooking of special foods, mending, sewing, cleaning and other household tasks; continued nursing care, including massaging his back and legs and helping him to walk about the house; doing all his personal errands outside the house; and taking him along on week-end trips.

(3) Upon the death of her husband in 1947, it was no longer necessary for plaintiff to maintain such a large home and she desired to give up working in the laundry, sell her home and enjoy a more complete social life than was possible while continually remaining at home caring for decedent. For these reasons, in the fall of 1948, she advised decedent he would have to find other quarters. Decedent repeated his promise to will her the bank account, urged her not to sell, and requested her to continue caring for him. In reliance upon these promises appellant was induced to continue caring for decedent until his death, in spite of the fact that his demands increased, in that he refused to give appellant messages left by her friends, discouraged her friends from calling at the house, and attempted to dominate her social and business affairs.

(4) Berge was again hospitalized April 13, 1950, and while at the hospital made a will bequeathing $1,000 to plaintiff and giving all the residue of his assets to the defendant. He died January 19, 1951, without changing that will or making a new one.

In affirming the judgment the court said at page 339 of 117 Cal.App.2d, at page 57 of 256 P.2d:

"It does not appear to us that plaintiff made such a change of position or that the services she rendered were so peculiar that she could not be compensated in terms of money. Recognition of the invalidity of the contract and consequent denial of enforcement of its provisions, would neither unconscionably injure the plaintiff nor unjustly enrich the decedent, his estate, or his legatee, were plaintiff to pursue her legal remedy of recovering from the estate the reasonable value of her services, less such amount as may already have been paid her.

"The facts of our case are quite like those in Jirschik v. Farmers & Merchants Nat. Bank, 107 Cal.App.2d 405, 237 P.2d 49, in which a demurrer to a similar complaint was sustained. There the plaintiff rendered services as a housekeeper and nurse for a person who orally promised to will her $15,000. Said the reviewing court: 'In this case the most that can be drawn from plaintiff's complaint is that while she was employed and paid by decedent she could have secured work at a higher rate of pay, with certain social security and unemployment benefits; and

that, relying upon decedent's promise to leave her $15,000 in his will—which promise he did not keep—she stayed with him, did not earn additional money in defense work, and did not secure the social benefits mentioned.

"'This does not show unconscionable injury sufficient to estop defendants from interposing the bar of the statute of frauds. Nor does it show unjust enrichment of decedent.

"'The complaint does not allege that plaintiff was paid less than the reasonable value of her services. And if the wages paid plaintiff had been less than they were reasonably worth, an action in quantum meruit for the difference would prevent any unjust enrichment of decedent, or of his estate. Monarco v. Lo Greco, supra [35 Cal.2d 621, 220 P.2d 737]; Ruinello v. Murray, supra [36 Cal.2d 687, 227 P.2d 251].' 107 Cal.App.2d at pages 406–407, 237 P.2d at page 50. A petition for a hearing by the Supreme Court was denied."

Respondent in reply relies upon several cases which she contends support the judgment. The principal one is Monarco v. Lo Greco, 35 Cal.2d 621, 220 P.2d 737, 738. The facts of that case as stated in the opinion are as follows:

"Natale and Carmela Castiglia were married in 1919 in Colorado. Carmela had three children, John, Rosie and Christie, by a previous marriage. Rosie was married to Nick Norcia. Natale had one grandchild, plaintiff Carmen Monarco, the son of a deceased daughter by a previous marriage. Natale and Carmela moved to California where they invested their assets, amounting to approximately $4,000, in a half interest in agricultural property. Rosie and Nick Norcia acquired the other half interest. Christie, then in his early teens, moved with the family to California. Plaintiff remained in Colorado. In 1926, Christie, then 18 years old, decided to leave the home of his mother and stepfather and seek an independent living. Natale and Carmela, however, wanted him to stay with them and participate in the family venture. They made an oral proposal to Christie that if he stayed home and worked they would keep their property in joint tenancy so that it would pass to the survivor who would leave it to Christie by will except for small devises to John and Rosie. In performance of this agreement Christie remained home and worked diligently in the family venture. He gave up any opportunity for further education or any chance to accumulate property of his own. He received only his room and board and spending money. When he married and suggested the possibility of securing some present interest to support his wife, Natale told him that his wife should move in with the family and that Christie need not worry, for he would receive all the property when Natale and Carmela died. Natale and Carmela placed all of their property in joint tenancy and in 1941 both executed wills leaving all their property to Christie with the exception of small devises to Rosie and John and $500 to plaintiff. Although these wills did not refer to the agreement, their terms were agreed upon by Christie, Natale and Carmela. The venture was successful, so that at the time of Natale's death his and Carmela's interest was worth approximately $100,000. Shortly before his death Natale became dissatisfied with the agreement and determined to leave his half of the joint property to his grandson, the plaintiff. Without informing Christie or Carmela he arranged the necessary conveyances to terminate the joint tenancies and executed a will leaving all of his property to plaintiff. This will was probated and the court entered its decree distributing the property to plaintiff. After the decree of distribution became final, plaintiff brought these actions for partition of the properties and an accounting. By cross-complaint Carmela asked that plaintiff be declared a constructive trustee of the property he received as a result of Natale's breach of his agreement to keep the property in joint tenancy. On the basis of the foregoing facts the trial court gave judgment for defendants and cross-complainant, and plaintiff has appealed."

In affirming the judgment the court said at page 623 of 35 Cal.2d, at page 739 of 220 P.2d:

"The controlling question is whether plaintiff is estopped from relying upon the statute of frauds (Civil Code, § 1624; Code Civ.Proc. § 1973) to defeat the enforcement of the oral contract. The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract (citing cases), or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute. (Citing cases.) In many cases both elements are present. Thus not only may one party have so seriously changed his position in reliance upon, or in performance of, the contract that he would suffer an unconscionable injury if it were not enforced, but the other may have reaped the benefits of the contract so that he would be unjustly enriched if he could escape its obligations. (Citing cases.)

"In this case both elements are present. In reliance on Natale's repeated assurances that he would receive the property when Natale and Carmela died, Christie gave up any opportunity to accumulate property of his own and devoted his life to making the family venture a success. That he would be seriously prejudiced by a refusal to enforce the contract is made clear by a comparison of his position with that of Rosie and Nick Norcia. Because the Norcias were able to make a small investment when the family venture was started, their interest, now worth approximately $100,000 has been protected. Christie, on the other hand, forebore from demanding any present interest in the venture in exchange for his labors on the assurance that Natale's and Carmela's interest would pass to him on their death. Had he invested money instead of labor in the venture on the same oral understanding, a resulting trust would have arisen in his favor. Byers v. Doheny, 105 Cal.App. 484, 493–495, 287 P. 988; see, Restatement, Trusts, § 454, comment J., illus. 12. His twenty years of labor should have equal effect. On the other hand, Natale reaped the benefits of the contract. He and his devisees would be unjustly enriched if the statute of frauds could be invoked to relieve him from performance of his own obligations thereunder.

"It is contended, however, that an estoppel to plead the statute of frauds can only arise when there have been representations with respect to the requirements of the statute indicating that a writing is not necessary or will be executed or that the statute will not be relied upon as a defense. This element was present in the leading case of Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154, and it is not surprising therefore that it has been listed as a requirement of an estoppel in later cases that have held on their facts that there was or was not an estoppel. See, e. g., Zellner v. Wassman, 184 Cal. 80, 87, 193 P. 84; Smith v. Bliss, 44 Cal.App.2d 171, 175, 112 P.2d 30; Standing v. Morosco, 43 Cal.App. 244, 246, 184 P. 954. Those cases, however, that have refused to find an estoppel have been cases where the court found either that no unconscionable injury would result from refusing to enforce the oral contract, Zellner v. Wassman, 184 Cal. 80, 87, 193 P. 84; Smith v. Bliss, 44 Cal.App.2d 171, 178, 112 P. 2d 30; Little v. Union Oil Co., 73 Cal. App. 612, 621–622, 238 P. 1066; Standing v. Morosco, 43 Cal.App. 244, 247, 248, 184 P. 954, or that the remedy of quantum meruit for services rendered was adequate. Murdock v. Swanson, 85 Cal.App.2d 380, 385, 193 P.2d 81; De Mattos v. McGovern, 25 Cal.App.2d 429, 432, 77 P.2d 522; cf., Morrison v. Land, 169 Cal. 580, 586, 147 P. 259. In those cases, however, where either an unconscionable injury or unjust enrichment would result from refusal to

enforce the contract, the doctrine of estoppel has been applied whether or not plaintiff relied upon representations going to the requirements of the statute itself. * * *"

Respondent also relies heavily on DeHermosillo v. Morales, 146 Cal.App.2d 819, 304 P.2d 854, as containing appropriate principles of law applicable to the factual situation in the instant case. The action in the DeHermosillo case was an action for "quasi-specific" performance of oral agreements to make a will devising property as compensation for services rendered, and to establish a trust in the property. The facts of the DeHermosillo case indicate that plaintiff was induced by decedent to come from Mexico to live with decedent and take care of her for the reason that decedent was sick and needed plaintiff; that a relationship similar to a close family relationship existed between decedent and plaintiff, and that decedent needed and wanted the services, companionship, love and affection of plaintiff only. 146 Cal. App.2d at page 828, 304 P.2d at page 860. There was evidence that plaintiff took decedent to the doctor and the hospital, and kept house, cooked, washed and ironed for her; after an operation for goiter was performed on decedent in 1951, decedent was not able to do much; plaintiff fed her, helped her bathe, dress, and move about; in October, 1951, plaintiff moved to another house; she went to decedent's house every day and took care of her and did the housework; plaintiff plastered the bedroom and painted the house; in 1952 decedent's husband was afflicted wth cancer, was bedridden for the last two months he lived, and required constant care; plaintiff took care of him every day during his illness; decedent had sclerosis of the heart and dropsy during the time plaintiff took care of her. There was abundant evidence of other acts of a similar nature performed by plaintiff during the lifetime of the decedent in reliance on her oral promise to devise certain real property to plaintiff. 146 Cal.App.2d at pages 821, 824–825, 304 P.2d at pages 856, 858–859.

In affirming a judgment in favor of plaintiff the court said: "* * * The trial judge could have inferred from the evidence just referred to that Mrs. Acosta contemplated that the services rendered by plaintiff were exceptional and could not be rendered by any other person. Also, the judge could have inferred that the services rendered by plaintiff were of such exceptional, extraordinary, and peculiar character that they would not be, and in contemplation of the parties were not to be, compensated for in money. Plaintiff was not paid for her services. In Monarco v. Lo Greco, 35 Cal.2d 621 at page 626, 220 P.2d 737, at page 741, it was said: 'It is settled that neither the remedy of an action at law for damages for breach of contract nor the quasi-contractual remedy for the value of services rendered is adequate for the breach of contract to leave property by will in exchange for services of a peculiar nature involving the assumption or continuation of a *close family relationship.*' (Italics added.)"

[1–7] Since the contract in the instant case was oral, it was necessary for Mary Ward to prove and plead facts which would give rise to an estoppel for otherwise the contract is barred by the statute of frauds. Civil Code, § 1624; Code Civil Proc. § 1973. The doctrine of estoppel has been applied by the courts of this state to prevent unconscionable injury that would result from refusal to enforce the oral contract in situations where one party has been induced to change his position seriously in reliance on the contract or in the unjust enrichment that would result if the contract were not enforced. Monarco v. Lo Greco, supra. Where no unconscionable injury exists or where the remedy of quantum meruit for services rendered is adequate the courts will not find an estoppel. Monarco v. Lo Greco, supra. Whether or not the elements of estoppel exist depends on the particular factual context. Jirschik v. Farmers & Merchants Nat. Bank, 107 Cal.App.2d 405, 237 P.2d 49. The mere rendition of personal services is not sufficient to take a contract from the operation

of the statute of frauds in an action for quasi-specific performance unless the services are of such peculiar, extraordinary, or exceptional character that it is impossible to estimate their value in money. Palmer v. Phillips, 123 Cal.App.2d 291, 266 P.2d 850. The question then becomes whether the facts proved are sufficient in the instant case for the court to have found that an estoppel existed. Basically Mary Ward gave up her home in Sacramento with her son to enter Perry Snideman's home. This is not such an abandonment of old ties as would seem to be sufficient. She performed household services. This too would not be enough. She offered him companionship. In some cases this has been an influencing factor. She assisted in the construction of the River Pines home. The closest case to this is the allegation in the Palmer case where it was alleged that plaintiff worked on her ranch. In that case the nature of the work performed was not alleged. It may not have been of such a nature that it would have increased the value of the ranch. In the instant case it is clear that Mary Ward did heavy construction work in assisting in the construction of the home in River Pines. While it might be said that her labor could be compensable in money, the services performed in the construction of the home were such that they undoubtedly enriched the estate. She also acted as a companion to the decedent. It is evident that their relationship was more than that of master and servant. She entertained the decedent's friends. The evidence discloses that she performed personal services far beyond those which are normally performed by a servant. She cared for his person, gave constant attention to his physical needs, and gave him comfort and solace. It is evident that the relationship was that of devoted friends. It is also of importance that she did not receive any compensation for all the things that she did. We think that the facts collectively were sufficient to warrant the trial court finding, as it did, that the services performed were of an extraordinary or exceptional nature, that they enriched the decedent's estate, and that they were not compensable in money. These findings are sufficient to support the judgment. Monarco v. Lo Greco, supra. We believe that the conclusion of the trial court as expressed in its memorandum opinion, and hereinafter quoted, is fully supported by the evidence and by principles of equity:

"It seems clear to the Court and the Court concludes that the plaintiff, under an agreement with decedent Perry Snideman, rendered services to him and, indeed, to members of his family of such character and to such extent that it is impossible to estimate the value of said services by a pecuniary standard and it is evident that the parties did not intend that they should be measured by such standard. The services so rendered included, but were not limited to, the care of decedent's home by plaintiff, the care of his person, both in dire illness and in health, constant attention to his physical needs and the constant rendition of comfort, solace, and companionship. She labored strenuously with decedent in the construction of a home at River Pines and lived there with [him] during the construction period, and thereafter, under adverse conditions. *The Court is satisfied that decedent agreed with plaintiff that if she would render such services during his lifetime she, in consideration thereof, would be given the use of the property situated in Sacramento and described in the complaint, during her lifetime, so long as she remained single and any proceeds from the rental of a portion of such property were to be by plaintiff devoted to the property itself, namely, the payment of taxes and necessary repairs and maintenance.* Unconscionable injury and unjust enrichment would result from a refusal to enforce such agreement. It is evident that plaintiff has never been compensated, even to the slightest degree, for her services, and it is also evident that she, at all times, acted in reliance on the assumption and assertions that arrangements had been completed to carry the agreement into effect. Defendant now would have her go her separate way un-

compensated and unappreciated. Equity will not tolerate such a result.

"Decedent, on March 11, 1955, after plaintiff had been with him for over two years, did, in violation of his agreement, place the property in joint tenancy with defendant and also made joint tenancy disposition of the River Pines Property. Upon his death in December of 1955 he left no estate from which plaintiff can hope to recover. She is, therefore, without adequate remedy or any remedy at law." (Emphasis added.)

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



168 Cal.App.2d 628

DIEBOLD, INCORPORATED, a corporation, Plaintiff and Appellant,

v.

STATE BOARD OF EQUALIZATION, Defendant and Respondent.

Civ. 9394.

District Court of Appeal, Third District, California.

March 12, 1959.

Action by Ohio corporation engaged in manufacturing bank vaults to recover sales taxes paid under protest. The Superior Court, Sacramento County, John Quincy Brown, J., rendered judgment adverse to corporation, and it appealed. The District Court of Appeal, Van Dyke, P. J., held that where Ohio corporation sold bank vaults to California banks under agreement that purchasers would make three advance payments, that final payments were due upon delivery, and that all material should remain property of corporation until fully paid for and final payments were always made after vaults were delivered in California, title to goods passed in California and transactions were subject to California sales tax but under three contracts specifying that title to merchandise would pass when merchandise was delivered by seller to common carrier consigned to buyer, title passed in Ohio and such transactions were nontaxable.

Judgment affirmed except as to three transactions and as to those transactions trial court directed to adjudge recovery by corporation of taxes paid.

1. Licenses ⇐34

In action by Ohio corporation engaged in manufacturing and selling bank vaults, safes, and chests and organized into various divisions including service division and bank division for recovery of sales taxes paid under protest, evidence sustained finding that corporation's bank division maintained a permanent office and place of business in California through which it channeled its sales to California banks in order to obtain benefits of a local business. West's Ann.Rev. & Tax.Code, § 6006(a, e).

2. Licenses ⇐34

In action by Ohio corporation engaged in manufacturing and selling safes, chests, and bank vaults and organized into various divisions including service division and bank division for recovery of sales taxes paid under protest, evidence sustained findings that corporation maintained a complete shop in Los Angeles which handled installation of items sold through its bank division, serviced equipment sold by corporation, and made its customers aware of availability of its shop in California as sales inducement and that presence in California of local shop for installation and servicing of equipment had been helpful to corporation in obtaining business for its bank division. West's Ann.Rev. & Tax. Code, § 6006(a, e).

3. Commerce ⇐40(1)

Where bank division of Ohio corporation engaged in manufacture and sale of

bank vaults maintained a permanent office and place of business in California channeled through office its sales to California banks in order to obtain benefits of a local business, maintained a complete shop in Los Angeles which handled installation of items sold through its bank division, serviced equipment sold, and made its customers aware of availability of its shop as sales inducement and presence in California of local shop had been helpful to corporation in obtaining business for its bank division, sales of bank vaults by corporation to California firms were not immune from taxation by California under the commerce clause. West's Ann.Rev. & Tax. Code, § 6006(a, e).

4. Sales ⇐450

A seller may reserve both property in goods and right to possession thereof even after delivery to buyer if it is specifically provided in the sales contract that he may. West's Ann.Civ.Code, § 1740(1).

5. Licenses ⇐15.1(6)

Where Ohio corporation sold bank vaults to California banks under agreement that purchaser would make three advance payments, that final payments were due upon delivery, and that all material should remain property of corporation until fully paid for and final payments were always made after vaults were delivered in California, title to goods passed in California and transactions were subject to California sales tax and reservation of title until goods were paid for was in no sense a reservation of a mere security title. West's Ann. Civ.Code, § 1740(1).

6. Licenses ⇐15.1(6)

Where contracts entered into between Ohio seller and California buyers provided that title to merchandise should pass when merchandise was delivered by seller to a common carrier consigned to the buyer and shipment was made from Ohio by common carrier under straight bill of lading showing manufacturer as consignor and buyer as consignee, title passed in Ohio when goods were delivered to carrier and transactions were not subject to California sales tax. West's Ann.Civ.Code, § 1740(1); West's Ann.Rev. & Tax.Code, § 6006(a, e).

7. Sales ⇐197

It is competent for parties to a sales transaction to stipulate as to time and place where title is to pass. West's Ann. Civ.Code, § 1740(1).

8. Evidence ⇐461(1)

When language employed in contract is fairly susceptible of either one of two constructions contended for, extrinsic evidence may be resorted to for purpose of explaining intention of parties. West's Ann.Civ.Code, §§ 1643, 3541.

9. Evidence ⇐461(1)

Where language in contract is fairly susceptible of either of two constructions contended for, conversations between and declarations of parties during negotiations before the execution of the contract may be shown for purpose of explaining intention of parties. West's Ann.Civ.Code, § 1647; West's Ann.Code Civ.Proc. § 1860.

10. Contracts ⇐170(1)

A construction given contract by acts and conduct of parties with knowledge of its terms before any controversy has arisen as to its meaning is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. West's Ann.Code Civ.Proc. § 1860.

11. Licenses ⇐34

In action by Ohio corporation engaged in manufacturing and selling bank vaults to California banks for recovery of sales taxes paid under protest, corporation had burden to prove its transactions were not taxable. West's Ann.Rev. & Tax.Code, § 6006(a, e).

12. Sales ⇐218½

In action by Ohio manufacturer of bank vaults to recover California sales taxes paid under protest for transactions whereby vaults not yet manufactured were sold to California banks pursuant to contracts which did not disclose intention of parties as to time when title would pass to purchasing banks, evidence sustained finding that title passed in California. West's

Ann.Civ.Code, § 1739, rule 5; West's Ann. Rev. & Tax.Code, § 6006(a, e).

13. Trial ⇐98

Where objection was made to receipt of files on ground that they were inadmissible until stripped of irrelevant matter, it was competent for court to overrule relevancy objection in form made although court might have insisted that files be rid of irrelevant matter before being received.

14. Appeal and Error ⇐1047(1)
Trial ⇐54(1)

In action by Ohio manufacturer to recover sales taxes paid under protest in connection with sales made to California purchasers, limiting of admission of corporation's files with respect to sale and delivery of goods to purpose of showing procedures in fulfilling orders but not admitting them with respect to issue of intent as to time of transfer of title was erroneous but was not prejudicial where proof of matters important and relevant to determination of issue of transfer of title appeared in record without reference to such files. West's Ann.Rev. & Tax.Code, § 6006(a, e).

Gilford G. Rowland, George E. Paras, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman and Edward P. Hollingshead, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal by Diebold, Incorporated, from an adverse judgment in an action brought to recover sales taxes paid under protest.

The trial court made findings as follows: Diebold is an Ohio corporation authorized to do business in California. Its main office and manufacturing plant is located in Canton, Ohio. Its business consists of manufacturing and selling fire and burglar resistive safes and chests, bank vaults and bank equipment, storage files, microfilm equipment and hollow metal doors and frames. It has organized its operations into various divisions, including the systems division, the service division and the bank division. The bank division is primarily concerned with the manufacture and sale of vaults and other equipment to banks. Diebold does not maintain an inventory of products sold through the bank division in this state. The equipment sold through the bank division is custom built to order. Except in exceptional circumstances, the equipment supplied through the bank division is shipped by Diebold directly to the customer under a straight bill of lading. On rare occasions it is necessary to send the equipment to the branch office of Diebold for delivery to the customer. The freight charges on all the shipments of equipment here involved were prepaid by Diebold. The bank division maintains a permanent office and place of business in California, through which it channels its sales to California banks in order to obtain the benefits of a local business. The sales of Diebold products made through its bank division to California banks are solicited by salesmen employed in this state by the bank division. On occasion employees of other divisions of Diebold are paid a portion of the commission on the sale for providing tips to the bank division salesmen. The California salesmen, after receiving the orders from the California banks, transmit these orders for products sold through the bank division to Canton, Ohio, for approval or rejection by general officers of Diebold there. Acceptance or rejection must take place at Canton, Ohio. No employee of Diebold in California has any authority whatever to accept or reject a contract. After the order is placed by the customer, the employees at the California office of Diebold are available to answer queries from customers with respect to changes in plans or delays in delivery. Each of the orders for equipment involved in this litigation was solicited in California by employees of the bank division located at the offices of that division in this state. Such sales were channeled through the offices of Diebold in this state. Diebold maintains a complete shop in Los Angeles, California, which

handles the installation of items sold through the bank division. This shop also services equipment sold by Diebold. In the solicitation of orders, Diebold makes its customers aware of the availability of the shop in this state as a sales inducement. Having a local shop in California for the installation and servicing of equipment is helpful to Diebold in obtaining orders from banks in this state. With respect to contracts for bank division products calling for installation by Diebold, the work of installation is performed by employees of the service division of Diebold in this state as part of the fulfillment of the sales contract. Other contracts provide that installation will be done by the bank itself and other contracts are silent on the matter of installation. It is only with respect to the contracts which provide for installation by Diebold that the service division performs such installation. Service policies and warranties on the bank division products are carried out by employees in the service division of Diebold in this state. Contracts for the continued servicing by the service division of Diebold of products sold by Diebold may be entered into by purchasers from Diebold. These service contracts are independent of the contracts of sale. Diebold retained title to the items of equipment here involved until after the items were delivered to the purchaser in California and were fully paid for by the purchaser in this state. The purchasers of items of equipment here involved did not obtain actual possession or the right to possession of such items until after the items were delivered to the purchasers in California.

Diebold's first contention on appeal is that the transactions described in the court's findings were immune from taxation under the commerce clause of the federal Constitution.

It is apparent from the form of the findings made that in rejecting the claim of immunity the trial court relied heavily upon the decision of the United States Supreme Court in the case of Norton Company v. Department of Revenue of the State of Illinois, 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517. In that case a Massachusetts corporation maintained in Illinois a branch office and warehouse which, in addition to over-the-counter sales, received orders which were forwarded to the home office for acceptance, acted as intermediary in distributing products from the home office in carload lots so as to reduce freight rates, serviced machines after sale and stood ready to receive complaints and to give engineering and technical advice. Illinois, in imposing a retailer's occupation tax on the corporation, based it on gross receipts from all sales to Illinois customers. The Supreme Court held that the Illinois courts were warranted in holding that the corporation had not established that such services as were rendered by its local office were not decisive factors in establishing and holding the Illinois market; that while a concern does not, by engaging in business within a state, lose its right to do interstate business with tax immunity, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business. Said the court, 340 U.S. 534, 71 S.Ct. 380, 95 L.Ed. at page 521:

> "This corporation has so mingled taxable business with that which it contends is not taxable that it requires administrative and judicial judgment to separate the two. We conclude that, in the light of all the evidence, the judgment attributing to the Chicago branch income from all sales that utilized it either in receiving the orders or distributing the goods was within the realm of permissible judgment. Petitioner has not established that such services as were rendered by the Chicago office were not decisive factors in establishing and holding this market. On this record, no other source of the customer relationship is shown.
>
> "This corporation could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce as set out in the Dilworth case. [McLeod v. J. E. Dilworth Co.,

322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304.] But, from a competitive point of view, that system has disadvantages. The trade may view the seller as remote and inaccessible. He cannot be reached with process of local courts for breach of contract, or for service if the goods are defective or in need of replacement. Petitioner elected to localize itself in the Illinois market with the advantages of a retail outlet in the State, to keep close to the trade, to supply locally many items and take orders for others, and to reduce freight costs to local consumers. Although the concern does not, by engaging in business within the State, lose its right to do interstate business with tax immunity, [citing case] it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business."

On this subject of immunity we think little more need be said beyond saying that the findings of the trial court in the instant case come squarely within the rule laid down in the Norton case and that on the authority of that case the transactions here involved cannot escape taxation under the immunity clause. This is said, of course, upon the assumption that, so far as material to the claim of immunity, the findings made are supported by the record. Diebold claims that certain vital findings are unsupported. We will next discuss these contentions.

[1] Diebold challenges the finding that its bank division maintains a permanent office and place of business in California through which it channels its sales to California banks in order to obtain the benefits of a local business. There is evidence that employees in the bank division occupy office space in the branch offices of Diebold operated by the systems division in San Francisco and Los Angeles. At these offices the bank division employees receive secretarial and telephone service and mail, including orders and other communications from customers, as well as interoffice communications from Canton. These interoffice communications frequently refer to "The Los Angeles Branch" or "The San Francisco Branch." These facilities enjoyed by the employees of the bank division were shown to be as permanent and sufficient for the bank division's purposes in doing business in California as that business required for its efficient conduct. The circumstance that the bank division was required to compensate the systems division for the office space, telephone, secretarial and mail services, which requirements were met by bookkeeping entry, does not deprive the court's finding that Diebold maintained for its bank division a permanent office and place of business in California of necessary support. It is unlikely that customers doing business with Diebold, meeting its bank division salesmen at these offices maintained under the name of Diebold, were impressed at all that they were not doing business directly with appellant. It was shown that in soliciting sales Diebold's bank division salesmen emphasized to customers the fact that installation and servicing of Diebold's products could and would be performed by Diebold employees (not bank division employees) and that the company had a complete shop in Los Angeles for this purpose. We think it sufficiently appears not only that Diebold had for its bank division's use permanent office, shop and service facilities in the state but that its solicitation of business by its bank division emphasized to its bank customers that these matters constituted reasons why it was better to do business with Diebold than with its competitors in that special field. Diebold's bank division employees were not itinerant "drummers". They worked out of permanent offices maintained by Diebold. They received and sent mail to customers and prospective customers from those offices. They continued in and from those offices to maintain close contact with customers who had ordered equipment made for their special uses. The trial court's findings that through those offices Diebold channeled its

California sales made by its bank division aptly describes what was taking place. Diebold lays great emphasis upon the departmentalization of its business but we think the trial court could and did conclude that under its methods of doing business in California its competitive capacity was little, if at all, lessened by its departmentalization from what it would have been had it forthrightly maintained branch offices without regard to departmentalization. We think the trial court could well doubt that Diebold's bank division customers were aware of that departmentalization as having any effect on business done with Diebold. It does not appear that any of the equipment sales here involved were not solicited by California employees of the bank division located in and working out of the local offices of Diebold. It appears to us and we think it appeared to the trial court that so far as Diebold's sales of bank equipment were concerned, so far as its competitors in that line were concerned, and so far as its customers and prospective customers in that line were concerned, Diebold was doing business under conditions just as local and just as favorable to it as if it had been a California corporation doing business solely in this state.

[2] Diebold challenges the finding that it maintains a complete shop in Los Angeles which handles the installation of items sold through its bank division, services equipment sold by Diebold, makes its customers aware of the availability of its shop in this state as a sales inducement and that the presence in California of this local shop for installation and servicing of equipment has been helpful to Diebold in obtaining business for its bank division. Diebold's form contracts which its bank division salesmen used provided a space for requirement of installation by Diebold if the customer wanted it and a number of the contracts in evidence show that installation was contracted for. When so required the service division did the work. On many other occasions it was done under a separate contract but that fact is not decisive in determining the question of immunity. There is in evidence a letter written by Mr. F. B. Schneider, the regional manager of the bank division located at Los Angeles, saying to a prospective bank customer: "We wish to call your attention to the fact that we are the only major vault company that maintains a complete shop in Los Angeles. All the installation work will be done by our own men, and in this way you will not have any divided responsibility in installing this equipment."

[3] Without going further, we hold that from this record the findings of the trial court are supported and that, therefore, as we have heretofore said on the authority of the Norton case, the transactions here involved were not immune from taxation under the commerce clause.

The next contention of Diebold is that the sales were not made in California and therefore that they are not taxable transactions. Diebold holds a retail sales license in this state and it appears in the record that it has paid and collected sales taxes on a great portion of its business although it contends that the transactions here involved are not so taxable. Diebold placed in evidence its order files with respect to each of the transactions here involved. These files were received for the purpose of showing its business procedure in connection with its bank division sales. Generally the sales were evidenced by either a written contract executed by both parties or by such as customer orders and Diebold acceptances. The contracts provided for progress payments. The order files show that full payment was not made until after the goods arrived in California. Section 6006 of the Revenue and Taxation Code provides as follows:

"'Sale' means and includes:

"(a) Any transfer of title or possession, * * * in any manner or by any means whatsoever, of tangible personal property for a consideration. * * *

* * * * *

"(e) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price."

The trial court found that Diebold retained title to the items of equipment here involved until after those items were delivered to the purchaser in California and until the price was fully paid by the purchaser which payments were made in this state; that the purchasers did not obtain actual possession or the right to possession of such items until after the items were delivered to the purchasers in California. Obviously, these findings, if supported, establish that the sales occurred in California and were taxable. Diebold contends the findings lack support.

[4] A seller may reserve both the property in goods and the right to possession thereof even after delivery to the buyer if it is specifically provided in the contract that he may. Sec. 1740, subd. (1), Civil Code. The section referred to reads:

"(1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer."

[5] As we have stated, two types of contract were used. We will discuss first the type referred to by the parties as the "Diebold Bank Division Agreements" which designation we will shorten to "bank agreements". In material part these agreements provided that the purchaser agreed to buy and the contractor agreed to furnish to the purchaser certain described work and materials; that the contractor was to furnish material only or (in some cases) was to furnish and install; that terms were net f. o. b., Canton, Ohio, freight allowed to destination; that the purchaser agreed to pay for the work and materials in the following manner: 25% thirty days from the date of the contract; 25% sixty days from date of the contract; 25% when work was shipped; and 25% upon completion of the contract. There then appeared an integration clause. Finally it was provided "All materials shall remain the property of said Contractor until fully paid for." It was shown that the final payment was always made after the goods were delivered to the purchasers in California. Since the bank division agreements provided that title should not pass until the goods were paid for, and since, in the performance of the contract the goods were to be shipped to California, and since the proof showed that the final payments were made after the goods reached California, the court's finding that title passed in California and the conclusion that therefore the transactions were taxable are fully supported by the record. Nevertheless, Diebold argues that before the goods left for California there was a transfer of the right of possession of the goods prior to the time they were delivered in this state. The claim is that the provision for reservation of title is a mere security provision, that the contract is a conditional contract of sale, and that there was a transfer of the right to possession before the goods left Ohio, occurring when the goods were shipped under a straight bill of lading, naming the purchaser as consignee. But this argument must fail before the clear terms of the instruments. The documents say nothing of credit. On the contrary, they call for three advance payments, 25% 30 days from date of contract, 25% 60 days from said date, 25% when goods are shipped. The final payments were due on "completion of contract" which means completion by Diebold, i. e., delivery. What procedure was followed by Diebold in shipping and delivery, other than as specified in the writings, could not change the contracts. The reservation of title until the goods were paid for (and that last act, in all cases, occurred in California) was in no sense the reservation of a mere security

title. The transactions carried on by means of the bank agreements were all taxable.

We will next discuss Diebold's contentions that sales made through the medium of purchase orders and Diebold acceptances constituted transactions nontaxable because title and/or possession were transferred before the goods left Ohio. Of the 51 transactions under review 17 fall in the classification now under discussion. The rest were bank agreement transactions. Sometimes the order files in evidence contain only the purchaser's orders; but the acceptances, if written acceptances were executed by Diebold, do not appear. The files contain in every instance numerous documents, many of which are interoffice communications and correspondence with the purchaser during the course of manufacture and delivery. Sometimes the purchase orders bear, stamped upon the face, statements, such as one which specified "that title to the merchandise shall pass to buyer when the merchandise is delivered by seller to the common carrier and consigned to buyer." There were three transactions in which this statement appeared on the face of the order. One order had stamped upon it the statement: "As a part of the fulfillment of this contract, it is understood that the property purchased is to be shipped to the Security-First National Bank of Los Angeles, from a point outside the State of California, and that no State of California sales or use tax is to be added to the cost thereof." Four orders had stamped upon the face of each the following: "The goods hereby ordered are to be shipped from a point outside of the State of California, directly to the purchaser in interstate commerce and without side markings." Three of the orders bore the following: "Shipment hereunder will be made from outside the State of California." One order was placed by the customer by telephonic communication and acknowledged by Diebold by letter. The telephoning of the order was done in California to a salesman operating in the San Francisco area.

[6, 7] First, as to the three contracts wherein the order specified that title to the merchandise should pass when the merchandise was delivered by the seller to a common carrier consigned to the buyer, we find the proof to be that shipment was made from Canton, by common carrier under straight bill of lading showing Diebold as consignor and the purchaser as consignee. Since it is competent for the parties to a sales transaction to stipulate as to the time and place where title is to pass, these three transactions were nontaxable. Pursuant to the express agreement of the parties, title passed in Ohio when the goods were delivered to the carrier.

[8-10] Turning our attention now to the 14 transactions not heretofore discussed, we find that the contracts involved are in 13 instances evidenced by purchase orders issued by the banks with written acknowledgments thereof by Diebold. As to one, the evidence shows an oral order from the purchasing bank telephoned to a Diebold salesman and acknowledged by Diebold in writing. There is nothing in the orders and the acceptances which expressly declares the intention of the parties in respect of the passage of title. Since the prime object of a sale or a contract to sell is the transfer of title, this essential element must therefore be ascertained by construction. Pursuant to recognized rules the contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if this can be done without violating the intention of the parties. Civil Code, Secs. 1643, 3541; See, Restatement, Contracts, Sec. 236 (a). When language employed is fairly susceptible of either one of two constructions contended for, extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates. Also for this purpose conversations between and declarations of the parties during the negotiations before the execution of the contract may be shown. Civil Code, Sec. 1647; Code Civil Proc., Sec. 1860; Walsh v. Walsh, 18 Cal.2d 439, 444, 116 P.2d 62; Re-

statement, Contracts, Sec. 235(d). Furthermore, a construction given the contract by the acts and conduct of the parties with knowledge of its terms before any controversy has arisen as to its meaning is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17. Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. Civil Code, Sec. 1737. Where there is a contract to sell specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case. In the transactions here under review, we think it clear we are dealing with contracts to sell goods not ascertained when the contracts were made, but which were ascertained when the goods were manufactured to order. Section 1739 of the Civil Code contains statutory rules for ascertaining intention and the section begins by declaring that:

> "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

Having regard to the stated terms of the contracts here involved does not lead us to a clear ascertainment of the intention of the parties and we thus pass on to proof of conduct, usages and circumstances. The court had before it testimonial proof that in all the transactions involved the goods were shipped by Diebold from Canton by common carrier to the purchasing bank in California and that Diebold prepaid the freight. Many of the orders contained the term "f. o. b. Canton, Ohio", but the trial court could conclude from the record this was a mere pricing term. The trial court could conclude that the contract to sell required Diebold to deliver the goods to the buyer at a particular place in California and to pay the cost of transportation. The transactions therefore come within Civil Code Section 1739, Rule 5, which reads:

> "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

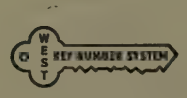
[11, 12] In view of what has been said and of the rule that the burden of proof lies upon the taxpayer to prove that the transaction is not taxable, the presumption being that it is, we hold that the trial court's determination as to the passage of title in California, save with regard to the three transactions wherein it was expressly agreed otherwise, is supported by the record.

[13, 14] Diebold contends that the trial court committed reversible error by limiting the evidential effect of its order files which it offered for all purposes, and which the court admitted for the purpose only of showing Diebold's procedures in fulfilling its contracts. These order files contained many documents, a great proportion of which had no probative value upon any contested issue, especially that of title transfer. Respondent objected to the receipt of the order files on the grounds of relevancy, arguing that the files were inadmissible until and unless Diebold stripped them of irrelevant matter. The court, contrary to respondent's contentions, appears, however, to have overruled the relevancy objection in the form made. It was competent for the court to do so, although it might have insisted that the files be rid of irrelevant matter before being received. The order files are now before us, compelling us in order to treat appellant's contentions as to limitation of proof to laboriously examine all of them. Most of the material matter contained in those files is in reality a duplication of the testimony of the witness Crawford, vice president of Diebold in

charge of the bank division, who testified concerning their contents upon exhibition to him of the writings. Thus he testified to the form and content of the bill of lading used by Diebold in shipping the goods; he testified to the form and content of the invoices used by Diebold when the goods were shipped; he testified as to the matters stamped upon the face of the various orders as hereinbefore related; he testified concerning shipping orders contained in a few files; Crawford also testified that when goods had been delivered to the carrier for shipment, the bill of lading, Diebold's invoice, and the written form, admitted in evidence, and designated as Diebold Form 1290, were all forwarded by mail to the purchaser, arriving in the usual course of business 10 days to 2 weeks ahead of the goods. This Form 1290 told the purchaser that the attached bill of lading was an acknowledgment by the carrier of the shipment of the goods in good condition; that Diebold's responsibility for the shipment had ceased upon such delivery of the goods to the carrier; that if goods were damaged or were short in quantity on arrival complaint must be made by the customer to the carrier or such claims of shortage or damage could not be allowed by the carrier. Diebold asserted its willingness to assist the purchaser in collecting claims for loss or damage without Diebold being thus made responsible therefor. Finally the form told the customer that claims for loss or damage could not be deducted from Diebold's invoice. The trial court in its memorandum of decision stated that it had received the offered files for the limited purpose of showing the Diebold procedures in fulfilling the orders but was rejecting the files on the issue of intent as to time of transfer. We think the court erred in so limiting those portions of the files which were relevant on that issue. We cannot, however, agree with Diebold's argument that the error was in anywise prejudicial. The proof of matters important and relevant to the determination of the issue of transfer, as we have said, in all essentials appears in the record without reference to the files. We hold that the trial court's findings on the question of when title passed in all of the order transactions, save three, are supported by the record.

For the reasons given, the judgment appealed from is affirmed except as to the three transactions wherein the parties expressly stipulated that title to the goods should pass when they were placed on board a common carrier in Canton. As to those transactions the trial court is directed to adjudge the recovery by appellant of the taxes paid. Respondent to recover costs.

PEEK and SCHOTTKY, JJ., concur.



168 Cal.App.2d 599

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Howard D. TAWNEY, Defendant and Appellant.

Cr. 6352.

District Court of Appeal, Second District, Division 2, California.

March 12, 1959.

Hearing Denied May 6, 1959.

The defendant was convicted for offering to sell and for selling a medical and osteopathic degree. The Superior Court of Los Angeles County, Lewis Drucker, J., entered judgment of conviction, and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Fox, P. J., held that the statute prohibits the sale of an osteopathic degree even though such degree is neither made nor purports to be made to deceive the licensing authorities.

Judgment and order denying motion for new trial affirmed and purported appeal from other orders dismissed.

1. Physicians and Surgeons ⇐10

The statute prohibiting sale or barter of any medical degree or osteopathic degree or any degree, certificate or transcript made or purporting to be made pursuant to any laws regulating the licensing and registration or issuing of a certificate to physicians and surgeons prohibits sale of osteopathic degree even though such degree is neither made nor purports to be made to deceive the licensing authorities. West's Ann.Bus. & Prof.Code, § 580.

2. Statutes ⇐206

Statutes should be so construed, whenever possible, as to give effect to each word and phrase therein contained.

3. Physicians and Surgeons ⇐10

The purpose of statute prohibiting sale or barter of any medical degree or osteopathic degree was to protect the public against the deception and chicanery of persons who, by reason of such fictitious degrees, would hold themselves out as possessing learning and skill which they did not in fact have. West's Ann.Bus. & Prof. Code, § 580.

4. Statutes ⇐211

The title is a useful guide in determining the intended scope of legislation; however, the title is not the only guide.

5. Statutes ⇐114(3)

Even though the title states that the act provides against the selling of fraudulent medical and osteopathic degrees to be used in obtaining license or certificate to practice in California, the act can contain a provision prohibiting sale of osteopathic degree even though such degree is neither made nor purports to be made to deceive the licensing authorities. West's Ann.Bus. & Prof.Code, § 580.

6. Physicians and Surgeons ⇐10

The statute prohibiting sale of osteopathic degrees was intended to prevent the defrauding of the public by misleading the public into believing that ostensible holder of degree has specialized training, as well as to provide the public with protection against treatment by those who do not meet the standards and requirements established by the California authorities. West's Ann.Bus. & Prof.Code, § 580.

7. Physicians and Surgeons ⇐10

The statute prohibits sale of osteopathic degree even though the degree is not to be used in California. West's Ann.Bus. & Prof.Code, § 580.

8. Criminal Law ⇐37

Where an investigator for the district attorney and a special investigator for the state board of medical examiners asked defendant if he could secure a medical degree for them, and defendant stated that he could not get a medical degree because that would be a felony, and the investigators feigned surprise and stated that they did not want to become involved, and thereafter the district attorney's investigator informed defendant that investigator had found a place where he could get a medical degree for $1,500, and defendant, without any solicitation, replied that he could procure a legitimate medical degree for $500, defendant was not entrapped into selling degree in violation of statute. West's Ann.Bus. & Prof.Code, § 580.

9. Criminal Law ⇐369(2)

In prosecution for sale of osteopathic degree, the blank diplomas and corporate seals which were found in defendant's office at time of defendant's arrest, and testimony relating to prior, and at that time not illegal, sales of nonmedical degrees, were relevant on the issue, raised by defense of entrapment, as to whether the idea or intent to sell the osteopathic degree originated with the defendant or the investigators to whom the defendant sold the degree. West's Ann.Bus. & Prof.Code, § 580; West's Ann.Education Code, §§ 24201, 24211.

10. Criminal Law ⇐369(1)

Generally, defendant in criminal prosecution may only be tried for offense alleged in indictment or information and evidence of collateral independent crimes or other acts is inadmissible.

11. Criminal Law
⇐365(1), 369(2), 370, 371(1, 12), 372(1)

Evidence of other crimes may be admitted when it tends directly to establish the crime charged by proving a material fact, where it is part of the res gestae, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice or a common plan or scheme.

12. Criminal Law ⇐371(1)

Evidence of other acts is admissible for the purpose of showing intent when the intent accompanying the act is equivocal, or where it is claimed by the defendant that the act was the result of mistake, accident or inadvertence, or where intent is otherwise denied.

13. Arrest ⇐71

Where arrest of defendant for sale of osteopathic degree was lawful and arresting officers had already obtained possession of such osteopathic degree, officers' search without warrant of defendant's office for additional evidence was justifiable, and blank diplomas and corporate seals discovered in such search were properly received in evidence. West's Ann.Bus. & Prof.Code, § 580.

14. Physicians and Surgeons ⇐10

In prosecution for sale of osteopathic degree, proffered testimony that the diploma involved would not be recognized by the California Board of Osteopathic Examiners was properly excluded, since the statute prohibits the mere sale of such a diploma. West's Ann.Bus. & Prof. Code, § 580.

15. Criminal Law ⇐808½

In prosecution for sale of osteopathic degree, instruction that the statute, in so far as it was applicable to the case, provided that no person should sell or barter or offer to sell or barter any medical degree or osteopathic degree was proper and there was no need to read all of the statute to the jury. West's Ann.Bus. & Prof. Code, § 580.

16. Physicians and Surgeons ⇐10

In prosecution for sale of osteopathic degree, it was not error to refuse to give requested instruction that jury must find from the evidence beyond a reasonable doubt that any degree which may have been offered for sale or sold was to enable the person to whom it was offered for sale or sold to secure a certificate of physicians and surgeons, since the statute prohibiting the sale did not require that the diploma or degree had to be used to secure a certificate or license. West's Ann. Bus. & Prof.Code, § 580.

17. Criminal Law ⇐1023(8)

Since there is no appeal from an order denying a motion in arrest of judgment, the attempted appeal from such order would be dismissed.

18. Criminal Law ⇐1134(10)

Orders prior to judgment are reviewable on appeal from the judgment.

19. Criminal Law ⇐1131(4)

Where the record disclosed no orders made after judgment, purported appeal from such orders would be dismissed.

Robert E. Ford, Hollywood, for appellant.

Stanley Mosk, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was indicted on two counts of violating section 580 of the Business and Professions Code. In count I it was alleged that on February 28, 1957, he "offered to sell a medical and osteopathic degree"; in count 2, that on March 26, 1957, he "sold a medical and osteopathic degree." The jury found defendant guilty on each count. He moved for a new trial and arrest of judgment. Both motions were denied. Proceedings were suspended and defendant was placed on probation for three years on condition, inter alia, that he spend the first four months in the county jail, and pay a fine of $1,000. He has appealed from the judgment (Pen.Code, § 1237, subd. 1), from the order denying his motions for a new trial and arrest of judgment, and "any and all other orders prior

to or subsequent to the judgment herein or any orders made in lieu of judgment."

In the interest of clarity, it seems desirable to summarize the transactions disclosed by the evidence in the order of their chronology. The first of these relates to a transaction between defendant and one Moskowitz, who was a reporter and writer on the staff of a local television station. On October 10, 1955, Moskowitz telephoned defendant stating that he had heard that defendant was offering various degrees in connection with certain institutions known as Educational Associates, Inc., and arranged with defendant for an appointment later in the day. Upon arrival at defendant's office on the second floor of a building on North Vermont, in Los Angeles, Moskowitz identified himself as the person who had called earlier that day and made an appointment. Defendant inquired as to the purpose of his visit. Moskowitz stated that he wanted to become an ordained minister; that he was employed by a literary agency at a very small salary; that he had an opportunity to become a lecturer in the field of comparative religion which would enable him to supplement his income, and that he felt if he could become an ordained minister it might help him to get the new position.

As a result of their negotiations, defendant delivered to Moskowitz the next day two documents with his name engraved thereon. One of these showed Moskowitz was an ordained minister; the other that he was a licensed practitioner in "New Thought Science." Each was signed by defendant as "President." For these documents Moskowitz paid defendant $59.

The next transaction relates to the acquisition of a Doctor of Engineering degree by Robert H. Meng, an investigator for the district attorney of Los Angeles County. Meng contacted defendant by telephone on October 8, 1956, and made an appointment to see the defendant at his offices the following evening. At that time, Meng informed the defendant that he would like to get an engineering degree, explaining that he worked with his father-in-law, who was an architect; that his father-in-law was planning to retire, and that he had a chance to take over the business provided he had an engineering degree. Defendant told him he could get an engineering degree for him for $250. Meng stated that he would contact defendant the following week and let him know whether he could raise the money. On October 17th Meng telephoned defendant that he had been able to obtain the money. Defendant informed him that he would have to get a letter of recommendation from his father-in-law and some preliminary plans that he might have drawn. Meng agreed to this. On October 22d Meng telephoned defendant at about 1:00 o'clock in the afternoon that he had the money, the plans, and the letter from his father-in-law. Defendant told him to come over at 2:00 o'clock and pick up the degree. At the appointed time, Meng appeared at defendant's office. Meng handed defendant a letter which purported to come from his father-in-law but which, in fact, had been prepared in the attorney general's office, and two sheets of plans which Meng had had no part in preparing and of which he knew nothing. Defendant glanced at them and inquired whether Meng had the fee. Meng thereupon gave him the $250. Defendant left the room but returned immediately with a blank degree which was signed by the defendant and the secretary of the school. The defendant telephoned to an engraver named Jones advising him that Meng was coming to his place of business. Defendant then gave Meng Jones' address and told him to take the document there and that Jones would engrave it. Pursuant to these instructions, Meng had the words "Doctor of Engineering," the date, and his name engraved on the diploma.

In late November or early December, 1956, Robert G. Wells, an editor and columnist for a Long Beach newspaper, went to defendant's office and told him that he had prepared a manuscript on self-help psychology which he desired to sell to a

publisher; that he needed a degree in psychology in order to get a publisher to consider his work. Defendant suggested that for such a purpose Wells would need a doctor's degree. The latter concurred in this suggestion. Defendant made inquiry as to what Wells had been doing. The latter told defendant that he was unemployed but was working on his manuscript and explained some of the philosophy embodied in his treatise. Defendant said that $300 was the normal tuition fee. Wells objected to the amount of the fee on the ground that he had a background in psychology and believed that he had completed all the necessary requirements. He made inquiry as to whether he could take tests rather than attend courses. The suggestions with respect to attending courses and taking tests were eliminated in favor of a thesis. On the basis that there would be no tests to grade and no courses to give, defendant agreed to reduce the price to $200.

Shortly after Christmas, Wells advised defendant that his thesis had been finished and that he was anxious to get a degree because he and his family were going back to Minneapolis. A few days after New Year's Day, 1957, Wells went to defendant's office and told defendant that he had brought a thesis with him which he was prepared to submit as the requirement for the degree. Upon Wells' paying the balance due, defendant gave Wells a diploma filled out in ink which defendant signed. An engraved diploma was later mailed to Minneapolis and forwarded to Wells.

We come now to the transactions on which the indictment is based. On February 26, 1957, Meng again contacted defendant stating that a friend from Denver wanted to get some kind of a medical degree because this friend was going into the shoe business with Meng and another man. An appointment was made for Meng, who was to bring his friend in upon his arrival. On the next day Meng and David Anthony May, a special investigator for the State Board of Medical Examiners, went to defendant's office where Meng introduced May as Mr. Anthony, whom he had known in the service. Meng explained to defendant that they were going to manufacture orthopedic shoes and needed some type of medical degree to aid in the promotion of sales of such shoes, and that since he had received an engineering degree from defendant he thought that defendant might be able to help them out with a medical degree. Defendant stated that he could get them an honorary degree from a local school and one from a school in Paris, but they could not get a medical degree from him because that was a felony. May and Meng acted surprised and said they did not want to become involved, but they would take one honorary degree, which defendant said would cost $100.

On February 28th, Meng telephoned defendant stating that he and "Dave" had discussed the matter and felt that the honorary degree which defendant had offered them would not be satisfactory for their purposes and that he had done some shopping round and had found a place where he could get a medical degree that would cost him $1,500. Defendant told Meng that such a degree would not be worth the paper it was written on, but that he could get them a legitimate medical degree from a university in India, which was formerly located in Chicago, and that the degree would cost them $500. Meng said he would telephone later and let him know their decision. In about an hour Meng telephoned defendant that he and Dave would take the medical degree and two honorary degrees also. Defendant requested a $200 deposit which, however, was reduced to $100 and which was made by May. The next day Meng and May went to defendant's office to discuss the diplomas. May inquired whether the degree was the one from the school in India. Defendant said that it was, and that it would be a degree in osteopathy and that it would be printed in English. Defendant asked for a résumé of May's high school and college work. May explained that he would be out of the city for awhile but that he would send it to Meng, who would deliver it to defendant. Defendant

then informed them that it would take about three weeks to get the degree from India; that it would not be an honorary degree.

On March 12th Meng telephoned defendant to inquire whether he had received the degrees. Defendant stated that he had not received the Doctor of Osteopathy degree yet but that he had one honorary degree. On March 19th Meng inquired of defendant whether he could get the degree from India as that was the one they wanted. Defendant informed him that he could get that degree; that all he had to do was call his contact; he stated that he would probably get it in about a week. Defendant showed Meng a newspaper article about a man named Oosterveen (apparently the defendant in People v. Oosterveen, 154 Cal.App.2d 620, 316 P.2d 390) who had been convicted of selling medical degrees, and said that he thought Oosterveen was in pretty bad trouble. Defendant stated that he still wanted to see "Anthony" and find out when and where he had gone to school.

Defendant called Meng the following day and informed him that he was not going to get a degree from India but instead was going to get one from Italy; that to get one from India would take a week or ten days while he could get one from Italy in only three or four days. He told Meng that he wasn't too sure of Dave and would rather deal directly with Meng; that he preferred to sell the degrees to Meng rather than to Dave; that by handling the transaction in this fashion, if any difficulty arose, Meng would be involved along with him. Meng said that arrangement was satisfactory to him.

On March 21st May, Ken Kloster, who was also from the State Board of Medical Examiners, and Meng went to defendant's office. Kloster was introduced as the third partner of May and Meng. Defendant showed them a sample of the degree from the school in Italy, pointing out that it was printed in Latin. He translated it for them. The parties discussed the size of the diploma. The defendant stated that the word "honorary" would not appear on the degree. Defendant remarked that he was a little leery about the transaction since the only one he knew was Bob [Meng]. They discussed the idea of defendant's dealing only with Meng. At defendant's request, May signed a statement to the effect that he understood that the degree conferred upon him as a Doctor of Osteopathy would be of an honorary nature and would have no value so far as licensing by any State Board was concerned or for the treating of the sick or afflicted. That the degree was issued to him solely as an honorary recognition due to his background in designing corrective shoes.

At approximately 7:30 a. m. on March 26th, defendant telephoned Meng at his home stating that he had the degree which Meng could pick up, but that he should not tell Dave or Ken or anyone else about it. Defendant instructed Meng to come out alone, bring the money, and pick up the degree. Later that day Meng and his partner, Slonaker, went to defendant's office. There were other law enforcement officers downstairs. Slonaker waited in the hall outside the office while Meng entered. Defendant was absent but returned shortly. Defendant said, inter alia, "I guess you have got the ready cash?" Meng replied that he had it and asked whether defendant had the degree. When defendant replied in the affirmative, Meng asked to see it. Defendant stated that he did not have it there; that he would have to go and get it; he said he was going right around the corner. Meng suggested that he go with him, to which defendant replied he would rather he did not. Defendant then remarked, "* * * You know this is illegal * * *." After some discussion defendant agreed that Meng could go with him to get the degrees. Meng then gave defendant $600. They walked out through the waiting room to the hallway, around the corner, and into another office. Defendant pointed to a chair on which there was a cardboard cylinder, and said that was it. Meng picked it up and followed defendant back to his office, taking the degrees out as he went. As

defendant walked through the waiting room into the office Meng's partner, Slonaker, identified himself, showed defendant a warrant and placed him under arrest.

In the cylinder were three documents, one entitled "Diploma Internationalis Doctoris Ordinis Scientiorum" and containing only the words "Orthopedic Science" and "David Anthony" in English; one entitled "Research University" which was signed by various people including the defendant; and another in Latin, the translation of which was as follows:

"The Phoenix Academy of Study
MCMLII (1952)
To the most beloved and most learned man
David Anthony
with all academic requirements completed, since he has attained the distinguished recognition and plan of
Orthopedics,
the men in the Phoenix Academy of Study, the power of the Academy having been conferred through tablets have bestowed the name and privileges
Doctor of Osteopathy
of the Phoenix Academy of Study. This tablet of certification fortified by the seal of the Academy and the signature of the president publicly and solemnly bears witness that this has been done.
D. Barii the first of March after the birth of Christ of the year 1957

(Signature illegible)

Favia Bari Graphic Arts—Rome"

Other law enforcement agents joined Meng and Slonaker and searched defendant's office while he remained there. During the course of this procedure, defendant looked at two members of the attorney general's staff and remarked: "Gee, I didn't know this was a felony. I thought it was just a misdemeanor."

In one of the rooms of defendant's suite there was a cabinet containing seals which made the following impressions: Searchlight College, Incorporated, Nevada; Chirologic College of California, Inc.; Pacific Oxford College, Inc.; Commonwealth University, Inc.; and Research University, Inc. The investigators also found in the suite documents having on them the words "Research University" and "Research University, Council Administration"; "Commonwealth University, College of Multicomplex Psychology"; "College of Applied Psychology"; "Pacific Oxford College"; and "Golden State University".

The defendant did not take the witness stand.

Defendant's grounds for reversal may be summarized as follows:

1. That the indictment failed to charge a public offense and the evidence was insufficient to support the verdict of guilty because it was neither alleged nor proved that the degrees offered or sold were made, or purported to be made, pursuant to any laws regulating the licensing of physicians and surgeons in California, and that in fact the uncontradicted evidence showed to the contrary.

2. That the evidence showed, as a matter of law, that he was entrapped by law enforcement officers.

3. That the trial court committed prejudicial error in the admission and rejection of evidence.

4. That the court erred in the giving and refusing of instructions to the jury.

[1] At the outset, we are met with a question of statutory construction; specifically, the meaning of section 580, Business and Professions Code. The People contend that it is a crime, under this section, to sell an osteopathic degree. The defendant, however, contends that the sale of such degree only becomes violative of section 580 if the degree which is sold is made or purports to be made pursuant to a law regulating the licensing and registration or issuing of a certificate to osteopathic physicians in California; that is to say, only a degree which may be used to

defraud the California licensing authorities.

Section 580 provides as follows: "No person, company or association shall sell or barter or offer to sell or barter any *medical degree, or osteopathic degree, or chiropractic degree, or drugless practitioner degree or naturopathic degree, or any* degree, certificate or transcript made or purporting to be made pursuant to any laws regulating the licensing and registration or issuing of a certificate to physicians and surgeons, drugless practitioners, chiropodists, midwives, osteopathic physicians and surgeons or drugless practitioners, naturopaths, chiropractors or persons lawfully engaged in any other system or mode of treating the sick or afflicted." (Emphasis added.)

It is defendant's position that the clause "made or purporting to be made pursuant to any laws regulating the licensing and registration or issuing of a certificate to physicians and surgeons" modifies not only the phrase immediately preceding it, viz., "any degree, certificate or transcript," but also that portion of the section which is printed in italics. Defendant then contends, basing his argument upon an analysis of the legislative history of section 580, that only degrees from a medical school which the California licensing authorities will recognize are considered as "made or purporting to be made pursuant to any laws regulating the licensing and registration or issuing of a certificate to physicians and surgeons." Therefore, as the instant degree was not of this type, his acts were not prohibited by section 580.

There are two lines of authority in California relative to the proper construction of modifying clauses. In People v. Kahn, 19 Cal.App.2d Supp. 758, 762, 60 P.2d 596, 598, upon which defendant relies, it is held that, quoting with approval from Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S. 345, 40 S.Ct. 516, 64 L.Ed. 944, "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."

However, in City of Santa Barbara v. Maher, 25 Cal.App.2d 325, 327, 77 P.2d 306, 307, cited by the People, this court stated: "It is a settled rule of statutory construction that relative or modifying phrases are to be applied to the words immediately preceding them and are not to be construed as extending to more remote phrases. (Citations.)" This court then quoted from 59 Corpus Juris, 985, as follows: "By what is known as the doctrine of the 'last antecedent', relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote." See also, 82 C.J.S. Statutes § 334.

[2] People v. Ortiz, 86 Cal.App.2d Supp. 937, 195 P.2d 82, pointed out that the rule of the Kahn case, supra, also was enunciated in the same paragraph in Corpus Juris as was the rule from the Maher case, supra. After quoting from the Maher case, the court in People v. Ortiz, supra, 86 Cal. App.2d Supp. at page 939, 195 P.2d at page 84, stated: "The paragraph in Corpus Juris from which the quotation was taken [985], goes on to conclude with this sentence: 'Where several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all.' This sentence came, with some changes, from Porto Rico Ry., Light & Power Co. v. Mor [citation]. The original sentence was quoted, and applied, by us in People v. Kahn [citation]. * * * We are forced to conclude, therefore, that where two sets of words are followed by a modifying phrase or clause, whether the phrase or clause modifies one or both precedent sets of words, depends upon the meaning that is to be given the sentence, a conclusion that offers no help in ascertaining the meaning." In the Ortiz case, as in the instant prosecution, it was arguable that the modifying clause was applicable to all

prior phrases,[1] yet the court limited its application to the phrase immediately preceding it. In the instant case, as in the Ortiz case, we must employ additional means to discover the intended coverage and limitations of section 580, for neither of the above rules offers much assistance. In the case at bar, several salient facts present themselves which aid in ascertaining the true intent of the legislature. In the first place, if it were the intention of the legislature to prohibit only the sale of diplomas which could be used to deceive the medical licensing authorities, then that portion of section 580 which we have italicized would serve no purpose whatsoever, for the statute without the italicized language would fully accomplish this purpose. In this regard, it is well settled that statutes should be so construed, whenever possible, as to give effect to each word and phrase therein contained. In People v. Burns, 75 Cal.App. 84, at page 88, 241 P. 935, at page 937, the court stated: "Equally elementary is the uniformly recognized canon of statutory construction that effect must be given, if possible, to every word, clause, and sentence of the statute defining the offense, and that no part or word can be ignored, discarded, treated as meaningless, or denied purpose and effect, unless there be irreconcilable contradiction and repugnance." Therefore, if the italicized portion is to be given meaning, it follows that section 580 prohibits the sale of an osteopathic degree even though such degree is neither made nor purports to be made to deceive licensing authorities.

[3] Our interpretation of section 580 is fortified by considerations of public policy. The obvious purpose of the section is to protect the public against the deception and chicanery of persons who, by reason of such fictitious degrees, would hold themselves out as possessing learning and skill which they did not in fact have. The spurious parchments denounced by the statute represent that the learning and skill apparently possessed by the holder thereof equip him to administer to the needs of mankind. While the illegitimate character of these "sheep skins" ordinarily would be readily detected by the licensing authorities so that the chances of the holders becoming ostensibly legitimate practitioners are relatively slight, the general public does not make it a practice of inquiring into the genuineness of a diploma nor whether one who has achieved such recognition is duly licensed to practice the particular healing art. It would thus be a simple matter for the holder of a fake diploma or degree to impose upon members of the public, either by carrying on a clandestine practice of a particular healing art for which he was neither licensed nor trained, or on a non-professional basis. The latter situation would arise where the holder of such a degree does not claim to be a licensed practitioner, but holds himself out to be better equipped, because of his apparent specialized training, to deal with a particular problem. Illustrative of this is where the holder of a fictitious osteopathic degree uses it to aid in deceiving the public into believing that shoes made by him possess certain "special" features because of his specialized training in this field. Such conduct would be detrimental to the public interest. Section 580 was adopted to prevent such imposition and frauds upon the public.

Defendant cites People v. Oosterveen, 154 Cal.App.2d 620, 316 P.2d 390, as authority for the proposition that section 580, if properly construed, could be paraphrased as follows: "No person * * * shall sell * * * any osteopathic degree * * * made or purported to be made pursuant to any laws regulating the licensing and registration or issuing of a certificate to physi-

1. The statutory provision under consideration read:
"(a) The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk *at an intersection* * * *." (Emphasis added.) In this case, it was argued that the italicized phrase modified "within any marked crosswalk." Vehicle Code, § 560(a).

cians and surgeons * * *." We are of the view, however, that the Oosterveen case does not support the defendant's position. In that case, the accused sold a medical degree from a purportedly defunct university in Mexico. The information alleged a violation of section 580, Business and Professions Code, in that the accused "did wilfully, unlawfully and feloniously sell and offer to sell a medical degree." Oosterveen argued, as does the defendant in the instant case, that only the sale of degrees made pursuant to the licensing laws was violative of section 580. In considering Oosterveen's argument, the court merely paraphrased the section to conform with his contentions and then stated that the record supported a conviction under the statute as he would have it construed. The court thereby avoided the question of interpretation which now confronts this court. Therefore, this case is of no assistance to the defendant.

[4, 5] Defendant next argues that considering the legislative history of section 580, it is clear that only the selling of degrees which could be used as a vehicle to deceive California licensing authorities was intended to be denounced by the legislature. In support of this position, our attention is directed to the fact that this section was derived from chapter 79, statutes of 1927, the title to which read in part as follows: "An act to provide against the selling * * * of any fraudulent degrees, certificates or transcripts to be used in obtaining a license or certificate to practice in the State of California * * *" and that the above title "is of great importance in showing the legislative intent." While we agree that the title is a useful guide in determining the intended scope of legislation, it is, of course, not the only one. The fact that the 1927 title did not spell out as one of the purposes of the act an intent to prohibit the mere sale of an osteopathic degree does not necessarily mean such prohibition is not embraced within its scope. See People v. Jordan, 172 Cal. 391, 394, 156 P. 451; People v. Oosterveen, 154 Cal.App.2d 620, 623–624, 316 P.2d 390. In People v. Oosterveen, supra, 154 Cal.App. 2d at page 623, 316 P.2d at page 392, the court stated: "In People v. Jordan [citation], it was held that where the body of an act embraces provisions that are germane to the general subject stated in its title, the title will be held sufficient to comprehend all of the provisions of the act itself; and where the title suggests to the mind the field of legislation that the text of the act includes, the title will not be held misleading or insufficient, *or the act restricted in its operation.*" (Emphasis added.) Applying the foregoing to the instant case, it is clear that the title to the act under discussion is sufficient to embrace the acts for which defendant has been tried and convicted. It therefore follows that this aspect of defendant's argument is without merit.

[6] Defendant argues that "[t]he sale of a degree or diploma is not, of itself, immoral or indecent or wrong. It is done every day by our leading educational institutions. True, regulation is necessary to obviate abuses—but a sale of a degree itself is not offensive, unless it tends to deceive a licensing authority." Applying this attitude to the facts of the instant case, defendant is in effect contending that it is moral, decent, proper and inoffensive for him to place at large an instrument which could mislead the public into believing that the ostensible holder of the particular degree or diploma had specialized training and upon that basis defraud the public. This position is not worthy of the space which has thus far been expended in stating it. Furthermore, we firmly believe that section 580, as presently constituted, was designed to protect the public from just this sort of abuse, as well as to provide protection from treatment by those who do not meet the standards and requirements established by California authorities.

[7] Defendant's position that as the degree was not to be used in California he committed no offense against the laws of this state is factually unsupportable.

The degree was sold here, and that is what section 580 enjoins. This statute in no sense attempts to regulate any conduct outside of California.

[8] From the foregoing it is clear that the indictment stated a public offense and it was neither necessary to allege nor to prove that the degree was made pursuant to laws regulating the licensing of osteopaths.

We next turn to defendant's argument that he was entrapped. In People v. Braddock, 41 Cal.2d 794, 802, 264 P.2d 521, 525, the court states the California approach to this question as follows, quoting from People v. Lindsey, 91 Cal.App.2d 914, 917, 205 P.2d 1114: "Where the doing of an act is a crime, regardless of the consent of anyone, the courts are agreed that if the criminal intent originates in the mind of the accused and the offense is completed, the fact that an opportunity was furnished, or that the accused is aided in the commission of the crime in order to secure the evidence to prosecute him therefor, constitutes no defense. (Citation.) If the officer uses no more persuasion than is necessary to an ordinary sale, and the accused is ready and willing to make the sale, there is no entrapment."

In the present case, the evidence shows that the defendant was aware that the sale of a medical degree was unlawful, for he so stated when asked by Meng and May if he could secure one for them. They did not urge the defendant to sell them one after he said he would not and, in fact, they acted surprised, commenting that they did not want to get involved. The subject was not brought up again until the defendant was informed by Meng that he could obtain a medical degree for $1,500, to which defendant replied, without any solicitation from Meng, that he could procure a legitimate medical degree for $500. From the above it is obvious that less persuasion was employed than is required for an ordinary sale. The defendant's initial rejection was unequivocally accepted, and when the defendant later said he could obtain a legitimate medical degree, he did so upon his own initiative, for at that time no new request was made and the original request had been rejected. No more was done than to furnish the defendant with an opportunity to offer and sell an osteopathic degree. The criminal intent cannot be said to have originated in any other than the defendant's mind. Meng did not ask the defendant to secure a degree, and had defendant not intended to sell the degree, the offer would not have been made by him.

Defendant quotes the following from People v. Bradford, 84 Cal.App. 707, 712, 258 P. 660, 662, in support of his position that he was entrapped: "Where the criminal intent originates in the mind of the entrapping person and the accused is lured into the commission of the offense charged in order to prosecute him therefor no conviction may be had." It is clear, however, that the facts of the instant case, when tested by this rule, disclose no entrapment, for instead of showing that the criminal intent was the product of Meng's mind, the evidence is clear that such intent originated in the mind of the defendant.

Likewise inapplicable is Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413, upon which defendant relies.

It is therefore clear that there is no merit in defendant's asserted defense of entrapment.

[9–12] Attention will now be directed to defendant's argument that the trial court committed prejudicial error in the admission and rejection of evidence. First, argues defendant, it was error to admit the testimony of Moskowitz pertaining to the sale to him of religious degrees, and of Wells relative to the sale of a Ph. D. degree in Psychology, and to admit in evidence the blank diplomas and corporate seals found in defendant's office at the time of his arrest. The general rule is that the defendant in a criminal prosecution may only be tried for the offense alleged in the indictment or information

and evidence of collateral independent crimes or other acts is inadmissible. There are, nevertheless, several recognized exceptions to this rule. As stated in People v. Albertson, 23 Cal.2d 550, 576, 145 P.2d 7, 20, "[e]vidence of other crimes may be admitted when it tends directly to establish the crime charged by proving a material fact, where it is part of the res gestae, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme (citations)." Of similar import is People v. Bean, 149 Cal.App.2d 299, 302, 308 P.2d 27, 29, where the court stated: "* * * evidence of other acts of a similar nature may be admitted, when not too remote, to prove a material fact or where it tends to show motive, plan, scheme or system or to show guilty knowledge." See also People v. Guthrie, 103 Cal.App.2d 468, 471, 229 P.2d 841; People v. Selk, 46 Cal.App.2d 140, 150, 115 P.2d 607. Furthermore, evidence of other acts is admissible for the purpose of showing intent when the intent accompanying the act is equivocal, or where it is claimed by the defendant that the act was the result of mistake, accident, or inadvertence, or where intent is otherwise denied. See People v. Channell, 136 Cal.App.2d 99, 112, 288 P.2d 326; II Wigmore on Evidence, 202, § 304.

It is clear from the evidence that defendant intended to sell the degree in question, but in view of his defense of entrapment it was important to determine whether the idea or intent to make this sale originated with the defendant or the investigators. The testimony regarding the prior sales of degrees and the possession by defendant of blank diplomas and corporate seals was relevant on that issue. It established that defendant was ready and willing to furnish, for a price, fraudulent indicia of educational achievement. He was therefore willing to subject the unsuspecting public to the impositions that would naturally tend to flow therefrom. While the degrees sold to Moskowitz and Wells were not then illegal,[2] as was the sale of the degree in question, the resulting fraud upon the public was no less grievous. The intent and purpose was the same in all these transactions. It is undeniable that the idea or intent to issue these spurious degrees to Moskowitz and Wells originated with the defendant. In view of the similar character of the transactions, it would be reasonable to infer that the idea or intent to issue the degree in question originated with defendant, as it did in the prior instances. Therefore the challenged evidence was admissible.

[13] Defendant also contends that the blank diplomas and corporate seals were improperly received in evidence on the theory of unlawful search and seizure, since the officers had no search warrant and that no further search for additional evidence was justifiable since the officers had already obtained possession of the documents alleged to have been illegally sold. This court held in People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582, 586, "that a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure, during such a search, of evidencee related to the crime is permissible." In re Dixon, 41 Cal.2d 756, 761–762, 264 P.2d 513; Harris v. United States, 331 U.S. 145, 151, 67 S. Ct. 1098, 91 L.Ed. 1399; United States v. Rabinowitz, 339 U.S. 56, 61, 70 S.Ct. 430, 94 L.Ed. 653. In Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 5, 70 L.Ed. 145, the court stated: "The right without a search warrant contemporane-

2. The following sections were added to the Education Code in 1958:

"§ 24211. No person, firm, association, partnership or corporation may sell, barter, offer to sell or barter, or conspire to sell or barter, any diploma as defined in this article." Added Stats. 1958, c. 13, § 2.

"§ 24201. As used in this article 'diploma' means any 'diploma,' 'degree,' 'certificate,' 'transcript,' 'document' or other writing in any language representing that any person has completed any course of study beyond high school * * *." Added Stats.1958, c. 13, § 2.

ously to search * * * the place where the arrest is made in order to find and seize things connected with the crime * * is not to be doubted."

In the instant case the arrest unquestionably was lawful and the search was made as an incident thereto. There is nothing to suggest the search was not made in good faith or that it was unreasonable either in scope or manner of execution; and the items seized were proper for evidentiary use in establishing the very crime for which defendant was arrested and were used exclusively for this purpose. As above pointed out, this evidence was admissible on the issue of entrapment, and certainly the officers were at liberty to seize admissible evidence incident to a lawful arrest.

In People v. Mills, 148 Cal.App.2d 392, 306 P.2d 1005, relied on by defendant, it was held that evidence seized without a search warrant at the time of the defendant's arrest was not admissible to support convictions of offenses other than the one for which he was arrested. In the instant case, however, the evidence obtained when defendant was arrested was used exclusively to support the very offense for which he was arrested.

[14] Defendant next argues that the court erred in sustaining objections to the proffered testimony of George Ruppers. By this witness, the defendant offered to prove that the diploma involved would not be recognized by the California Board of Osteopathic Examiners. As section 580 prohibits the mere sale of such a diploma, the question whether or not the California authorities would or would not recognize it is wholly immaterial and, therefore, evidence relative to this question was properly excluded.

[15, 16] Finally, defendant contends that the court erred in giving the following instruction: "Section 580 of the Business and Professions Code of the State of California, insofar as it is applicable to this case, provides as follows: 'No person * * * shall sell or barter or offer to sell or barter any medical degree, or osteopathic degree * * *.'" In view of our interpretation of section 580, this was a proper instruction and there was no need to read all of section 580 to the jury. Furthermore, it was not error to refuse to give the instructions requested by the defendant which read in part as follows: "* * * you must find from the evidence beyond a reasonable doubt, that any degree which may have been offered for sale or sold was to enable the person to whom it was offered for sale or sold to secure a certificate of physicians and surgeons." Since, as already pointed out, the diploma or degree need not be used to secure a certificate or license in order to violate section 580, this proposed instruction was properly refused.

[17–19] Since there is no appeal from an order denying a motion in arrest of judgment, the attempted appeal from such order is dismissed. People v. Proctor, 46 Cal.2d 481, 483, 296 P.2d 821; People v. Smyre, 165 Cal.App.2d 651, 332 P.2d 391. Defendant's purported appeal from orders prior to judgment is dismissed, since such orders are reviewable on appeal from the judgment. As the record does not disclose any orders made after judgment, the purported appeal therefrom is also dismissed. The only order made in lieu of judgment was the order granting probation which is "deemed to be a final judgment" for purposes of appeal. Pen.Code, § 1237, subd. 1. The order denying motion for a new trial and the judgment are affirmed.

ASHBURN and HERNDON, JJ., concur.

169 Cal.App.2d 1

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph COTTON, Defendant and Appellant.

Cr. 3447.

District Court of Appeal, First District, Division 2, California.

March 20, 1959.

Hearing Denied May 13, 1959.

Prosecution for unlawful sale of heroin. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that remarks by prosecuting attorney that a witness for the state was a man worthy of belief, and that at least "some of us," believe he is worthy of belief or he would not have been put on the witness stand, was not prejudicial misconduct, especially in view of court's instruction that statements of counsel were not evidence, and that beliefs of counsel were not evidence.

Judgment affirmed.

1. Criminal Law ⇐720(5)

It is misconduct for a prosecuting attorney to express his personal belief as to the reliability of a witness.

2. Criminal Law ⇐730(8)

In prosecution for unlawful sale of heroin, remarks by prosecuting attorney that a witness for the state was a man worthy of belief, and that at least "some of us," believe he is worthy of belief or he would not have been put on the witness stand, was not prejudicial misconduct, especially in view of court's instruction that statements of counsel were not evidence and that beliefs of counsel were not evidence.

3. Criminal Law ⇐1171(1)

Whether a prosecuting attorney has been guilty of prejudicial misconduct must be determined in the light of the particular fact situation involved.

4. Criminal Law ⇐1171(1)

In prosecution for unlawful sale of narcotics, remarks of prosecuting attorney to the effect that an undercover agent working for the state bureau of narcotics is in danger and "is occasionally disposed of in another fashion by the people with whom he has been trafficking", was not prejudicial misconduct, in view of fact such comment could not be deemed an attempt to attribute any murderous design to defendant, who was not sought to be connected with the argument, but rather, such argument went to the nature of the work done by the witness.

Glenn P. Lewis, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

Defendant appeals from a judgment entered on a jury verdict finding him guilty on two counts of selling heroin. The sole issue on the merits is whether the district attorney was guilty of prejudicial misconduct.

In their brief, the People argued that the appeal was filed too late. On oral argument, the attorney general properly and commendably conceded that the notice of appeal was filed in time. People v. Slobodian, 30 Cal.2d 362, 181 P.2d 868. It is thus unnecessary to pass upon appellant's motion to augment the record, which deals only with the timeliness of his appeal.

The transactions leading up to the charges here involved occurred in San Francisco on April 1, 1957 and April 6, 1957. John A. Keeys, an undercover agent for the State Bureau of Narcotics testified that he had bought a "paper" from the defendant on each of those dates. The defendant testified that he had met Keeys and talked to him, but denied both sales. The only other witness at the trial was the narcotic chemist who testified to the contents of the "pa-

pers" purchased by Keeys. Defendant argues that in a case which turns solely on his credibility and the credibility of Keeys, certain remarks made by the district attorney constitute reversible error.

In his closing argument, the district attorney said:

> "* * * when Mr. Keeys is used by the State Bureau of Narcotics and he is produced here as a witness and knowing that he is going to give testimony that is not corroborated in the fashion that we have talked about, I ask you to draw the very clear inference that that man is a man who is worthy of belief. At least some of us believe he is worthy of belief or we wouldn't use him in this work and wouldn't put him on the witness stand."

[1, 2] It is misconduct for a prosecuting attorney to express his personal belief as to the reliability of a witness. People v. Pantages, 212 Cal. 237, 297 P. 890. However, the issue here is whether this comment was prejudicial. Appellant objected and the trial court promptly admonished the jury that "statements of counsel are not evidence and, of course, the beliefs of counsel are not evidence."

In the preceding argument of defense counsel, he had said, referring to Keeys,

> "On the basis of his statement, which, of course, Mr. Reichert believes and the police believe, or they wouldn't be here, * * * charges have been brought."

Thus, the belief of the prosecutor and other law enforcement officers in Keeys' integrity was first placed before the jury by defense counsel. The prosecutor's statement was but repetition of one made by the defense with, we may assume, the view that it was helpful to the defendant. In these circumstances we cannot say that the prejudicial effect of the prosecutor's remark was so great that it was not removed by the court's admonition.

[3, 4] The defendant next complains about certain remarks of the district attorney to the effect that an undercover agent like Mr. Keeys was in danger and "is occasionally disposed of in another fashion by the people with whom he has been trafficking." Defendant, relying on People v. Vienne, 142 Cal.App.2d 172, 297 P.2d 1027; People v. Talle, 111 Cal.App.2d 650, 245 P.2d 633; People v. Whitehead, 148 Cal.App.2d 701, 307 P.2d 442, argues that these remarks were of an inflammatory nature and presented the jury an unwarranted inference that the defendant was a man capable of murder. We cannot agree. Whether a prosecutor has been guilty of prejudicial misconduct must be determined in the light of the particular fact situation involved. People v. Lyons, 50 Cal.2d 245, 324 P.2d 556. Here the argument of defense counsel had been directed largely to the nature of Keeys' employment by the state. The prosecution reply did not, fairly read, attempt to attribute any murderous design to the defendant, who was not sought to be connected with the argument in any way. Rather, the argument went to the nature of the work done by Keeys. No objection was made to any of this argument. The trial court did, in its instructions, advise the jury in detail that arguments of counsel are not evidence. Under these circumstances, we find no prejudice in the challenged remarks.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

51 Cal.2d 777

PEOPLE of the State of California, Respondent,

v.

Herbert J. MATTSON, Appellant.

Crim. 6328.

Supreme Court of California, In Bank.

March 17, 1959.

Defendant was convicted of issuing checks without sufficient funds. The Superior Court, San Diego County, William A. Glen, J., entered judgment and defendant appealed. The Supreme Court, Schauer, J., held that defendant, an indigent, was not entitled as a matter of constitutional and statutory right both to conduct his own defense and to be provided with the services of court-appointed counsel to advise and assist him in a subservient capacity in preparing for and during trial.

Affirmed.

Opinion, 327 P.2d 915, vacated.

1. Criminal Law ⇐641

Generally, when the public defender is appointed to represent a defendant accused of a crime, the public defender becomes the attorney for defendant for all purposes of the case and to the same extent as if regularly retained and employed by defendant, and public defender has the right and duty to control the trial.

2. Criminal Law ⇐641(1)

An accused has no federal constitutional right to present his case both by counsel and in person in either a federal or a state court.

3. Criminal Law ⇐641(1)

The right of a California defendant to appear and defend in person and with counsel, granted by the State Constitution and statute, does not include the right to conduct the defense both in person and through counsel; in the interest of orderly procedure the trial court can require a defendant to elect whether he or his counsel will actively conduct the case. West's Ann.Const. art. 1, § 13; West's Ann.Pen. Code, § 686.

4. Criminal Law ⇐641(1)

The California constitutional provision that in criminal prosecutions, in any court whatever, the party accused shall have the right to appear and defend, in person and with counsel, and the statutes implementing such rights accord the accused not only a right to counsel but also a right to represent himself if he so elects; however, except in certain situations, the court cannot force a competent defendant to be represented by an attorney. West's Ann. Const. art. 1, § 13; West's Ann.Pen.Code, §§ 686, 858, 859, 859(a), 860, 987, 1018.

5. Criminal Law ⇐641(1)

So long as defendant is represented by counsel at the trial, he has no right to be heard by himself; conversely, when defendant has intelligently declined aid of counsel he has no right to interrupt the trial with a demand for legal assistance. West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, § 686.

6. Criminal Law ⇐641(1)

A fundamental reason for according an accused the right to counsel is that without the aid of an attorney other protections which the law affords would often avail defendant little since it cannot be assumed that he is sufficiently articulate and adequately conversant with his constitutional and legal rights and his procedural duties to protect himself throughout course of criminal proceedings. West's Ann. Const. art. 1, § 13; West's Ann.Pen.Code, §§ 686, 858, 859, 987.

7. Constitutional Law ⇐268
Criminal Law ⇐641(1)

The federal courts, in determining whether state's denial of counsel amounts to a denial of federal due process, and the California courts, in determining the extent of the right to counsel under state law, consider such matters as intricacy of accusatory pleading, complexity of law as to offense charged and included offenses, defendant's intelligence, education, experience, including familiarity with the

criminal law derived from prior prosecutions, youth, mental and physical health and emotional condition, the attitude of the court and the prosecuting officials and the existence of inflamed public opinion, and also the severity of the penalty. West's Ann.Const. art. 1, § 13; West's Ann.Pen. Code, §§ 686, 858, 859, 987; U.S.C.A. Const. Amend. 6.

8. Constitutional Law ⇐268

Federal due process requires a state to furnish counsel to a defendant unable to employ an attorney, whether or not defendant requests such appointment, if the lack of representation results in fundamental unfairness. U.S.C.A.Const. Amend. 6.

9. Constitutional Law ⇐268

Where federal due process requires appointment of counsel, the state court's appointment must be effective; it must afford counsel time and opportunity, and impose upon him the duty, to consult with defendant and investigate and prepare the case for trial. U.S.C.A.Const. Amend. 6.

10. Constitutional Law ⇐268

Where federal due process requires appointment of counsel, accused has right to counsel at every step of the proceedings leading to conviction, not only to effective representation at the trial on the merits but also to the advice of counsel as to whether a plea of guilty is appropriate, and, where objections must be raised before the case is at issue, to appointment of counsel at a time which will enable defendant to make such objections. U.S.C.A. Const. Amend. 6.

11. Criminal Law ⇐641(1)

The California right to counsel requires an effective, not a mere pro forma, appointment; counsel must be afforded time and opportunity for investigation and consultation with defendant in the preparation of the defense and opportunity to consult freely with defendant during the trial, and defendant is entitled to representation at every step of the proceedings, including the aid of counsel to enable an intelligent decision as to his plea and to representation at arraignment for and pronouncement of judgment. West's Ann. Const. art. 1, § 13; West's Ann.Pen.Code, §§ 686, 858, 859, 987.

12. Criminal Law ⇐641(1)

Both federal due process and California law require that waiver of right to counsel, to be effective, must be with an intelligent appreciation of its consequences, and whether there is a proper waiver should be clearly determined by the trial court, and it is fitting and appropriate for that determination to appear upon the record. U.S.C.A.Const. Amend. 6; West's Ann.Const. art. 1, § 13.

13. Criminal Law ⇐264

Even when a defendant represented by the public defender expresses the desire to plead guilty, it is the public defender's task to investigate carefully all defenses of fact and of law which may be available to the defendant and confer with him about them before the public defender permits the defendant to foreclose all possibility of defense and submit to conviction without a hearing by pleading guilty. West's Ann.Gov.Code, § 27706(a).

14. Criminal Law ⇐641

A defendant who elects to go to trial represented by out-of-state counsel has no right to services of public defender as an advisor concerning local law.

15. Criminal Law ⇐641(1)

In the constitutional and statutory provisions that defendant has the right to appear and defend in person and with counsel, "defend", as used generally with reference to the act of a party to a lawsuit, means "to deny or oppose the right of the plaintiff", and as used specifically in referring to the act of an attorney, means "to act on behalf of" accused person, and the defendant's right to have counsel assigned to "defend" him under the statutes is the right to have counsel act on defendant's behalf and to appear for and represent him. West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, §§ 686, 859, 987.

See publication Words and Phrases, for other judicial constructions and definitions of "Defend".

16. Courts ⇐78

It is the duty of the court to safeguard and promote the orderly and expeditious conduct of its business and to guard against inept procedures and unnecessary indulgences which would tend to hinder, hamper or delay the conduct and dispatch of its proceedings.

17. Criminal Law ⇐304(2)

Common knowledge of judges and attorneys suggests that there are at least some persons who, although not members of the bar, undertake to act as their own attorney in presenting their cause or defense and who in so acting do not appear to feel bound by attorney's statutory duty to maintain the respect due to the courts of justice and judicial officers, and to employ, for the purposes of maintaining the causes, such means only as are consistent with the truth and never to seek to mislead the judge by an artifice or false statement of fact or law, and to abstain from all offensive personality and to advance no fact prejudicial to the honor or representation of a party or witness unless required by the justice of the cause, and not to encourage either the commencement or the continuance of an action from any corrupt motive of passion or interest. West's Ann. Bus. § Prof.Code, § 6068(a–h).

18. Attorney and Client ⇐14

The court-appointed attorney as well as the accused is entitled to fair consideration.

19. Attorney and Client ⇐14

An attorney at law is a member of an ancient, honorable and deservingly honored profession; he is regarded as an officer of the court, of any court in which he appears.

20. Attorney and Client ⇐14, 32

Whether appointed to represent an indigent or employed by a man of wealth or by the state, the diligence and quality of the lawyer's service and the ethical standards of his conduct are the same; his office and the prerogatives of that office, and the respect due to him in the discharge of his duties, are the same.

21. Attorney and Client ⇐23

The court should not appoint counsel, whether to defend an indigent or otherwise, and require of him that in so doing he surrender any of the substantial prerogatives traditionally or by statute attached to his office.

22. Criminal Law ⇐701

The right of an accused to the services of an attorney contemplates that the attorney will investigate possible defenses or alternative procedures and advise the accused of his conclusions and does not contemplate that the attorney will act as a mere subservient helper under the direction of the accused. West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, §§ 686, 858, 859, 987.

23. Criminal Law ⇐641(1)

Neither the express provisions of California law nor general considerations of fairness require that an intelligent, competent defendant who obdurately insists upon controlling and conducting his own defense should be entitled as a matter of right to the services of counsel to act under defendant's control. West's Ann. Const. art. 1, § 13; West's Ann.Pen.Code, §§ 686, 858, 859, 987.

24. Criminal Law ⇐641(1)

Where defendant charged with crime is unable to employ counsel, is not statutorily required to have counsel and is competent to decide whether he desires counsel, the defendant during the proceedings before the magistrate and the trial court has as a matter of absolute right but two choices in the matter of a court-appointed attorney; he can accept representation by counsel or he can elect to represent himself, and if he makes the latter election, he assumes for all purposes connected with his case, and must be prepared to be treated as having, the qualifications and responsibilities concomitant with the role he has undertaken, and he is not entitled either to privileges and indulgences not accorded attorneys or to privileges and indulgences not accorded defendants who are represented by counsel. West's Ann.

Const. art. 1, § 13; West's Ann.Pen.Code, §§ 686, 858, 859, 859(a), 860, 987, 1018.

25. Criminal Law ⇐641(3)

Where defendant was intelligent and mentally competent and understood, although he did not agree with, the legal effect of his insisting upon representing himself, the superior court could not force defendant to accept representation of counsel. West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, § 686.

26. Criminal Law ⇐641(3)

The trial judge, in discharging his serious and weighty responsibility of determining whether there is an intelligent and competent waiver of the right to counsel by the accused, has no duty to give defendant a legal education and has no right, in view of the privilege against self-incrimination, to ask defendant about his understanding of the facts of the case; if the judge's properly limited inquiry concerning necessity for appointment of counsel suggests that defendant may not comprehend his position then the judge should assign an attorney to consult privately with defendant concerning the latter's need for representation, and such an appointment would not require the attorney to surrender the prerogatives of his position. West's Ann.Const. art. 1, § 13.

27. Criminal Law ⇐641(1)

The California constitutional provision giving the accused the right to appear and defend in person and with counsel accords to California defendants the same right as is accorded to federal defendants by the Sixth Amendment of the Federal Constitution; this does not mean that the California right to counsel is or must be identical with the federal right to counsel, and consonant with the Federal Constitution the state right could be less comprehensive than the federal right. U.S.C.A. Const. Amend. 6; West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, § 859; Fed.Rules Crim.Proc. rules 5(b), 40(b), 44, 18 U.S.C.A.

28. Constitutional Law ⇐250, 268

Although a defendant who represents himself and who employs counsel of his choice is allowed out-of-court consultation with such attorney and indigent defendant who has court-appointed attorney cannot represent himself and is not allowed out-of-court consultation, this difference is not a denial of due process or equal protection of the law. West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, §§ 686, 825, 858, 859, 987.

29. Constitutional Law ⇐268

In a state prosecution, federal due process accords the defendant the unqualified right to be heard through his own counsel.

30. Constitutional Law ⇐268

A state's failure to furnish the services of an attorney to a defendant who is unable to employ his own counsel is not a denial of federal due process unless it leads to fundamental unfairness.

31. Criminal Law ⇐1077

A convicted California defendant, without a showing of probable cause, has a right of appeal if the prescribed procedural steps are timely taken; but the appellate court need not appoint counsel for indigent defendant except where its independent investigation of the record shows that such appointment would be helpful to defendant or the court.

32. Attorney and Client ⇐42
Criminal Law ⇐1131(4)

Private counsel, so long as he complies with the procedural rules, can brief and argue an appeal which is a waste of time in substance for defendant, the people and the court; but the court can dismiss, as irregular, sham, or frivolous, an appeal which has no proper appellate objective and the attorney who prosecutes such an appeal can be disciplined. Rules of Professional Conduct, rule 13; West's Ann. Bus. & Prof.Code following section 6076; West's Ann.Bus. & Prof.Code, § 6077.

33. Criminal Law ⇐641(1)

Trial court has discretion to permit the party who is represented by counsel to participate in the conduct of the case or permit defendant who appears in propria persona to employ an attorney to sit by

him and advise him during the presentation of the case in court, or to appoint an attorney, with the latter's consent, to render such advisory services to an indigent defendant who wishes to represent himself; however, the court should not permit the litigant both to have counsel and to actively participate in the conduct of the case unless the court on a substantial showing determines that in the circumstances of the case the cause of justice will thereby be served and that the orderly and expeditious conduct of the court's business will not be thereby substantially hindered, hampered or delayed.

34. Criminal Law ⇐696(3)

Where defendant, although he was diligently represented on his appeal by court-appointed counsel, persisted in presenting documents in propria persona which reflected his misconceptions of and refusal to accept established rules of law, such documents would be stricken. West's Ann. Rules on Appeal, rule 12(b).

35. Criminal Law ⇐1128(4)

The general rule that a defendant who is represented by an attorney of record will not be personally recognized by the court in the conduct of his case applies to the filing of pro se documents on appeal.

John T. Schall, San Diego, under appointment by the Supreme Court, for appellant.

Edmund G. Brown, Atty. Gen., and Carl Boronkay, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

A jury found defendant guilty of three counts of issuing checks without sufficient funds (Pen.Code, § 476a) and found that he had suffered a prior conviction of felony. Defendant appeals from the ensuing judgment. As the sole ground for reversal he contends that an indigent defendant is entitled as a matter of constitutional and statutory right both to conduct his own defense *and* to be provided with the services of court-appointed counsel to advise and assist him in a subservient capacity in preparing for and during trial. We have concluded that the right to counsel does not include an absolute right to services of the character and capacity indicated; that the court should not appoint counsel to defend an indigent and require that in so doing the attorney surrender any of the substantial prerogatives traditionally or by statute attached to his office; that a defendant for whom counsel is appointed should not be permitted both to have counsel and to actively participate in the conduct of the case unless the court in its discretion determines that in the circumstances of the case the cause of justice will thereby be served and that the orderly and expeditious conduct of the court's business will not thereby be substantially hindered, hampered or delayed; that under the circumstances of this case there was no error in refusing to appoint counsel to act in a subservient capacity; and that for the reasons aforesaid and hereinafter developed the judgment of conviction should be affirmed.

The Evidence as to the Substantive Offenses. On June 20 and 21, 1955, defendant, a resident of Louisville, Kentucky, made three purchases (a typewriter, a watch, and a camera) in three San Diego shops. For each purchase he gave a check on the printed form of OK Auto Parts, signed by defendant and drawn on the Liberty National Bank and Trust Company of Louisville. Each seller deposited his check for collection and none of the checks was paid. OK Auto Parts, a firm owned by defendant's wife and managed by defendant, had had two checking accounts with the Louisville bank but those accounts were closed in 1947. Since 1947 neither defendant nor the firm had any account with that bank.

Defendant testified as follows: When he wrote the subject checks he was suffering from "hysterical amnesia." He has no knowledge of having been in San Diego in June, 1955, of having written the subject checks, or of having had the typewriter, watch, or camera. His wife gave him the

printed forms of checks "and the defendant was advised that there was an account at the Liberty National Bank." At the time defendant wrote the checks he "had many thousands of dollars" and "could have charged any of these items. I didn't have to write a check and steal them." (Defendant's property has since been "tied up" because of a divorce action by his wife.)

Defendant further testified confusingly as follows concerning the Louisville bank account; "[D]uring May, 1955, just prior to the issuance of these checks, the defendant put in the bank of Louisville in one of the OK Auto Parts account[s], of his own money, over $1,000 in $100 bills" yet "all during May, the account was closed." "I put over $2,000 in the Bank of Louisville during the week just before I went on this trip [to San Diego]. * * * I was in the bank trying to give them trade acceptances for Mrs. Mattson and notes for collateral to be put into the account, and [a director and vice president of the bank] * * * told me to send Mrs. Mattson in with them since he couldn't give me any information on the accounts since I was not the owner."

A psychiatrist who had examined defendant testified for the People that "there was nothing presented by the defendant to convince me that at any time in the past that he had had a valid amnesia."

[1–3] *Defendant's Insistence upon Representing Himself and at the Same Time Being Afforded the Assistance of Counsel.* On August 21, 1957, defendant appeared in the superior court for arraignment. Proceedings on this and subsequent days through the time of trial (September 25 and 26, 1957), quoted and summarized in the margin,[1] disclose the following situation: De-

1. On August 21, 1957, when the case was called, defendant produced a petition for habeas corpus and asked the court "if it will direct it be entered properly with the Clerk of the court and notarized accordingly." The court said that the petition "doesn't have to be verified. Just file it. * * * Better serve the District Attorney with a copy." The following then occurred:

"The Defendant: The defendant has been trying to get the proper papers so that he could give verified copies, service on the District Attorney, but has no means to do so.

"The Court: You use the term 'the defendant.' You are the defendant, aren't you?

"The Defendant: Yes, and I am acting as my own counsel, your Honor.

"The Court: Why don't you have counsel?

"The Defendant: I had an unfortunate experience in Kentucky and it was through an appeal that I got out of a bad situation because the Court appointed attorney did not call my witnesses and a biased judge forced me to trial. * * *

"The Court: Okay. What do you want to do about the arraignment on the checks?

"The Defendant: The defendant pleads not guilty and not guilty by reason of insanity and asks a jury trial in both instances.

"The Court: You are entitled to that as a matter of right unless you waive it * * *

"The Defendant: Since the defendant has no way of subpoenaing witnesses, these are the two witnesses and the papers that the defense would like subpoenaed. (Hands documents to clerk.)

"The Court: George, will you give the defendant some subpoenas so he can get them out while he is in jail? If he doesn't want counsel I can't ask anybody else to prepare them for him. * *

"The Defendant: I would like to enter this in a motion to dismiss. (Hands papers to Court.) * * *

"The Court: Mr. Mattson, if you are going to make a motion to quash something you'd better do it before you enter a plea. Better set aside your plea and we will put this on the calendar for Friday morning * * *

"The Clerk: What about his writ of habeas corpus?

"The Court: We will hear that on Friday morning, too. * * *

"The Clerk: Your true name is Herbert J. Mattson?

"The Defendant: Legal name, sir.

"The Clerk: You are representing yourself, Mr. Mattson?

"The Defendant: I represent myself.

"The Court: It is my understanding you don't want Court appointed counsel.

"The Defendant: I would appreciate Court appointed counsel only for the purpose of assisting me in filing these things, but not to defend myself in a jury trial, no. [Defendant then filed in the superior court a "Motion to Vacate Warrant" and "subpoenas," not in prop-

fendant repeatedly refused to accept appointment of counsel to represent him and insisted upon representing himself. He asked and the court refused appointment of counsel to aid defendant in filing papers, preparing subpoenas, and obtaining docu-

er form, for witnesses and papers. In a document filed by defendant in propria persona in this court he says that he wished to file "motions for Out-Of-State Witness Depositions, Court Records, Bank Statement [and other documents], * * * which had not been put into court acceptable form. Since Prisoner Appellant did not have proper paper, notary service or the legal advice he needed."]

"The Court: I don't know where to draw the line.

"The Defendant: Under the Constitution of California I am allowed that, if your Honor thinks it would be more feasible?

"The Court: Well, if we appoint a lawyer for you he will represent you for this case because all the motions you are making, you can't separate the motions from the case.

"The Defendant: I don't want any lawyer to hire—

"The Court: Okay. You represent yourself."

On August 23, 1957, defendant's "Motion to Vacate Warrant" and his petition for habeas corpus were heard and denied. Defendant then pleaded not guilty and not guilty by reason of insanity, and the following occurred:

"The Defendant: If it please your Honor, the Court recognizes the sanity of the defendant by allowing him to plead his own case and since this alleged crime happened in 1955 and the defendant has, by a competent jury at a mental inquest in the State of Kentucky been found sane, I ask the Court to please waive a psychiatrist. The defendant should not be forced to give testimony and be a witness during his insanity hearing.

"The Court: Well, the law provides if you enter a plea of not guilty by reason of insanity we have to appoint two psychiatrists. We can't waive the law. I was going to suggest since you are representing yourself and pleading not guilty by reason of insanity, I think you are going to have considerable difficulty. In one breath you say you are insane and in the next breath you want to represent yourself. Maybe that is natural. I don't know.

"The Defendant: Your Honor, the defendant didn't state that. The defendant merely stated he is sane now, but he has entered an insanity plea on the alleged crime at the time of the crime and for your Honor's information Dr. Van Hagen, appointed by the Judge of the Federal Court, Southern District [Los Angeles], found the defendant in the case before that Court insane, and since then has found the defendant sane.

"The Court: Well, we will have to go through the same procedure and whether you claim to be insane at that time or at this time, or at both times, we have to have two psychiatrists appointed. * * * If you don't want to tell the doctor anything you don't have to."

On September 18, 1957, an amended information was filed, and the following occurred:

"The Court: Well, you are not represented by counsel?

"Defendant Mattson: I am my own counsel.

"The Court: The Court offered to appoint an attorney for you.

"Defendant Mattson: Yes, your Honor. * * *

"The Clerk: You are not represented by counsel and you don't wish counsel?

"Defendant Mattson: That is correct."

Concerning the alleged prior conviction of felony, defendant said, "a Presidential pardon [has] been issued * * * and as to the defendant's knowledge, this is not a prior." The court suggested that "you better deny the prior then." Defendant said, "the defendant is not in a position to deny or affirm, having actually been declared insane several times. * * * I would rather admit to it without knowledge because all I have is a quasi conscious knowledge * * * I want to admit to the prior since I cannot prove differently at this time, and I prefer to do that." Defendant pleaded not guilty and not guilty by reason of insanity to the substantive offenses charged in the amended information. The court set September 25, 1957, for trial and said, "If you want an attorney to defend you, I will appoint one." Defendant replied, "No, your Honor, I do not."

On September 20, 1957, defendant again appeared in court and the following occurred: (We note that defendant in propria persona has presented to this court a document by which he asks this court to correct the transcript of September 20, 1957, in certain respects. Defendant has not met the requirements of Rule 12(b) of the Rules on Appeal, which provides that "If any material part of the record is incorrect in any respect

ments. The court of its own motion gave defendant much legal advice. Defendant was mentally competent and alert and had some knowledge of law, but either did not understand or refused to recognize some rules of procedure, particularly rules of evi-

* * *, the reviewing court, on suggestion of any party * * *, may direct that it be corrected." Defendant's proposed "corrections" are not material. If they were made they would merely reiterate what is already apparent from the record; i. e., that defendant took the position that he was entitled to be furnished the assistance but to refuse the representation of counsel.)

"The Court: This defendant * * * wanted to represent himself. He didn't want counsel.

"Defendant Mattson: I still didn't want counsel.

"The Court: Why did you write the letter saying you wanted an attorney?

"Defendant Mattson: * * * [T]he deputies * * * told me the subpoenas that the court clerk furnished me were the wrong ones for the out of town witnesses * * * I would want counsel appointed only for the purpose of subpoenaing the witnesses properly. * *

"The Court: If you want an attorney to act as a stenographer, that is one thing; but if you want an attorney to represent you as an attorney, that is another.

"Defendant Mattson: I think the Constitution allows me to have the assistance of counsel for that purpose, that I have to be represented by counsel.

"The Court: We don't have stenographers to represent people, we have lawyers.

"Defendant Mattson: I don't want a lawyer, I just want my witnesses to appear at the trial * * *

"The Court: I would suggest that you give us a list of the witnesses you want subpoenaed, and the District Attorney's office has a stenographer down there and they will prepare it for you * * * You will get your subpoenas. I just want to know if you want a lawyer.

"Defendant Mattson: No, I don't want counsel."

(Pertinent to defendant's expressed attitude concerning the aid of counsel, it is further noted that in a document which was proffered by defendant in propria persona to the District Court of Appeal when this case was before that court, which was not filed in that court because defendant was there represented by court-appointed counsel, but which accompanies the record, defendant states that several days prior to August 21, 1957, an attorney visited him in jail and defendant informed the attorney that defendant "would not accept counsel to defend him" because counsel "could bind him to something he would not wish to participate in" but that "he would seek counsel to assist and legally advise him.")

On September 25, 1957, immediately before trial, defendant stated that he wished to deny the previously admitted prior conviction. He was permitted to do so after the court (in substance) explained, and defendant stated that he understood, that the allegation of the prior conviction, if denied, would be read to the jury and evidence to prove it received.

At the trial all admissible evidence and much irrelevant evidence offered by defendant was admitted. Defendant examined a police officer as to whether he took from defendant "papers * * * including certified deposits in the bank where this would have shown that * * there was money in the account"; the officer testified that he did not take any papers from defendant; defendant made no further effort to prove that there were "certified deposits" or "money in the account."

By examination of an attorney who had represented defendant, by defendant's own testimony, and by cross-examination of the psychiatrist who testified for the People, defendant sought to show the contents of the report of another psychiatrist (a resident of Los Angeles) who had concluded in 1956 that defendant had suffered from amnesia. The trial court explained that if defendant wanted the Los Angeles psychiatrist's testimony he should have called him as a witness. Defendant said, "I would like to do that," but he did not do so, although the appearance of other persons from Los Angeles, who were subpoenaed as witnesses on defendant's behalf shows that defendant was not denied the opportunity to obtain the testimony of out-of-county witnesses.

The court of its own motion diligently sought to protect defendant when he insisted upon bringing out his entire past record of involvement with the law. When, at defendant's invitation, the prosecuting attorney inquired about prior convictions on other charges similar to the principal offenses for which defendant was being tried, defendant explained that he had "made deals" with the prosecuting attorneys and judges whereby, in return for defendant's pleas of guilty,

dence. He clearly indicated that he did not wish to be represented by counsel because he correctly understood that if he were so represented counsel could control the presentation of the case [2] and defendant would have no right to participate actively in the conduct of the trial.[3] No attempt of the prosecution to take improper advantage of defendant appears and (leaving aside for the moment the question of defendant's right to the aid of an attorney) the record discloses no unfairness in his trial and no miscarriage of justice in his conviction.

Although defendant in the superior court asked only for assistance of an attorney to prepare particular papers designated by defendant (that is, for aid in a quasi-clerical capacity), on appeal he urges that the superior court should have appointed an attorney to furnish legal advice as to the preparation and presentation of his defense. No California case has been found which discusses the question whether a defendant who insists upon representing himself has the right to have court-appointed counsel to assist and advise in preparation for or during the trial. The following rules are pertinent:

[4] The California Constitution (art. I, § 13) provides that "In criminal prosecutions, in any court whatever, the party ac-

some charges were reduced and others were dismissed.

After the jury found against defendant on his plea of not guilty, he asked to withdraw his plea of not guilty by reason of insanity. The court permitted defendant to do so only after it had fully advised him of his right to be tried on the insanity issue and had expressly found, on the basis of its own observation and of reports of the court-appointed psychiatrists who had examined defendant, that defendant had the capacity to withdraw the plea.

2. "Generally speaking, 'When the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant.' (In re Hough (1944), 24 Cal.2d 522, 528–529 [150 P.2d 448].)" (In re Atchley (1957), 48 Cal.2d 408, 418 [3], 310 P.2d 15; see In re Burroughs (1957), 148 Cal.App.2d 800, 810 [2], 307 P.2d 709.) The public defender, when he represents a defendant, has the right and duty to control the trial. (In re Atchley, supra, at page 418 [4] of 48 Cal.2d at page 21 of 310 P.2d; see People v. Merkouris (1956), 46 Cal.2d 540, 554 [5], 297 P.2d 999.)

3. An accused has no federal constitutional right to present his case both by counsel and in person in either a federal or a state court. (Egan v. Teets (9 Cir., 1957), 251 F.2d 571, 579 [15], certiorari denied 352 U.S. 853, 77 S.Ct. 76, 1 L.Ed.2d 63; Shelton v. United States (5 Cir., 1953), 205 F.2d 806, 812–813, certiorari dismissed on petitioner's motion, 346 U.S. 892, 74 S.Ct. 230, 98 L.Ed. 395, petitioner's motion to vacate dismissal denied 349 U.S. 943, 75 S.Ct. 876, 99 L.Ed. 1269; United States v. Foster (U.S.D.C., S.D.N.Y., 1949), 9 F.R.D. 367, 372, convictions affirmed; United States v. Dennis (2 Cir., 1950), 183 F.2d 201, 233 [40, 41]; Dennis v. United States (1951), 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137.) It may be mentioned that, although a federal court in its discretion may permit a party to appear both in person and by counsel, or may permit a party who is represented by counsel to conduct the trial while counsel sits silent, it has been said that such practices are usually undesirable. (Brasier v. Jeary (8 Cir., 1958), 256 F.2d 474, 478; Overholser v. De Marcos (1945, 80 U.S.App.D.C. 91), 149 F.2d 23, 26 [13], certiorari denied 325 U.S. 889, 65 S.Ct. 1579, 89 L.Ed. 2002.)

The right of a California defendant to appear and defend in person *and* with counsel, granted by the state Constitution (art. I, § 13) and statute (Pen. Code, § 686) does not include the right to conduct the defense both in person and through counsel; in the interest of orderly procedure the trial court can require a defendant to elect whether he or his counsel will actively conduct the case. (People v. Northcott (1930), 209 Cal. 639, 648–649 [6], 651, 289 P. 634, 70 A.L.R. 806.) A defendant who is represented by counsel is not entitled as a matter of right to personally conduct his case (People v. Glenn (1950), 96 Cal.App.2d 859, 868, 216 P.2d 457); rather, "usually, and properly, counsel should conduct the trial" (People v. McKinney (1957), 152 Cal.App.2d 332, 336 [6], 313 P.2d 163).

cused shall have the right * * * to appear and defend, in person and with counsel." This right is implemented by various statutory provisions, including the following: When defendant is brought before a magistrate on an arrest, the magistrate must inform him "of his right to the aid of counsel in every stage of the proceedings." (Pen.Code, § 858.) The magistrate, and the superior court before arraignment, must ask defendant "if he desires the aid of counsel," and if defendant desires and is unable to employ counsel, "must assign counsel to *defend* him." (Pen.Code, §§ 859, 987; italics added.) "In a criminal action the defendant is entitled: * * * 2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel." (Pen.Code, § 686.)

The foregoing sections accord the accused not only a right to counsel but also a right to represent himself if he so elects. Except in certain situations not here pertinent,[4] the court cannot force a competent defendant to be represented by an attorney. (People v. Rose (1919), 42 Cal.App. 540, 553[7], 183 P. 874; see also Adams v. United States ex rel. McCann (1942), 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268.)

[5] As has been stated (ante, footnote 3), despite the constitutional (art. I, § 13) and statutory (Pen.Code, § 686) provisions that defendant has the right to appear and defend in person *and* with counsel, defendant is not entitled to have his case *presented* in court *both by himself and by counsel* acting at the same time or alternating at defendant's pleasure. (People v. Northcott (1930), supra, 209 Cal. 639, 648–650[6], 651, 289 P. 634, 70 A.L.R. 806; People v. Mims (1958), 160 Cal.App.2d 589, 325 P.2d 234.) So long as defendant is represented by counsel at the trial, he has no right to be heard by himself (People v. McKinney (1957), supra, 152 Cal.App.2d 332, 336[6], 313 P.2d 163; People v. Glenn (1950), supra, 96 Cal.App.2d 859, 868, 216 P.2d 457); conversely, when defendant has intelligently declined the aid of counsel he has no right to interrupt the trial with a demand for legal assistance (In re Connor (1940), 16 Cal.2d 701, 709[8], 108 P.2d 10).

[6–12] A fundamental reason for according to an accused the right to counsel is that without the aid of an attorney other protections which the law affords would often avail defendant little since it cannot be assumed that he is sufficiently articulate and adequately conversant with his constitutional and legal rights and his procedural duties to protect himself throughout the course of criminal proceedings. Therefore, the federal courts, in determining whether a state's denial of counsel amounts to a denial of federal due process, and the California courts, in determining the extent of the right to counsel under state law, consider such matters as the intricacy of the accusatory pleading, the complexity of the law as to the offense charged and included offenses, defendant's intelligence, education, experience (including familiarity with the criminal law derived from prior prosecutions), youth, mental and physical health and emotional condition, the attitude of the court and the prosecuting officials and the existence of inflamed public opinion, and also the severity of the penalty. Considering the foregoing matters, the courts have developed familiar rules, stated in the margin, as to the scope of an accused's right to representation by counsel at the trial and in the antecedent proceedings.[5]

[13, 14] Correlative to a defendant's California right to have counsel (whether

4. Pen.Code, § 859a (defendant not represented by counsel cannot plead guilty before the magistrate), § 860 (only "a defendant represented by counsel" can waive his right to a preliminary examination before the magistrate), § 1018 (court cannot receive plea of guilty to crime for which maximum punishment is death or life imprisonment without possibility of parole unless defendant is represented by counsel).

5. Federal due process requires a state to furnish counsel to a defendant unable to employ an attorney, whether or not defendant requests such appointment, if the lack of representation results in "fundamental unfairness." (Uveges v. Com-

employed or appointed) afforded opportunity to prepare so that he can intelligently advise and represent defendant, is the public defender's duty not merely to "defend" the indigent accused in court but also to "give counsel and advice to such person about any charge against him upon which the public defender is conducting the defense." (Gov.Code, § 27706, subd. (a).) And even when a defendant represented by the public defender expresses the desire to plead guilty, "It is his [counsel's] task to

monwealth of Pennsylvania (1948), 335 U.S. 437, 441, 69 S.Ct. 184, 93 L.Ed. 127; Wade v. Mayo (1948), 334 U.S. 672, 683–684, 68 S.Ct. 1270, 92 L.Ed. 1647; Powell v. State of Alabama (1932), 287 U.S. 45, 71, 53 S.Ct. 55, 77 L.Ed. 158.) Where federal due process requires appointment of counsel, the state court's appointment must be effective. It must afford counsel time and opportunity, and impose upon him the duty, to consult with defendant and investigate and prepare the case for trial. (Powell v. State of Alabama (1932), supra, 287 U.S. 45, 71, 53 S.Ct. 55, 77 L.Ed. 158.) The accused has the right to counsel at every step of the proceedings leading to conviction, not only to effective representation at the trial on the merits but also to the advice of counsel as to whether a plea of guilty is appropriate (Commonwealth of Pennsylvania ex rel. Herman v. Claudy (1956), 350 U.S. 116, 76 S.Ct. 223, 100 L.Ed. 126; Williams v. Kaiser (1945), 323 U.S. 471, 475, 65 S.Ct. 363, 89 L.Ed. 398; Tomkins v. State of Missouri (1945), 323 U.S. 485, 488–489, 65 S.Ct. 370, 89 L.Ed. 407), and, where objections must be raised before the case is at issue, to appointment of counsel at a time which will enable defendant to make such objections (Reece v. State of Georgia (1955), 350 U.S. 85, 89, 76 S.Ct. 167, 100 L.Ed. 77).

Similarly the California right to counsel requires an effective, not a mere pro forma, appointment. Counsel must be afforded time and opportunity for investigation and consultation with defendant in the preparation of the defense (In re Ochse (1951), 38 Cal.2d 230, 231 [1], 238 P.2d 561; People v. Sarazzawski (1945), 27 Cal.2d 7, 17 [14], 161 P.2d 934; In re Qualls (1943), 58 Cal. App.2d 330, 136 P.2d 341; People v. Simpson (1939), 31 Cal.App.2d 267, 270 [1], 88 P.2d 175; In re Snyder (1923), 62 Cal.App. 697, 217 P. 777) and opportunity to consult freely with defendant during the trial (People v. Zammora (1944), 66 Cal.App.2d 166, 234–235 [33, 34], 152 P.2d 180). Defendant is entitled to representation at every step of the proceedings, including the aid of counsel to enable an intelligent decision as to his plea (People v. Chesser (1947), 29 Cal.2d 815, 820 [1], 178 P. 2d 761; People v. Avilez (1948), 86 Cal. App.2d 289, 296 [4b], 298 [7], 194 P.2d 829; People v. McGarvy (1943), 61 Cal. App.2d 557, 561 [1, 2], 142 P.2d 92), and to representation at arraignment for and pronouncement of judgment (In re Levi (1952), 39 Cal.2d 41, 46 [8], 244 P.2d 403).

Both federal due process and California law require that waiver of the right to counsel, to be effective, must be with an intelligent appreciation of its consequences. (Moore v. State of Michigan (1957), 355 U.S. 155, 161–162, 78 S.Ct. 191, 2 L.Ed.2d 167; Johnson v. Zerbst (1938), 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461; In re James (1952), 38 Cal.2d 302, 313 [8], 240 P.2d 596; People v. Chesser (1947), supra, 29 Cal.2d 815, 822–825 [4–6], 178 P.2d 761; In re Jones (1948), 88 Cal.App.2d 167, 168–169, 198 P.2d 520.) In this connection we repeat and reemphasize the statement which we quoted in People v. Chesser, supra, at page 822 of 29 Cal. 2d at page 764 of 178 P.2d, from Johnson v. Zerbst, supra, at page 465 of 304 U.S., at page 1023 of 58 S.Ct.: "*Whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.*"

In this connection it is noted that the California Legislature, recognizing that the appellate courts often had occasion to consider the contention that a plea of guilty implied a waiver of counsel and to emphasize that such waiver should not be accepted unless it is understandingly made, in 1949 amended section 1018 of the Penal Code to provide that "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any plea of guilty of any other felony be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it," and by a 1951 amendment added to the foregoing sentence the following clause: "and then,

investigate carefully all defenses of fact and of law which may be available to the defendant and confer with him about them before he permits his client to foreclose all possibility of defense and submit to conviction without a hearing by pleading guilty." (People v. Avilez (1948), supra, 86 Cal. App.2d 289, 296[5], 194 P.2d 829, citing In re Hough (1944), supra, 24 Cal.2d 522, 529, 150 P.2d 448.) But a defendant who elects to go to trial represented by out-of-state counsel has no right to the services of the public defender as an advisor concerning local law. (People v. Saltz (1955), 131 Cal.App.2d 459, 470–471[5a, 6, 5b], 280 P.2d 900.)

In the light of the foregoing rules we consider the construction of our Constitution (art. I, § 13) and statutes (Pen.Code, §§ 686, 859, 987) urged by counsel appointed to represent defendant on this appeal. Counsel points out that the requirement (Pen.Code, §§ 859, 987) that "the court [magistrate and trial court] must assign counsel to defend" has only two expressed statutory prerequisites; i. e., an attorney must be assigned if defendant "[1] desires and [2] is unable to employ counsel." Therefore, counsel says, we should not read into the statutes as a further prerequisite to the right to an assigned attorney the condition that defendant give up his right to represent himself. Furthermore, counsel points out, defendant has the constitutional (art. I, § 13) and statutory (Pen.Code, § 686) right "to appear *and* defend in person *and* with counsel" (italics added), yet this right does not include a right of defendant both to represent himself and to be represented by an attorney. (People v. Northcott (1930), supra, 209 Cal. 639, 648–649[6], 289 P. 634, 70 A.L.R. 806.) It is counsel's position that the use of the conjunctive "and" in the just quoted provisions of Constitution and statute indicates that a defendant who elects to represent himself still retains some right to the services of counsel, and that since such right does not include representation it must include assistance and advice.

[15] The People reply that the foregoing arguments overlook the normal, dictionary meaning of "defend." That word (as used generally with reference to the act of a party to a lawsuit) means "To deny or oppose the right of the plaintiff" and (as used specifically in referring to the act of an attorney) means "to act on behalf of (an accused person)." (Webster's New Internat. Dict., 2d ed., 1958.) Therefore, the People urge, defendant's right to have counsel assigned "to defend him" (Pen.Code, §§ 859, 987) is the right to have counsel "act on [his] behalf"; i. e., to appear for and represent him.

[16] The People's position is supported not only by dictionary definition but also by the sound concept that it is the duty of the court to safeguard and promote the orderly and expeditious conduct of its business and to guard against inept procedures and unnecessary indulgences which would tend to hinder, hamper or delay the conduct and dispatch of its proceedings.

[17] In this connection it is noted that Business and Professions Code section 6068[6] declares in clear language certain duties of an attorney in respect to courts of justice, judicial officers, and the conduct of proceedings before the courts.

only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel."

6. Bus. & Prof.Code § 6068: "It is the duty of an attorney:

"(a) To support the Constitution and laws of the United States and of this State.

"(b) To maintain the respect due to the courts of justice and judicial officers.

"(c) To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense.

"(d) To employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

"(e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client.

"(f) To abstain from all offensive personality, and to advance no fact prej-

Common knowledge of judges and attorneys (and to some extent the transcript in the case at bar, as hereinafter pointed out) suggests that there are at least some persons who, although not members of the bar, undertake to act as their own attorney in presenting their cause or defense and who in so acting do not appear to feel bound to "maintain the respect due to the courts of justice and judicial officers" (§ 6068, subd. (b)) or to "employ, for the purpose of maintaining the causes * * * such means only as are consistent with truth, and never to seek to mislead the judge * * * by an artifice or false statement of fact or law" (Id., subd. (d)) or "To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause" (Id., subd. (f)) or "Not to encourage either the commencement or the continuance of an action * * from any corrupt motive of passion or interest" (Id., subd. (g)).

[18–21] It is also a sound concept that the court-appointed attorney as well as the accused is entitled to fair consideration. An attorney at law is a member of an ancient, honorable and deservingly honored profession. He is regarded as an officer of the court, of any court in which he appears. Whether appointed to represent an indigent or employed by a man of wealth or by the state, the diligence and quality of the lawyer's service and the ethical standards of his conduct are the same; his office and the prerogatives of that office, and the respect due to him in the discharge of his duties, are the same. The court should not appoint counsel—whether to defend an indigent or otherwise—and require of him that in so doing he surrender any of the substantial prerogatives traditionally or by statute attached to his office.

[22–24] The right of an accused to the services of an attorney contemplates that the attorney will investigate possible defenses or alternative procedures and advise the accused of his conclusions, not, as this defendant requested, that the attorney will act as a mere subservient helper under the direction of the accused. Neither the express provisions of California law nor general considerations of fairness require that an intelligent, competent defendant who obdurately insists upon controlling and conducting his own defense should be entitled as a matter of right to the services of counsel to act under defendant's control. Where a defendant charged with crime is unable to employ counsel, is not statutorily required to have counsel (ante, footnote 4), and is competent to decide whether he desires counsel, the defendant during the proceedings before the magistrate and the trial court has as a matter of absolute right but two choices in the matter of a court-appointed attorney: he can accept representation by counsel (as most defendants with the ability to employ counsel have the good sense to do) or he can elect to represent himself. If he makes the latter election, he assumes for all purposes connected with his case, and must be prepared to be treated as having, the qualifications and responsibilities concomitant with the role he has undertaken; he is not entitled either to privileges and indulgences not accorded attorneys or to privileges and indulgences not accorded defendants who are represented by counsel. (People v. Chessman (1951), 38 Cal.2d 166, 174[2], 238 P.2d 1001.)

[25] In the circumstances of this case, the superior court could not force defendant to accept representation of counsel, for he was intelligent and mentally competent and understood (although he did not agree with) the legal effect of his insisting upon representing himself. And in the circumstances defendant's refusal to accept rulings and suggestions of the superior court will not be regarded by this court as showing that de-

udicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

"(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

"(h) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."

fendant was incapable of protecting his rights and presenting his case, particularly in view of the trial court's conclusion, expressed hyperbolically at the end of the proceeding, that "I think, from my own observation, he knows more what he is doing than I know what I am doing."

[26] Of course there might be circumstances in which a defendant, without being afforded the opportunity to consult privately with an attorney, could not arrive at an intelligent decision as to whether he should represent himself. The trial judge in discharging his "serious and weighty responsibility * * * of determining whether there is an intelligent and competent waiver [of the right to counsel] by the accused" (Johnson v. Zerbst (1938), supra, 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461; People v. Chesser (1947), supra, 29 Cal.2d 815, 821–822, 178 P.2d 761) has no duty to give defendant a legal education, and the judge has no right, in view of the privilege against self-incrimination, to ask defendant about his understanding of the facts of the case. If the judge's properly limited inquiry concerning the necessity for appointment of counsel suggests that defendant may not comprehend his position then the judge should assign an attorney to consult privately with defendant concerning the latter's need for representation. Such an appointment of counsel, unlike the appointment sought by defendant here, would not require the attorney to surrender the prerogatives of his position.

[27] Our conclusion that a California defendant has no absolute right to the services of an attorney in a mere advisory capacity harmonizes with the federal law as to right to counsel. It has been said that section 13 of article I of the California Constitution accords to California defendants "the same right" as is accorded to federal defendants by the Sixth Amendment of the United States Constitution. (People v. Lanigan (1943), 22 Cal.2d 569, 575, 140 P.2d 24, 148 A.L.R. 176.) Of course this does not mean that the California right to counsel is or must be identical with the federal right to counsel. Consonant with the federal Constitution the state right could be less comprehensive than the federal right. (Betts v. Brady (1942), 316 U.S. 455, 471, 62 S.Ct. 1252, 86 L.Ed. 1595.) Actually, in some respects the California right is more comprehensive than the federal right.[7] But since the California right is substantially similar to the federal right, we may appropriately inquire whether the federal right includes the right to services of assigned counsel merely as an assistant and advisor and not as a legal representative.

Rule 44 of the Federal Rules of Criminal Procedure (effective March 21, 1946, 327 U.S. 866, 18 U.S.C.A., 1951 ed.) provides, "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel *to represent him* at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." (Italics added.) According to the United States Supreme Court, Rule 44 states "The view of this Court as to the practice best adapted to the needs of the federal courts and most responsive to the requirements of the Federal Constitution and statutes as well as to the decisions of this Court." (Bute v. People of State of Illinois (1948), 333 U.S. 640, 662 [68 S.Ct. 763, 775 [15]], 92 L.Ed. 986.)

In Shelton v. United States (5 Cir., 1953), supra, 205 F.2d 806, 812–813, defendant elected to represent himself but asked appointment of an attorney to assist him "outside the court room * * * in preparing suggested charges to the jury, etc." and to "advise me during the trial." The district court ruled, "You are either going to be

7. E. g., at preliminary federal proceedings before a committing magistrate a defendant who is unable to employ counsel is not entitled to assigned counsel. (Fed.Rules Crim.Proc. prescribed by the United States Supreme Court, 327 U.S. 825 et seq., 18 U.S.C.A., 1951 ed., Rule 5(b), Rule 40(b) (2), and Note 2 of Advisory Committee on the Rules to Rule 44.) The California magistrate, on the other hand, must assign counsel at the preliminary examination if defendant desires and is unable to employ counsel. (Pen.Code, § 859.)

represented by counsel or you are going to represent yourself * * *. [T]he court is not going to appoint a lawyer and have him occupy an inferior position in the defense of your case." The Court of Appeals upheld this ruling and determined that the right of the accused to "the Assistance of Counsel for his defence" (U.S.Const., Amendment VI) does not include the right to court-appointed advisory counsel.

[28–32] We recognize that in the California courts, under our holding in the case at bar (as in the federal courts, under the holding in Shelton, supra), a defendant who insists upon representing himself and who can employ an attorney may secure a quantum or type of legal assistance greater than or different from that which must be accorded a defendant who is unable to employ an attorney and who insists upon representing himself, for a defendant who can find private counsel willing to accept employment in "an inferior position in the defense" *must* be allowed out-of-court consultation with such attorney. (See Pen. Code, § 825.) But the only reason the indigent does not have out-of-court consultation with an attorney is because he refuses to accept appointment of an attorney to represent him; i. e., to act within the traditional and statutory status of his office. This difference between the right to the aid of counsel of defendant's choice and the right to have counsel provided is not a denial of due process or equal protection.[8]

[33] We are not saying that the trial court may not in its discretion, upon what it may determine to be good cause shown, permit a party who is represented by counsel to participate in the conduct of the case (see ante, footnote 3), or permit a defendant who appears in propria persona to employ an attorney to sit by him and advise him during the presentation of the case in court, or even appoint an attorney (with the latter's consent) to render such advisory services to an indigent defendant who wishes to represent himself (see, e. g., People v. Chessman (1951), supra, 38 Cal.2d 166, 174 [2], 238 P.2d 1001). These matters are within the sound discretion of the trial judge, who is in a position to appraise the courtroom situation and determine what procedure will best promote orderly, prompt

8. E. g., in preliminary federal proceedings an accused is not entitled to assignment of counsel but he is entitled to employ counsel. (Fed.Rules Crim.Proc. cited ante, footnote 7.) And in a state prosecution federal due process accords defendant the "unqualified" right to be heard through his own counsel (In re Groban (1957), 352 U.S. 330, 332, 77 S.Ct. 510, 1 L.Ed.2d 376; Chandler v. Fretag (1954), 348 U.S. 3, 9, 75 S.Ct. 1, 99 L.Ed. 4) whereas a state's failure to furnish the services of an attorney to a defendant who is unable to employ his own counsel is not a denial of federal due process unless it leads to "fundamental unfairness" (Uveges v. Commonwealth of Pennsylvania (1948), supra, 335 U.S. 437, 440–441, 69 S.Ct. 184, 93 L.Ed. 127; Betts v. Brady (1942), supra, 316 U.S. 455, 473, 62 S.Ct. 1252, 86 L.Ed. 1595).

In this state there is a similar difference between the right to employ counsel on appeal and the right to be furnished counsel on appeal, although such difference has little practical effect. The convicted California defendant, without a showing of probable cause, has a right of appeal if the prescribed procedural steps are timely taken. But the appellate court need not appoint counsel for the indigent defendant except where its independent investigation of the record shows that such appointment would be helpful to defendant or the court (People v. Hyde (1958), 51 Cal.2d 152, 331 P.2d 42); see Caritativo v. People of State of California (1958), 356 U.S. 971, 78 S.Ct. 1133 [after the United States Supreme Court granted certiorari in a death penalty, *forma pauperis* case, and after counsel had briefed and argued the case for petitioner, counsel's request for his own appointment was denied by minute order "for lack of a timely showing of a need for such appointment"]). Private counsel, on the other hand, so long as he complies with the procedural rules, can brief and argue an appeal which is a waste of time and substance for defendant, the People, and the court. But the court can dismiss, as irregular, sham, or frivolous, an appeal which has no proper appellate objective (People v. Shorts (1948), 32 Cal.2d 502, 516 [2b], 197 P.2d 330) and the attorney who prosecutes such an appeal can be disciplined (Rules of Professional Conduct, Rule 13; Bus. & Prof.Code, § 6077).

and just disposition of the cause. The court, however, should not permit a litigant both to have counsel and to actively participate in the conduct of the case (as by conducting examination of witnesses, interposing objections, arguing points of law or of fact, addressing the jury, etc.) unless the court on a substantial showing determines that in the circumstances of the case the cause of justice will thereby be served and that the orderly and expeditious conduct of the court's business will not thereby be substantially hindered, hampered or delayed.

[34, 35] In the case at bar, defendant's conduct in propria persona in connection with the prosecution of his appeal confirms the conclusion that the superior court was justified in determining that his requests for the services of counsel prior to trial were not made with any real intention to accept sound advice. On appeal, although defendant has been diligently represented by court-appointed counsel, he has persisted in presenting documents in propria persona which reflect his misconceptions of and refusal to accept established rules of law. In these documents he asks that the record be "augmented" to include matters which are not of record below; he asserts that the record is erroneous in unspecified respects and in specified immaterial respects (Rule 12(b) of the Rules on Appeal provides that "If any material part of the record is incorrect in any respect * * * the reviewing court * * * may direct that it be corrected"); and he presents contentions which are without support in the record and contentions which were not made in the trial court. Furthermore, during the pendency of this appeal defendant has harassed this court with meritless pro se applications for writs attacking almost every step in the San Diego proceedings against him, beginning with unsupported complaints as to the prosecuting attorney's obtaining a requisition for defendant's extradition from Kentucky and ending with unsupported complaints as to the manner in which his court-appointed counsel presented the appeal. The general rule that a defendant who is represented by an attorney of record will not be personally recognized by the court in the conduct of his case (People v. Merkouris (1956), supra, 46 Cal.2d 540, 554 [5], 297 P.2d 999) applies to the filing of pro se documents on appeal (Electric Utilities Co. v. Smallpage (1934), 137 Cal.App. 640, 641–642, 31 P.2d 412). Because of the undesirability of fruitlessly adding to the burdens of this court the time-consuming task of reading pro se documents which are not properly before us, and, if they be read, of consequently enlarging this opinion by a recountal and discussion of the contentions made in propria persona, such documents filed in this appeal by defendant should be stricken.

For the reasons above stated the documents filed in propria persona by defendant during the time when he has been represented by court-appointed counsel are stricken from the files and the judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE and McCOMB, JJ., concur.



169 Cal.App.2d 103

Oscar G. GOLDMAN, Plaintiff and Respondent,

v.

Charlotte L. GOLDMAN, Defendant and Appellant.

Civ. 17938.

District Court of Appeal, First District, Division 1, California.

March 26, 1959.

Hearing Denied May 20, 1959.

Action for annulment of marriage on ground that defendant was of unsound mind at time of the marriage. From a judgment of the Superior Court, City and County of San Francisco, Thomas M. Foley, J., in favor of plaintiff, the defendant appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia,

that the evidence did not support finding of unsoundness of mind and lack of capacity on part of defendant to consent to the marriage.

Reversed.

1. Marriage ⇐60(8)

In action to annul a marriage between plaintiff and defendant, finding declaring that defendant "was of unsound mind" at time of marriage and "incapable of legally consenting to" the marriage was not insufficient for failure to specify the particular type of unsound mind required, the lack of sufficient mental capacity to understand nature of marriage contract and its duties and responsibilities, since under statute which uses merely the words "that either party was of unsound mind" it is not necessary to specify with such particularity either in a pleading or in a finding on such issue. West's Ann.Civ.Code, § 82.

2. Pleading ⇐8(1)
Trial ⇐395(5)

Findings as well as pleadings should state ultimate facts, and test in either case is the same.

3. Appeal and Error ⇐931(1), 989

On appeal from judgment annulling marriage on ground of defendant's mental incapacity at time of marriage, any evidence which might be subject to differing inferences must be read in light most favorable to plaintiff, and in such inquiry appellate court cannot consider evidence unfavorable to trial court's finding. West's Ann.Civ.Code, § 82.

4. Marriage ⇐60(7)

In determining whether plaintiff is entitled to annulment of marriage on ground that defendant was of unsound mind at time of marriage, the day of marriage is the critical date for determination of lack of capacity, and that may be determined from proof of party's condition before and after that date. West's Ann.Civ.Code, § 82.

5. Evidence ⇐63
Mental Health ⇐13, 17

The presumption is always that a person is sane, and insanity exists as a matter of law only from time it is shown to exist and proof of subsequent insanity will not create nor carry a presumption of its past existence.

6. Marriage ⇐60(7)
Mental Health ⇐10

In action to annul marriage contracted in 1943 on ground that defendant was of unsound mind at time of marriage, the psychiatrist's diagnosis in late 1949, the determination made at time of defendant's commitment to state hospital in March, 1950, and her continuation at hospital constituted substantial evidence in support of an inference that defendant lacked requisite mental capacity as early as the latter part of 1949, but such circumstances did not go back to date of marriage in 1943. West's Ann.Civ. Code, § 82.

7. Marriage ⇐60(7)

In action to annul marriage performed in 1943 on ground that defendant was of unsound mind at time of marriage, psychiatrist's opinion, on basis of his 1949 diagnosis (aided by some information concerning history of the case) that defendant was "not mentally healthy at that time", that her ailment had started, that her illness had already begun, and that she was beginning to be disinterested in her surroundings, withdrawn, less active, and not a "healthy state of mind", but which did not assert that unhealthy mental condition had at that time developed to such a degree as to render her incapable of understanding what she was doing, was short of being substantial evidence of lack of requisite capacity at time of the marriage, especially in face of presumption of sanity. West's Ann.Civ.Code, § 82.

8. Marriage ⇐60(7)

In action to annul marriage on ground that defendant was of unsound mind at time of marriage, testimony regarding events which occurred some three or four months after the marriage and some of which did not occur until eight or nine months after the marriage was too remote in time to constitute substantial evidence of incapacity on day of the marriage. West's Ann.Civ.Code, § 82.

9. Evidence ⇐474(4)

In action for annulment of marriage on ground that defendant was of unsound mind at time of marriage, the opinion of defendant's daughter by prior marriage that defendant was of unsound mind at time of marriage was not entitled to weight where reasons for such opinion were the daughter's observations, prior to marriage, of defendant's changes in mood, from daydreaming to cheerful, and talking to herself in the dark, which talking might have occurred in her sleep.

10. Marriage ⇐60(7)

In action to annul marriage on ground defendant was of unsound mind at time of marriage, evidence did not support finding of unsoundness of mind and lack of capacity to consent to the marriage. West's Ann. Civ.Code, § 82.

11. Appeal and Error ⇐1176(4)

On appeal from judgment annulling marriage on ground that defendant was of unsound mind at time of marriage, appellate court would not direct entry of judgment for defendant notwithstanding fact that evidence was insufficient to sustain finding of unsound mind and lack of capacity to consent to the marriage, where there was a sharp conflict in the evidence and the plaintiff might be able to make a better showing upon another trial, if one was held. West's Ann.Civ.Code, § 82.

12. Appeal and Error ⇐173(10)

The question whether plaintiff was guilty of laches in not bringing suit for annulment of marriage until 13 years after marriage, which was not raised by defendant in trial court, could not be presented for first time on appeal.

13. Appeal and Error ⇐991

Whether or not a party is guilty of laches is primarily a question of fact and within trial court's province.

Joseph T. Curley, Marvin C. Hix, San Francisco, for appellant.

Charles Bagby, John F. Foley, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant appeals from a judgment annulling the marriage of the parties upon the ground that defendant was of unsound mind at the time of the marriage.

[1, 2] (1) *Was the finding insufficient because it declared that defendant "was of unsound mind" at the time of the marriage and "incapable of legally consenting to" the marriage? No.*

Defendant claims this finding was insufficient because it failed to specify the particular type of unsound mind here required, the lack of sufficient mental capacity to understand the nature of the marriage contract and its duties and responsibilities.

It is not necessary to specify with such particularity either in a pleading or in a finding on this issue. The statute is not that specific. It uses merely the words "that either party was of unsound mind." Civil Code, § 82. A pleading in substantially the same words as those used in the finding in this case was treated as sufficient in McClure, on Behalf of Caruthers v. Donovan, 33 Cal.2d 717, 732, 205 P.2d 17. Findings as well as pleadings should state ultimate facts. The test in either case is the same. 24 Cal.Jur. 969, Trial, § 203, note 15; 2 Witkin, California Procedure 1843, Trial, § 112; and cases cited in each. Using that test we deem the questioned finding sufficient.

(2) *Does the evidence support the finding of unsoundness of mind and lack of capacity to consent to the marriage? No.*

The marriage was solemnized on the 18th of June, 1943. Defendant was committed to Agnew State Hospital in March of 1950 and has remained there ever since except for a period of two months when she was paroled to one of her sisters. Plaintiff filed this action on July 16, 1956.

Three witnesses gave evidence tending to support the questioned finding. A summary of their testimony follows.

Plaintiff testified that about four months before the marriage he had discussions with defendant about the purchase of a home. He asked her aid in making a selec-

tion but her attitude was one of great indifference. She gave him no suggestions as to what she wanted. She had no ideas for him to carry out. When looking at possible homes she did not indicate what she liked or did not like. The same occurred in selecting furniture and furnishings for the home. She would just shrug her shoulders and say, "well I don't care." She exhibited an attitude of total indifference. Upon their wedding day they agreed to meet at a bus station at a certain hour and take the bus to the place where the marriage was to be solemnized. She did not show up until about an hour after the time appointed. She gave no explanation why she was late.

At first they occupied the same bed. After three or four months she would prevent his sleeping by vibrating the bed, jumping up and down on it while he was trying to sleep. He would remonstrate and get no response. After a while it got so bad he had to use another bed. She suggested that he take the bed in their spare room, which he did.

For a period of about six months after the marriage he and she went shopping together on a Saturday and she prepared the meals. At the end of this period she refused to go shopping and to do any more cooking, and he had to do the shopping and prepare her meals as well as his own. The only reason or explanation she gave for not shopping or cooking was the remark "Why should I?" About four to six to eight months after the marriage she remarked that she was very unhappy in the home and wanted to move. Asked why, she said "I consider this place a prison; I feel like I am confined. I cannot stand it."

On several occasions she would take a paper of matches, light them and throw them on the rug and say to him she was going to burn the house down. He would then go over and step on them and she would go to her room and lock the door. She would lock herself in quite frequently.

Plaintiff's official duties required him to work until a late hour upon occasion. Upon several such occasions in 1943 when he arrived at home the doors were locked. Though he had a key he was unable to get in because the inside latch was turned. He would ring the bell and knock on the door, and nothing would happen. The latch on one of the doors was a chain latch which he found he could open by cutting the chain with a hacksaw. On at least two occasions defendant was awake and, when asked what the problem was, laughed and said nothing. Not long after the marriage defendant falsely accused plaintiff of infidelity, of double-crossing her in everything she did and claimed that on the nights he was out at work he was not at work at all and probably was either in some political deal of some kind or out with somebody he should not be with. About two years after their marriage she denied he was married to her.

The same general situation developed between the defendant and her daughter, who was 14 years old at the time of the marriage. Defendant became critical of everything the daughter said or did. This criticism was continuous and continuously got worse. It became so bad that at one time defendant said that the daughter was not her child.

It was about one and a half or two years after the marriage when he began to suspect that defendant was mentally ill. Earlier than that he realized that there was something wrong but could not diagnose it himself. He had not had any experience with persons who were mentally ill, nor any opportunity to observe mental illness.

Defendant finally consulted a psychiatrist and was given shock treatments toward the end of 1949. After a period at a private institution she was committed to Agnew State Hospital in March of 1950.

The psychiatrist who examined defendant in the fall of 1949 and prescribed electric shock treatments testified that his initial diagnosis was a depression. After the shock treatments his diagnosis was schizo-affective psychosis, which he described as "a combination of dementia praecox and a psychosis combination," adding that to the layman it signifies insanity. It is not a dis-

ease of sudden onset, "the very meaning of the term 'schizo' means gradual onset." He further testified that on the basis of information given him by the plaintiff in 1949 and information some one gave to a physician at the hospital when she was admitted for shock treatments, she was showing inappropriate and withdrawn disinterested behavior developing over a period of many years. Upon the basis of this and other information thus furnished, the witness said it would be consistent to say that the ailment "started back some several or many years before I saw her in 1949." This was a long standing condition at the time he saw her. Asked if in his opinion the defendant was of unsound mind on June 18, 1943, the witness said it was his opinion that "she was not mentally healthy at that time, that this ailment for which I treated her had started at the time of or at the termination of her first marriage, which I presume would go back before 1940 * * *." From information made available to the witness, he expressed the opinion that defendant was already becoming somewhat withdrawn and disinterested in her surroundings at the time of the marriage, i. e., at that time her present illness had already begun. She was beginning to be disinterested in her surroundings, withdrawn, less active, "and that isn't a healthy state of mind." The witness did not know whether this unhealthy mental condition had at that time developed to such a degree as to render her incapable of understanding what she was doing. As late as 1949 when he saw her she was not totally out of contact with things. She still had a certain amount of understanding. She knew the day. She recognized the witness when he saw her at the hospital. She knew she was in the hospital. She wanted to go home. She was oriented as to time and place.

Defendant's daughter, who was born in 1929, testified that she shared a room with her mother prior to the latter's marriage to plaintiff. Beginning in about 1935 or 1936 her mother would laugh and mumble to herself in the dark and would have sudden alterations in mood. The witness could remember being awakened at night and her mother would be laughing and kind of mumbling, talking to herself. Her mother seemed rather withdrawn a lot of the time and then would suddenly become very cheerful and make some very cheerful remarks. By "withdrawn" the witness meant "sort of day-dreaming and far away."

After the marriage the daughter was attending high school and would get home from school at about 4 o'clock in the afternoon. Many times her mother would be sitting at the kitchen table writing shorthand notes, drawing little faces on a piece of paper, not really doing much of anything, just kind of passing the time away in that manner. She would read newpapers and read things into the newspaper articles. On one such occasion the mother said "Frank [defendant's brother] did that" and upon another occasion, "How much did Russell [defendant's first husband] pay Oscar [her present husband] to marry me?" On such an occasion the daughter would say "Mother, what do you mean?" "Well, I know what is going on," would be the response. Asked what she meant, defendant would leave the kitchen and go into her room and lock the door. The witness said "Mother would never say anything that you could get at. I would question her and I know we would both end up in tears. I would say [to] her, 'Mother, what are you talking about?' and she would say, 'Well, I know what is going on and I know what it is all about' and I can recall I was very frightened about what was happening, but I didn't know what was happening." Her mother cried very frequently, "just about every day." The daughter would come home from school in the afternoon and the mother would come out and say "what is going on?" and the daughter would say "I don't know what you mean, 'what is going on' and I would say, 'There is nothing going on.' You have got a nice house and we are happy," and then the mother would start to cry and the daughter would cry and "there was just a constant turmoil in that respect." That took place over a long period of time, starting in the daughter's

first or possibly second semester at high school. She started high school in August, 1943. One time in 1945 or 1946 she saw her mother light some matches. It was in the living room. There were matches on the floor. Plaintiff stepped on them to put them out and defendant went back to her bedroom. Asked if, in her opinion, her mother was sane or insane on August 18, 1943, she replied: "I would say definitely she wasn't sane." A motion to strike this answer for failure of the witness to give the reasons for her opinion was denied. Upon cross-examination she was asked why she thought the defendant was insane "on the date of marriage." The witness replied: "* * * when I was even a little girl, Mother was a very upset woman, very upset * * * she was very withdrawn and you could never really pin her down to anything and there was that idea of kind of talking to herself at night, and she was so bitter against men * * * Mother was a very withdrawn person." The witness was not sure whether her mother was asleep or awake when talking to herself at night. On one occasion in her testimony she said she did not know, and upon another occasion she said she did not think her mother talked in her sleep.

[3] From this evidence the trial court concluded that at the time of the marriage defendant lacked mental capacity to understand the nature of the marriage contract, its duties and responsibilities. The question before us is whether or not this was enough evidence, substantial evidence, to justify that conclusion. Any of it that may be subject to differing inferences must be read in the light most favorable to the plaintiff, the prevailing party below. In such an inquiry we are not to consider evidence unfavorable to the trial court's finding. Such evidence merely created a conflict which the trier of the facts resolved in favor of the plaintiff. Dunphy v. Dunphy, 161 Cal. 380, 384, 119 P. 512, 38 L.R.A.,N.S., 818; In re Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384.

[4] In ascertaining whether or not the favorable evidence furnished substantial support for the finding of incapacity, we must bear in mind that the day of the marriage is the critical date for determination of lack of capacity. It may, of course, be determined from proof of the party's condition before and after that date. Vitale v. Vitale, 147 Cal.App.2d 665, 669–670, 305 P.2d 690; Williams v. Williams, 63 Cal. App. 482, 218 P. 783.

[5] We must also bear in mind that the "presumption is always that a person is sane * * * Insanity exists as a matter of law only from the time it is shown to exist and proof of subsequent insanity will not create nor carry a presumption of its past existence * * *" In re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45, 46.

[6] The psychiatrist's diagnosis in late 1949, the determination made at the time of defendant's commitment to the state hospital in March, 1950, and her continuation at the hospital constitute substantial evidence in support of an inference that the defendant lacked the requisite mental capacity as early as the latter part of 1949. But that does not take us back to the date of the marriage, June 18, 1943.

[7] Nor was the psychiatrist, upon the basis of his 1949 diagnosis (aided by some information concerning the history of the case) able to formulate an opinion as to defendant's capacity at the time of the marriage. The most that he could say was that in his opinion she was "not mentally healthy at that time"; her ailment had started; her illness had already begun; she was beginning to be disinterested in her surroundings, withdrawn, less active, not a "healthy state of mind"; but he did not know whether this unhealthy mental condition had at that time developed to such a degree as to render her incapable of understanding what she was doing. This falls considerably short of being substantial evidence of a lack of the requisite capacity at the time of the marriage, especially in the face of the presumption of sanity.

[8] This brings us to the consideration of the events which occurred and the traits

that were displayed during the first year or two of the marriage. Whatever probative value those manifestations might have, they were quite remote in time. It was not until six months and more that defendant stopped cooking and shopping. Until then, apparently she shopped and cooked as willingly and ably as any housewife might do. None of the other out-of-the-ordinary events were described as having occurred sooner than three or four months after the marriage. As to many of them, plaintiff said "it all started to occur approximately from four to six or eight months after the marriage. I wouldn't want to definitely state it was this date or that * * *"

So, also, in respect to the post-marriage conduct of defendant as observed and told by the daughter. The events of which the daughter spoke occurred after she entered high school in August of 1943, in her first semester or possibly her second semester. Accordingly, those incidents could have occurred commencing anywhere from three to eight or nine months after the marriage. That was too remote in time, we think, to constitute substantial evidence of incapacity on the day of the marriage.

The indifference which defendant displayed when looking for a house and shopping for furniture prior to the marriage, and her unexplained delay in meeting plaintiff at the bus station on the day of the marriage, were close enough in time but had no discernible evidentiary significance as to defendant's comprehension of the nature of marriage and the duties and responsibilities of a spouse.

[9] That leaves only the daughter's observations, prior to the marriage, of her mother's changes in mood, from daydreaming to cheerful, and talking to herself in the dark, which talking may have occurred in her sleep. Such evidence also has too slender a bearing upon mental capacity to furnish substantial support for the finding in question.

Concerning the daughter's expression of opinion, we recognize it has been said that the opinion of a layman (an intimate acquaintance) is entitled to "some weight" over and above "that which would follow, as a matter of necessary inference, from the reasons assigned" for the opinion. Dunphy v. Dunphy, supra, 161 Cal. 380, 385, 119 P. 512, 514, 38 L.R.A.,N.S., 818. That statement was followed by the statement that if "those reasons furnished any logical support for the opinion declared, the opinion, in and of itself, is to be given such weight as the trial court may think it deserves." At page 386 of 161 Cal., at page 514 of 119 P. In the instant case we do not consider that those reasons furnish logical support for the opinion given by the lay witness. We note, also, that, when asked for that opinion, the daughter's attention was directed to "August 18, 1943," which in fact coincided with the commencement of her high school career, two months after the day of the marriage.

[10, 11] Although the judgment must be reversed, this is not a case for a reviewing court to direct entry of judgment for the defendant, as the latter would have us do. There was a sharp conflict in the evidence. Plaintiff might be able to make a better showing upon another trial, if one is held. He should not be precluded from undertaking to do so.

(3) *Is defendant entitled at this time successfully to urge the defense of laches? No.*

[12, 13] The question whether plaintiff was guilty of laches in not bringing this action until 13 years after the marriage was not raised by defendant in the trial court. It is too late for defendant to present such a question for the first time upon appeal. Parkside Realty Co. v. MacDonald, 166 Cal. 426, 433, 137 P. 21; Busick v. Mandeville, 80 Cal.App.2d 853, 856, 183 P.2d 362. Whether or not a party is guilty of laches is primarily a question of fact and within the trial court's province. Williams v. Marshall, 37 Cal.2d 445, 455, 235 P.2d 372; Gump v. Gump, 42 Cal.App.2d 64, 69, 108 P.2d 21; Taylor v. Marine Cooks and Stewards Ass'n, 117 Cal.App.2d 556, 561, 256

P.2d 595. If defendant had raised the issue below, plaintiff might have adduced a satisfactory explanation for the delay.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.



169 Cal.App.2d 59

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jacob WISSENFELD, Defendant and Appellant.

Cr. 3582.

District Court of Appeal, First District, Division 1, California.

March 24, 1959.

Rehearing Denied April 23, 1959.

Hearing Denied May 20, 1959.

Defendant upon a plea of guilty to assault with intent to commit robbery while armed was sentenced to imprisonment and the court suspended the sentence and defendant incarcerated in a New York State prison filed a petition for writ of error coram nobis to vacate the sentence on the ground that it was void because the defendant had previously been convicted in New York State of a crime which if committed in California would not have entitled him to probation. From an order denying petition in the Superior Court, City and County of San Francisco, Gerald S. Levin, J., the defendant appeals. The District Court of Appeal, Fred B. Wood, J., held that coram nobis was not the available remedy and that the defendant's notice of appeal was not dismissible on the ground that it was filed too late.

Order affirmed.

1. Criminal Law ⇐982.6(4)

Where defendant was sentenced for a felony and the court thereupon suspended sentence on the condition that defendant be confined in the county jail for one year, order of suspension was in legal effect an order granting probation.

2. Criminal Law ⇐982.6(4)

If an order of suspension of sentence of the defendant in prosecution for assault with intent to commit robbery while armed was void because the defendant had previously been convicted in New York state of third-degree robbery allegedly a felony if committed in California and was therefore not entitled to probation, such would not infect the sentence itself with invalidity but the judgment would remain valid and must be served. West's Ann.Pen.Code, § 1203.

3. Criminal Law ⇐322

Presumption obtained that the official duty has been regularly performed and that a court or judge acting as such is acting in the lawful exercise of his jurisdiction. West's Ann.Code Civ.Proc. § 1963, subds. 15, 16.

4. Criminal Law ⇐997(4)

Where, based upon a plea of guilty to assault with intent to commit robbery while armed, the defendant was sentenced to imprisonment and the court thereupon suspended the sentence, defendant was not entitled to file a petition for a writ of error coram nobis to vacate the sentence upon the theory that it was void because he had previously been convicted in New York state of a felony which if committed in California would not have entitled him to probation, since coram nobis was not an available remedy. West's Ann.Code Civ.Proc. § 1963, subds. 15, 16.

5. Criminal Law ⇐997(1)

A collateral attack cannot be made upon a sentence through the medium of a writ of error coram nobis.

6. Criminal Law ⇐997(6)

Where defendant upon a plea of guilty to assault with intent to commit robbery while armed was sentenced and the court thereupon suspended the sentence, coram nobis was not available to the defendant claiming that the sentence was void be-

cause the defendant had previously been convicted in New York state of third-degree robbery, a felony, which if committed in California would not have entitled the defendant to probation, where there would still remain the question of whether the New York offense would have been a felony if committed in California and such would be a question of law for the correction of which coram nobis would not be available.

7. Criminal Law ⇐1081

Where order appealed from was made August 5, 1958, and notice of the appeal was filed August 19, but the defendant was incarcerated in a New York prison at the time and defendant filed a verified statement that on August 13, he had delivered the notice of appeal to the chief clerk of the New York state prison with necessary postage for mailing, appeal was not dismissible on the ground that notice of appeal was filed too late.

Jacob Wissenfeld, pro. per.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

[1] In 1948, based upon his plea of guilty of the charge of assault with intent to commit robbery while armed, petitioner was sentenced to imprisonment in the state prison for the term prescribed by law. Thereupon the court suspended sentence on condition that petitioner be confined in the county jail for one year. This order of suspension was in legal effect an order granting probation (Oster v. Municipal Court, etc., 45 Cal.2d 134, 139, 287 P.2d 755; People v. Sheeley, 159 Cal.App.2d 578, 580, 324 P.2d 65; People v. McGillis, 166 Cal.App.2d 91, 332 P.2d 706; People v. Brandon, 166 Cal.App.2d 96, 332 P.2d 708).

Ten years later petitioner, now incarcerated in a New York state prison, filed a petition for a writ of error coram nobis to vacate the 1948 sentence upon the theory that it was void because, as alleged by petitioner, he had previously been convicted in New York state of third degree robbery, allegedly a felony if committed in California, and therefore not entitled to probation. Pen.Code, § 1203. He appeals from an order denying his petition.

[2] If the order of suspension were void for the reason assigned, it would not infect the sentence itself with invalidity. In such a case "the judgment remains valid and must be served." People v. Cravens, 115 Cal.App.2d 201, 204, 251 P.2d 717, 719.

Nowhere on the face of the record does the asserted invalidity appear. The information did not charge a prior. It made no mention of any prior conviction in New York or elsewhere. Nor do we find any mention of such in the minutes of the court's proceedings, nor in the judgment itself. And the judgment long since became final. For aught that appears before us, the granting of probation was perfectly regular, proper and legally effective.

[3, 4] In such a situation, in view of the presumptions that official duty has been regularly performed and that a court or judge, acting as such, was acting in the lawful exercise of his jurisdiction (Code Civ.Proc. § 1963, subdivisions 15 and 16) it is a fair inference that the trial judge had no knowledge or information concerning petitioner's prior conviction. It was knowledge possessed by petitioner and withheld by him from the court. In such a case, coram nobis is not an available remedy. People v. Carroll, 149 Cal.App.2d 638, at pages 640, 641, 309 P.2d 128, at page 129; People v. Sharp, 157 Cal.App.2d 205, at page 207, 320 P.2d 589, at page 590; People v. Price, 162 Cal.App.2d 196, 328 P.2d 467.

[5] A collateral attack such as is here attempted can not be made through the medium of the writ here sought. People v. Adamson, 34 Cal.2d 320, 326–328, 210 P.2d 13; People v. Sorensen, 111 Cal.App.2d 404, 405, 244 P.2d 734; People v. Cravens, supra, 115 Cal.2d 201, 204, 205, 251 P.2d 717.

[6] Moreover, even if the record did show that petitioner was convicted of third degree robbery in New York prior to his California conviction, and the point were available to him, there would remain the question whether the New York offense "would have been a felony if committed in this State" (Pen.Code, § 1203). That would be a question of law for the correction of which, if wrongly decided, coram nobis would not be available. People v. Martinez, 88 Cal.App.2d 767, 771, 199 P.2d 375. See also People v. Reid, 195 Cal. 249, 258, 232 P. 457, 36 A.L.R. 1435; People v. Tucker, 154 Cal.App.2d 359, at page 361, 316 P.2d 417; People v. Sharp, 157 Cal.App.2d 205, 207, 320 P.2d 589.

Accordingly, nothing of which we can take cognizance in this proceeding indicates that petitioner served a sentence in California. He merely observed and complied with the terms and conditions upon which he was granted probation. People v. Wallach, 8 Cal.App.2d 129, 133, 47 P.2d 1071; In re Martin, 82 Cal.App.2d 16, 22, 185 P.2d 645.

[7] Respondent contends that petitioner's notice of appeal was filed too late. The order appealed from was made August 5, 1958. The notice of appeal was received and filed August 19. But the petitioner was incarcerated in a New York prison at the time. The notice is dated August 13, 1958, and he has filed a verified statement that on that date he delivered the notice of appeal to the chief clerk of the New York state prison, giving the clerk authority to take the necessary postage out of petitioner's account for mailing to the clerk of the superior court for the city and county of San Francisco. That presumably was sufficiently early for actual filing to have occurred within the ten days prescribed by the Rules on Appeal, if promptly mailed by the New York prison authorities. These facts bring this appeal within the purview and protection of the doctrine enunciated in People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868, and later cases construing and applying that doctrine. We do not think the fact that petitioner was confined in an out-of-state prison renders that doctrine inapplicable.

The order is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; PETERS, J., not participating.



169 Cal.App.2d 165

ALLSTATE INSURANCE COMPANY, a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION of the State of California, Defendant and Appellant.

Civ. 23353.

District Court of Appeal, Second District, Division 3, California.

March 26, 1959.

As Modified on Denial of Rehearing April 21, 1959.

Hearing Denied May 20, 1959.

Action by insurer against the state board of equalization to recover additional assessments levied by the board and paid by insurer under protest. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment for insurer and the board appealed. The District Court of Appeal, Vallée, J., held that installment payment fees which were charged insureds in addition to annual premiums if insureds requested payment of premiums on the installment plan, were a part of insurer's "gross premiums" within meaning of section of constitution providing for an annual tax on the gross premiums of an insurer.

Reversed.

1. Taxation ⇐140

Section of Constitution providing that basis of annual tax on an insurer in respect to each year shall be amount of gross premiums applies equally to all insurance companies, and provides for imposi-

tion of the tax on gross premiums from all insurance, whether life, fire, marine or casualty, with the only exceptions being title insurance, reinsurance, and ocean marine insurance. West's Ann.Const. art. 13, § 14½.

2. Taxation ⇐140

Determination of whether a particular payment to an insurer is a premium, within meaning of section of Constitution providing for a tax on gross premiums received by insurers, is a question of law. West's Ann.Const. art. 13, § 14½.

3. Insurance ⇐180

"Premium" in the law of insurance means the amount paid to the insurer for the insurance.

See publication Words and Phrases, for other judicial constructions and definitions of "Premium".

4. Insurance ⇐183

The "gross premium," or amount charged in a contract of insurance, ordinarily includes two elements, the net premium and the loading, and the loading, or the amount arbitrarily added to the net premium, is intended to cover the expenses of the company, and in a stock company it may also be a source of profit, and in a mutual company, a source from which dividends may be paid to the insured.

See publication Words and Phrases, for other judicial constructions and definitions of "Gross Premium".

5. Taxation ⇐140

Reimbursement of the additional expense resulting from selling insurance on an installment basis is an essential element of the gross premium charged the insured, within section of Constitution providing for a tax on an insurer based on its annual gross premiums. West's Ann.Const. art. 13, § 14½.

6. Taxation ⇐387

Entire cost to a policyholder arising out of the issuance and performance of a contract of insurance constitutes the taxable premium within section of Constitution providing for a tax on an insurer based on its annual gross premiums, and there is nothing in the Constitution to indicate the word "gross" as used therein is not to be given its usual meaning of whole, entire, total, without deduction. West's Ann.Const. art. 13, § 14½.

See publication Words and Phrases, for other judicial constructions and definitions of "Gross".

7. Taxation ⇐387

Installment payment fees which were charged insureds in addition to annual premiums if insureds requested payment of premiums on the installment plan were a part of insurer's "gross premiums" within meaning of section of Constitution providing for an annual tax on the gross premiums of an insurer. West's Ann.Const. art. 13, § 14½; West's Ann.Ins.Code, § 1852 (c, d).

Edmund G. Brown and Stanley Mosk, Attys. Gen., and Harold B. Haas, Deputy Atty. Gen., for appellant.

Luckham & Grabow and Paul P. Selvin, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff brought this action to recover $9,355.07, comprising additional assessments levied by defendant against plaintiff in 1955. Plaintiff had judgment as prayed, with interest. Defendant appeals.

Plaintiff, an Illinois corporation, since prior to 1951 has been authorized to transact disability, liability, plate glass, common carrier liability, boiler and machinery, burglary, credit, sprinkler, and automobile insurance business within the state, and since January 1954 has also been authorized to transact fire, marine, team and vehicle, and miscellaneous insurance business within the state.

Plaintiff charged a stated premium, payable in advance, for a year of insurance. However, if the insured desired to pay the premium in installments he could do so by paying 40 per cent thereof plus what plaintiff designates as an "installment payment fee" in advance, paying 30 per cent in three

months and 30 per cent in six months from the inception date of coverage. Plaintiff paid the tax on the installment payments for the years 1951–1954. It did not pay any tax on the installment payment fees it collected for those years. In 1955 the board levied additional assessments covering the "installment payment fees" collected by plaintiff in the years 1951–1954. Plaintiff paid the additional assessments under protest and brought this suit to recover them.

The amount of the "installment payment fee" was determined by cost accounting and was imposed to cover additional bookkeeping expense, and the collection expense ensuing from the necessity of additional entries in the accounts and billings resulting from the exercise of the installment payment plan. An application for insurance contained a printed box in which the installment fee was set forth. Policies of insurance contained a space in which the "Total Payment Fee" is stated and made a part of the payments to the company.[1]

The senior vice president of plaintiff testified: "When the applicant has agreed, let us say, to buy coverages totaling $70 premium, the agent then says, 'And would you give me a check for the entire amount now?' And if the applicant says he cannot, then the agent explains that he can pay that premium on the installment plan for a small additional fee, and if the applicant agrees to that, he then multiplies the $70 by 40%, getting $28, and adds fifty cents [now $.75] thereto, and writes $28.50, as the down payment." Referring to the "installment payment fee," he said: "It is an additional operation that must be performed, and we can cost account that, and that is what we charge to the customer who elects to buy time." At the expiration of a prior policy a notice of premium is sent to the policyholder. The notice quotes the "Annual Premium in Full," the single cash premium, and the company calculates 40 per cent of that amount and adds the installment fee of $.50 to it, showing the total of the two as the amount of the down payment if the customer wishes to use the installment payment plan.

The chief actuary of the department of insurance of California testified that life insurance companies on many policies allow the policyholder an option of either paying the premium annually in advance or on a "fractional" basis such as monthly, quarterly, or semi-annually. Such installment premiums are increased in amount over the pro rata proportion of the single annual premium by an additional charge based on a calculation of the additional collection expense and a loss of interest resulting from the installment payments. The additional charge is computed on a percentage basis. Periodic payments are more expensive to the companies. It is the custom and practice of the life insurance companies to report the full amount of these monthly, quarterly, or semi-annual premiums, which include the additional charge, for tax purposes. The premium in life insurance includes the actual mortality cost, a loading charge to cover the expense of doing business, and a profit to the company. The actuarial concepts of the chief actuary apply to all fields of insurance covered by the constitutional provision with respect to "gross premiums." See Mowbray-Blanchard, "Insurance," 4th ed., McGraw-Hill, 344; Michelbacher, "Multiple-line Insurance," McGraw-Hill, 74; Maclean, "Life Insurance," 5th ed., McGraw-Hill, 117.

The issue is: Are the installment payment fees received by plaintiff part of the "gross premiums" within the meaning of section 14⅘ of article XIII of the Constitution?

1. This space read:
"Payment Schedule
Amount Paid$———
Total Payment Fee$———
Total of Deferred Payments ..$———
Due on Delivery$———"

Notices of premium due contained this:
"To pay the
Annual Premium in Full $———
or to use the Payment Plan
Your first payment will be $———"

Section 14⅓ in pertinent part reads:

"In the case of an insurer not transacting title insurance in this State, the 'basis of the annual tax' is, in respect to each year, the amount of gross premiums, less return premiums, received in such year by such insurer upon its business done in this State."

[1] The constitutional provision applies equally to all insurance companies. Bankers' Life Co. v. Richardson, 192 Cal. 113, 122, 218 P. 586. It imposes the tax on "gross premiums" from all insurance, whether life, fire, marine, or casualty, with the only exceptions being title insurance, reinsurance, and ocean marine insurance. Northwestern Mutual Life Ins. Co. v. Roberts, 177 Cal. 540, 542–543, 171 P. 313.

[2, 3] The determination of whether a particular payment is "premium" is a question of law. "Premium" in the law of insurance means the amount paid to the company for insurance. State Farm Mutual Automobile Ins. Co. v. Carpenter, 31 Cal. App.2d 178, 179–180, 87 P.2d 867. It has been defined as "the sum which insured is required to pay." 44 C.J.S. Insurance § 340, p. 1302.

[4] The gross premium, or the amount charged in a contract of insurance, ordinarily includes two elements, that is, the net premium and the loading. The loading, or the amount arbitrarily added to the net premium, is intended to cover the expenses of the company. In a stock company it may also be a source of profit; and in a mutual company, a source from which dividends may be paid to the insured. Fox v. Mutual Benefit Life Insurance Co., 8 Cir., 107 F.2d 715, 717. Also see 2 Joyce, Insurance, 2d ed., 2171, § 1083.

One of the questions in Bankers' Life Co. v. Richardson, 192 Cal. 113, 218 P. 586, was whether assessments collected by the plaintiff, an assessment life company, from its members under its assessment contracts were included within "gross premiums." The court held such assessments were premiums within the meaning of section 14, now section 14⅓, of article XIII of the Constitution, stating (192 Cal. at page 121, 218 P. at page 590):

"We think it is clear, therefore, that the first contention of the appellant must fall, and that the constitutional amendment should be construed as providing that it was a 'gross earnings tax' which the framers of the amendment intended, and which the people levied by the adoption of this amendment. To so hold, of course, implies that all earnings, either by way of premiums or assessments, must be included in the term 'gross premiums received upon its business done in this state.'"

Also see Western Travelers Accident Ass'n of California v. Johnson, 14 Cal.App.2d 306, 309, 58 P.2d 206.

Equitable Life Assur. Soc. of United States v. Johnson, 53 Cal.App.2d 49, 127 P.2d 95, says it is clear that it was the intent of the constitutional provision to tax all receipts that could reasonably be classified as "premiums." The court held that "gross premiums," as used in the constitutional provision, includes the consideration paid for an annuity. The court stated (53 Cal.App.2d at page 59, 127 P.2d at page 100):

"'The Institute of Actuaries' Text-Book defines Premium as follows: "The sum, whether single or periodical, which is payable in consideration of a benefit, is usually called a premium." This definition does not include the idea that the premium must be sufficient or at least equal to the present value of the benefit, nor indeed does that idea properly enter into the definition of the word. The distinction is all the more important as the actuary in his ordinary work is engaged in finding present values of *sufficient* premiums and thus always has the question of the sufficiency of a premium in view. It is beyond question, however, that a sum of money paid and received in consideration for an insurance, endowment or annuity is a premium,

whether it be sufficient or not from an actuarial standpoint. A very simple definition would seem to be: "A premium is the price of an insurance, endowment or annuity." ' "

The agreement before the court in Industrial Indem. Exchange v. State Board of Equalization, 26 Cal.2d 772, 161 P.2d 222, provided that of "savings" credited to the insured, the management of the company should receive a commission. The insurance company entered the savings in its books as a credit to the insured and deducted the entire amount of that credit from its taxable gross premiums. Instead of paying or allowing the full amount of the credit to the insured, it paid 5 per cent thereof to its attorney in fact pursuant to the terms of the agreement and paid 95 per cent of the credit to the insured. The court held that the 5 per cent commission to the attorney in fact, even though credited on the books to the insured, was an expense attributable to the insurance, a part of the price of the insurance, and a part of gross premiums subject to taxation.

In Groves v. City of Los Angeles, 40 Cal. 2d 751, 256 P.2d 309, Groves was engaged in the business of soliciting, negotiating, and effecting bail bonds as agent of National Automobile and Casualty Insurance Company. As agent, he could charge for a bail bond any percentage of the face amount not exceeding 10 per cent. He paid 2 per cent of the face amount of the bond, part of which was for a reserve fund to meet losses on bonds, less a certain per cent to Associated, attorney in fact for National with power to appoint agents; and Associated paid 1 per cent of the amount of the bond less its commission to National. Holding that the entire amount paid by one obtaining a bond was premium, the court stated (40 Cal.2d at page 759, 256 P.2d at page 314):

"Defendants point out (heretofore mentioned) that the receipt given by the plaintiff-agent to the one obtaining the bail bond, mentions only the 1% received by National as the premium, and the rest is for services in arranging for the bond. Also he bears the burden of his expenses in conducting the business and may charge for the bond such percentage as he desires not exceeding 10%. We hold, however, that that does not necessarily establish him as an independent contractor rather than National's agent. We believe also that there is no escape from the conclusion that the full sum received by him from the one desiring the bail bond is the gross premium for the bond. National may act only through agents and plaintiff is its agent. All the business transacted by plaintiff is agency business, the end objective and result of which is to find takers of bail bonds and to furnish bail bonds to applicants therefor, and *the amount charged the applicant for a bond is the premium on that bond.* It is not significant how National, Associated and plaintiff choose to allocate that amount, such as for various services, premiums, etc. That is nothing more than an intramural arrangement for their convenience. The fact remains that whatever plaintiff receives from the customer or client for a bond, he is authorized to obtain it, and does so as agent of National. The question should not turn on whether the amount charged for the bond is broken down to specific items for their convenience. The situation should be the same as where National paid plaintiff's expenses incurred in writing bonds, because those expenses would be reflected in the gross premium paid—the amount charged the applicant for a bond. Nor is it persuasive that plaintiff-agent does not pay all of the 10% he receives to Associated or National. There is little difference whether he uses it to defray the expenses of conducting the bail bond business and pay himself a commission or whether all of it is paid to National which in turn pays him a commission and meets the expenses. *The essence*

of the matter is that the amount paid by the insured for the bond is the premium and it has been so recognized by the courts. [Citations.] And a mere bookkeeping method cannot thwart the law. [Citation.] Defendants seem to think that State Farm Mutual Automobile Ins. Co. v. Carpenter, supra, 31 Cal.App.2d 178, 87 P.2d 867, holding that a membership fee to become a member of an insurance organization is not a part of the premium, and Mutual Benefit Life Ins. Co. of Newark, N. J. v. Richardson, supra, 192 Cal. 369, 219 P. 1003, holding that the amount of the premium stated in the policy above the cost thereof and declared as a dividend to the insured was not premium, are opposed to the views here expressed, but those holdings on the facts are not contrary to the principle here stated, because the sums paid were not what was actually given by the insured for his insurance. In the first case above cited the membership fee did not entitle the payor to insurance. It only authorized him to apply for insurance and pay the premium. In the second, the amount paid back to the insured as a dividend meant the premium was that much less. In both the basic theory is that the amount paid by the insured for the insurance is the premium. Here, as the bail agent is the insurer's agent, what he receives from the applicant for the insurance—that is, what the applicant pays for the bail bond is the premium. What the agent receives, in legal effect the insurer receives. The so-called 'fees' received by the bail agent do not result in a reduction of the cost to the insured." (Emphasis ours.)

Also see United States Fidelity & Guaranty Co. v. State Board of Equalization, 47 Cal.2d 384, 303 P.2d 1034.

The facts in Duel v. State Farm Mut. Automobile Ins. Co., 240 Wis. 161, 1 N.W. 2d 887, 2 N.W.2d 871, were these (1 N.W. 2d 891): "Under defendant's plan for writing insurance, each policyholder, upon becoming such, is required to pay a separate membership fee for each general class or kind of automobile insurance which he then or thereafter may purchase. This fee is considered by defendant to be wholly separate and distinct from the premium charged in connection with the policy purchased. The fee varies with the type of coverage and the territory in which the applicant resides or does business. There is a minimum fee for comprehensive coverage of $2 and a maximum fee of $10 for collision coverage. Once a membership is paid for any given coverage it is never required to be paid again, although the insured may later change the cars to which the policy applies or drop and later reinstate his insurance." Holding that the membership fee was part of the premium, the court stated (1 N.W.2d 892):

"It is claimed that the membership fee entitles insured to no insurance; that all insurance protection is in consideration of the separate premium. The fact remains that a person may not become insured without paying the membership fee and that the membership fee defrays expenses customarily allocated to premium in the writing of insurance. We are unable to avoid the conclusion that such an exaction is a splitting of the premium as that term is used in the statutes. * * *

"[1 N.W.2d at page 893.] [W]e hold that the premium must include the normal and usual expenses of furnishing insurance protection; that the statute requires that the consideration for the premium shall be insurance protection and not extraneous privileges of the sort here given by the membership fee. Thus, it is not only the statutory purpose to include in the term 'premium' all sums which must be paid before insurance protection is granted and which are exacted to defray the cost of insurance protection, but it is contemplated that in return for this premium insurance protection be given

which is susceptible of periodic measurement when the insurance is for a definite term. It cannot have been the statutory intent to permit insurance companies to allocate a portion of the expenses of doing business for some sort of privilege and to designate the rest of the cost of insurance a premium."

Also see Metropolitan Life Ins. Co. v. Rouillard, 92 N.H. 16, 24 A.2d 264. Cf. Commissioner of Corporations and Taxation v. Metropolitan Life Ins. Co., 327 Mass. 582, 99 N.E.2d 866; Metropolitan Life Ins. Co. v. Scheufler, Mo., 180 S.W.2d 742.

State Farm Mutual Automobile Ins. Co. v. Carpenter, 31 Cal.App.2d 178, 87 P.2d 867, relied on by plaintiff, is not helpful. In that case membership fees were paid to a mutual company by an applicant for the privilege of applying for insurance, which were not returnable if he was rejected by the insurance company and which did not give him any policy protection in and of themselves. The court said they were not premiums and were not to be included in the computation of a gross premium tax. The membership fee was not consideration for the insurance. State Farm was distinguished in Groves v. City of Los Angeles, supra, 40 Cal.2d 751, 761, 256 P.2d 309, 315, "because the sums paid were not what was actually given by the insured for his insurance."

[5] The expense of administering the insurance is a component of premium. State Compensation Ins. Fund v. McConnell, 46 Cal.2d 330, 338–340, 294 P.2d 440, 445. Reimbursement of the additional expense resulting from selling the insurance on an installment basis is an essential element of the gross premium. The Insurance Code provides for the inclusion as an essential element of the premium of every aspect of the expense of the company. Ins. Code, § 1852(c), (d). "Rate-making involves a consideration, not only of the particular hazards of various occupations, but also of losses (pure premium) and of expense (expense loading). This is especially true where, as under our statute, the rate must be adequate. Expense is, therefore, not only a relevant, but an essential factor to be considered." State Compensation Ins. Fund v. McConnell, 46 Cal.2d 330, 338, 294 P.2d 440.

[6] The sole basis for the imposition of the "installment payment fee" and the determination of its amount was the expense to the company of the additional installment collections. Plaintiff made the charge of the "installment payment fee" directly to the insured in order that the increase of its expense from acceptance of installment premiums be passed directly to the insured. The option to the insured was whether he wanted to pay in installments. If he did, he was required to pay the installment payment charge. The option was not whether he wished to pay the charge but in what form he wished to pay the premium, i. e., cash or installments. The insured paid the fee as part of the cost of the insurance he wanted. The "installment payment fee" was an item of expense loading to cover the additional cost of the installment premium plan, and was in the same category as the expense loading in the cash premium. It was "actually given by the insured for his insurance." Groves v. City of Los Angeles, supra, 40 Cal.2d 751, 761, 256 P.2d 309, 315. The expense incident to the installment payment plan does not differ in character from other expenses included in premium. The entire cost to the policyholder arising out of the issuance and performance of the contract of insurance constitutes the taxable premium. There is nothing in the Constitution to indicate the word "gross" is not to be given its usual meaning of "whole; entire; total; without deduction."

[7] We conclude that the "installment payment fee" is a part of the "gross premiums" within the meaning of section 14⅓ of article XIII of the Constitution.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

169 Cal.App.2d 67

Sydney Ruth RUBINOW, etc. et al., Plaintiffs and Appellants,

v.

COUNTY OF SAN BERNARDINO, etc. et al., Defendants and Respondents.

Civ. 5913.

District Court of Appeal, Fourth District, California.

March 24, 1959.

Action for death of motorist whose vehicle collided with automobile which had allegedly been driven erratically in presence of defendant deputy sheriff. The Superior Court of San Bernardino County, Jesse W. Curtis, Jr., J., entered a judgment of dismissal after sustaining a demurrer, and plaintiffs appealed. The District Court of Appeal, Shepard, J., held that complaint, which failed to allege knowledge by officer that law was being violated and that officer could have made arrest in time to have prevented accident, was insufficient.

Affirmed.

1. Negligence ⇐108(1), 110

Ordinarily speaking, negligence may be pleaded in general terms, but first a duty to act must be shown.

2. Municipal Corporations ⇐189(1)

Where there was at least some degree of discretion required to be exercised by police officer, facts which plaintiffs rely upon to place on shoulders of officer duty to act should be sufficiently alleged so as to make such duty clear and unequivocal.

3. Sheriffs and Constables ⇐137(1)

In action for death of motorist whose vehicle collided with automobile which had allegedly been driven erratically in presence of defendant deputy sheriff, complaint, which failed to alleged knowledge by officer that law was being violated and that officer could have made arrest in time to have prevented accident, was insufficient.

John Paul Jones, D. W. Brobst, Oakland, for appellants.

Albert E. Weller, County Counsel, J. B. Lawrence, Deputy County Counsel, San Bernardino, for respondents.

SHEPARD, Justice.

This is an appeal from a judgment of dismissal of plaintiffs' complaint following the sustaining of a demurrer and the additional order at plaintiffs' request that it be "without leave to amend."

In general substance the complaint alleges that 28 March 1956, Wynn Estelle Rubinow was killed in an automobile accident on Highway 66 near Newberry in San Bernardino County; that the accident was caused by the careless, negligent, reckless, erratic and unlawful driving of one George Moore, Jr. due to said George Moore's drunken and intoxicated condition; "that at said time and place, said Ford automobile operated by the said George Moore, Jr., as aforesaid, was being operated in the presence of and was being followed and observed by said defendant, Ernest J. Rowland, Deputy Sheriff of said County of San Bernardino, and that said Ernest J. Rowland failed and neglected to faithfully perform his duties, to stop and prevent the violation of the law being committed in his presence by the said George Moore, Jr."; that as a proximate result of said defendant's negligence the automobile of George Moore, Jr. collided with that of plaintiffs' deceased, causing her death; and that plaintiffs are the surviving husband and minor child of said deceased.

The third cause of action under similar allegations alleges severe injury to Sydney G. Rubinow, Jr., and a fifth cause of action under similar allegations alleges severe injuries to Sydney Ruth Rubinow. The second, fourth and sixth causes of action were abandoned by plaintiffs and are not before us for consideration. Defendants demurred to all causes of action, both generally and specially. The special demurrer sets up a large number of defects

in the wording of the complaint, among which are that the complaint does not show whether Rowland could see that the law was being violated by Moore, and whether Rowland could have stopped Moore's alleged violations before the accident occurred.

Plaintiffs base their contention of liability on the statutory provisions relating to duties of officers, and on the contention that the failure or neglect of an officer to perform his duty with injury to others results in liability. They cite in support thereof Government Code Section 26600 that "The sheriff shall preserve peace, * * *"; Section 26601, that "The sheriff shall arrest * * * all persons who attempt to commit or who have committed a public offense"; Penal Code Section 836, that "A peace officer may * * * without a warrant, arrest a person: 1. For a public offense committed or attempted in his presence"; 5 Cal.Jur.2d 155, to the effect that "* * * there is authority to the effect that where the circumstances require it, the right and duty exist for an officer to make such an arrest before the damage is done * * *"; 21 Cal.Jur. 400, "it is the duty of the police (peace officer) to watch over the safety of citizens and to guard their person and property from destruction and injury"; Government Code, Section 26685, "Whenever any action is brought against any sheriff, all deputies * * * upon whose negligence, wilful or wrongful act, or other default the action is based are necessary parties defendant."

Plaintiffs also quote from Falasco v. Hulen, 6 Cal.App.2d 224, 242, 44 P.2d 469, 477, in support of their position, to the effect that "Public officers, * * * are not relieved from liability for acts of negligence * * * 'A peace officer is generally held to be personally liable for negligent or wrongful acts causing personal injury or death'". This cited case was one in which the collision was caused by the excessive speed and negligence of a constable driving an automobile on an errand of mercy not technically within the protection afforded to police and fire vehicles on certain emergency calls. Reynolds v. Lerman, 138 Cal.App.2d 586, 292 P.2d 559, was a judgment on conversion where the sheriff allowed certain property under his care on a writ of attachment to be sold under a warehouseman's lien. Osborne v. Schaeffer, 152 Cal.App.2d 56, 312 P.2d 340, was a case in which a trusty appointed by the sheriff to assist in jail administration was alleged to have unlawfully assaulted plaintiff. Hayward Lumber & Investment Co. v Biscailuz, 47 Cal.2d 716, 306 P.2d 6, was a case in which the sheriff was charged with the breach of a mandatory official duty in that he wrongfully released certain bank deposits from a writ of attachment. Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876, 879, was an arrest for unlawful assembly at a "hot rod" race, and the court said in holding the officers not liable for making the arrest that "a public offense is committed in the presence of an officer within the meaning of a statute such as Penal Code, § 836, when 'circumstances exist which would cause a reasonable person to believe that a crime has been committed in his presence.'"

Defendants contend that the power of a police officer to arrest and prosecute misdemeans without a warrant is quasi-judicial and discretionary; that there is no judicial authority under common law nor under California Statutes for imposing civil liability for failure to make an arrest without a warrant; and they cite the use of the word *may*, as used in Penal Code Section 836, as affirmatively supporting their position that the officer has no compulsory or mandatory official duty to make an arrest for a misdemeanor committed in his presence. They cite and quote from White v. Towers, 37 Cal.2d 727, 235 P.2d 209, 211, 28 A.L.R.2d 636, which was an action for damages for malicious prosecution against an investigator for the State Fish and Game Commission who had filed a complaint against White in the United States District Court charging pollution of navigable waters. Our Supreme Court upheld a judgment

for defendant after demurrer to the complaint was sustained, and said:

"As such officer he is entitled to the immunity from civil liability with which the law surrounds officials directly connected with the judicial processes. To rule otherwise would place every honest law enforcement officer under an unbearable handicap and would redound to the detriment of the body politic. 'The public welfare requires that this choice (whether or not to institute proceedings) shall be free of all fear of personal liability. To assure this freedom of action it is deemed best to make that assurance positive and definite by securing him against even actions based upon a malicious abuse of his official power.'"

In Wilson v. Sharp, 42 Cal.2d 675, 268 P.2d 1062, 1065, a taxpayer sought to recover from the county counsel moneys allegedly illegally paid to Sharp, for which said county counsel failed and neglected to sue. The trial court, on motion, struck that portion of the complaint above referred to. Our Supreme Court, in holding that the action of the trial court was proper, ruled that the Government Code section making it the duty of the county counsel to institute suit to recover money illegally paid "does not, however, purport to create a cause of action against the district attorney or county counsel, * *" The court further held that in spite of the wording of Section 26525 of the Government Code discretion is vested in the county counsel because both a question of law and fact are involved, and cites with approval White v. Towers, supra; Coverstone v. Davies, supra; and other cases.

In Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1, and in Bartlett v. State of California, 145 Cal.App.2d 50, 301 P.2d 985, it was held that Government Code Section 1953 is restrictive in nature and does not extend the liability of public officers.

[1–3] Counsel have not cited, nor have we been able to find, any decision of a court of last resort directly passing upon a set of facts like those here under consideration. Nor do we find it necessary, in the case at bar, to pass on the question of whether or not an officer's immunity from liability in civil damages for failure to make an arrest without a warrant, is absolute because we feel that the pleading, as presented, is clearly deficient in charging facts which would place a flat and unequivocal duty on any officer's shoulders to make an arrest.

It is perfectly true that, ordinarily speaking, negligence may be pleaded in general terms. Modica v. Crist, 129 Cal.App.2d 144, 146(3), 276 P.2d 614. But first a duty to act must be shown. Pascoe v. Southern California Edison Co., 102 Cal.App.2d 254, 257, 227 P.2d 555; Routh v. Quinn, 20 Cal.2d 488, 491(2), 127 P.2d 1, 149 A.L.R. 215. It appears to us that in a case of the type here at hand there is at least some degree of discretion required to be exercised by the officer, and where that is true the facts which plaintiffs rely upon to place on the shoulders of the officer the duty to act should be sufficiently alleged so as to make that duty clear and unequivocal. This is a simple, ordinary rule of fairness. In the case at bar, the pleading does not allege facts from which the officer would necessarily know, even in the exercise of extraordinary diligence, that an offense was being committed. The only outward or visible sign indicated by the pleading is the word "erratic", but the word "erratic" is applicable to many types of driving that are not unlawful. The pleading does not allege either directly or indirectly that the officer, in fact, knew that an offense was being committed. Before the officer would be under any duty to act in any way there must have been either actual or constructive knowledge of an offense committed in his presence, and there is nothing for the general allegation of negligence to attach to until the facts creating a duty are first set forth.

The order that the demurrer be sustained, was, at the request of the defendants, "without leave to amend." Since this

is true we must assume that plaintiffs are unwilling or unable to allege the missing elements above pointed out, to wit, knowledge by the officer that the law was being violated and that he was able to make an arrest in time to have prevented the accident of which they complain. In our opinion, the action of the trial court in sustaining the demurrer "without leave to amend" was correct.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.



169 Cal.App.2d 92

N. ADLER, Plaintiff and Respondent,

v.

Jack BLAIR, also known as Jack D. Blair, also known as John Darby Blair, John Doe and Jane Doe, Defendants,

Dorothy Kalleen Blair, Appellant.

Civ. 23477.

District Court of Appeal, Second District, Division 3, California.

March 25, 1959.

Action against husband, wherein attachment was levied on automatic laundry business, and wife filed third party claim on ground that the attached property was her separate property and was not subject to attachment for husband's separate debt. The Superior Court, Los Angeles County, Robert H. Scott, J., entered judgment denying third party claim, and wife appealed. The District Court of Appeal, Vallée, J., held that evidence sustained trial court's finding that, at time of levy, husband was part owner and entitled to share in possession of attached property.

Affirmed.

1. Appeal and Error ⇐920(4), 989

Upon appeal from judgment denying wife's third-party claim in action against husband wherein attachment was levied on property which wife claimed was her separate property and was not subject to attachment for husband's separate debt, the District Court of Appeal would view the evidence in light most favorable to plaintiff and would disregard conflicting evidence.

2. Husband and Wife ⇐262(2)

In action against husband, wherein attachment was levied on automatic laundry business, and wife filed third-party claim on ground that attached property was her separate property and was not subject to attachment for husband's separate debt, wife had burden of establishing that attached property was her separate property. West's Ann.Code Civ.Proc. § 689.

3. Property ⇐9

Presumption that person who exercises acts of ownership over property is owner thereof constitutes evidence and will support a finding made in accordance with it, even in face of contrary evidence. West's Ann.Code Civ.Proc. § 1963.

4. Evidence ⇐595

It is for trier of fact to determine whether, under the circumstances, greater weight is to be given to a disputable presumption or to contrary evidence.

5. Husband and Wife ⇐264

In action against husband, wherein attachment was levied on automatic laundry business and wife filed third-party claim on ground that attached property was her separate property and was not subject to attachment for husband's separate debt, evidence sustained trial court's finding that, at time of levy, husband was part owner and entitled to share in possession of the attached property. West's Ann.Code Civ. Proc. §§ 689, 1963.

6. Evidence ⇐383(7)

In action against husband, wherein attachment was levied on automatic laundry

business, and wife filed third-party claim on ground that attached property was her separate property and was not subject to attachment for husband's separate debt, trial court, as finder of facts, was not required to accept, at face value, documents by which husband stated that particular automatic laundries were wife's separate property.

7. Attachment ⇐309

Where, in action against husband, attachment was levied on automatic laundry business, wife filed third-party claim on ground that attached property was her separate property and was not subject to attachment for husband's separate debt, and judgment denying third-party claim was not entered until after wife's counsel and plaintiff's counsel had rested after stating that they each had no further evidence they wished to produce, cause was submitted on the merits, and judgment denying third-party claim was not, in effect, a judgment of nonsuit, claimed by wife to be improper in view of evidence supporting third-party claim.

8. Attachment ⇐306

In action against husband, wherein attachment was levied on automatic laundry business, and wife filed third-party claim on ground that attached property was her separate property and was not subject to attachment for husband's separate debt, question whether wife should be allowed to amend her third-party claim was matter lying within trial court's discretion.

9. Appeal and Error ⇐953

In action against husband, wherein attachment was levied on automatic laundry business, and wife filed third-party claim on ground that attached property was her separate property and was not subject to attachment for husband's separate debt, trial court's denial of wife's request to file amended third-party claim would not be disturbed on review in absence of showing of an abuse of trial court's discretion in such matter.

Robert S. Butts, Hollywood, for appellant.

D. Brandon Bernstein, Beverly Hills, for respondent.

VALLÉE, Justice.

Appeal from a judgment denying a third party claim.

Plaintiff Adler brought suit against Jack Blair to recover in excess of $6,750. An attachment issued and was levied on an automatic laundry business, referred to as the "North Broadway Store." Dorothy Blair filed a third party claim. On stipulation, the attachment was released and the property sold. Plaintiff Adler filed an undertaking in double the value of the property levied on.

After a hearing the court found that Jack Blair was the part owner and entitled to a share in the possession of the property attached at the time of the levy; Dorothy Blair was not and is not the sole owner or entitled to its exclusive possession; she has no exclusive right, estate, title, or interest therein; and not all of the property was her separate property. The judgment was to the same effect. Dorothy Blair appeals.

Appellant first asserts the attached property was her separate property and was not subject to attachment for the separate debt of Jack Blair; that the finding that he had an interest in the property is contrary to the evidence.

[1] Viewing the evidence in the light most favorable to respondent, disregarding conflicting evidence, the record shows these facts. Jack Blair and Dorothy Blair were married on January 3, 1949 and have been husband and wife since. At the time of their marriage Jack was in the "launderette" business. On April 2, 1949 Jack gave Dorothy a letter in which he stated:

> "All of the money we have is money you inherited from your uncle. any business you buy or investments you may make with that money is your

separate property and I do relinquish and waive any rights to your separate property or the earnings from your separate property. If I should help you with or work in your business I will not claim anything against you for my services.

"In other words, except for the 1949 convertible Buick which I gave to you and my clothes and perhaps $50 or so I am clean and have nothing. All else is yours and I have no right to it."

Thereafter Dorothy bought, operated, and sold a succession of laundromats. Jack and Dorothy worked together in the laundromats that were acquired from time to time. He selected locations. He made arrangements for the purchase of equipment. He managed some of the laundries. He composed material advertising the business. He opened a laundromat in Ontario. The lease of a store in Compton was in the names of both Jack and Dorothy. At the time the Compton lease was executed Jack told Dorothy, "We are doing very well and we should start another store, and this is a good location." Dorothy testified that most of the leases of stores "probably" bore Jack's signature. Jack negotiated for and secured six leases in writing covering laundries in which he was named as lessee, including the North Broadway Store, and made deposits with the lessors at the time the leases were executed.

In 1956 Dorothy had four laundromats. In June 1956 she entered a sanitarium where she remained until December 15, 1956. While she was in the sanitarium Jack sold the four laundromats under a power of attorney purportedly executed by Dorothy. On October 24, 1956 Jack leased the North Broadway Store, the property attached. The lease, in writing, was in Jack's name as sole lessee. He made a deposit of rent of either $150 or $300. He alone signed an application for an industrial waste permit for that store. He procured liability policies on six laundromats, including the North Broadway Store, in each of which he was named as sole beneficiary. He collected the moneys and emptied wash machines and coin boxes in the North Broadway and other stores. He contracted for the plumbing to install washers in the North Broadway Store.

On April 15, 1956 Jack and Dorothy executed a conditional sales contract and promissory note for the purchase of equipment for the stores. On February 11, 1957 Jack signed a document in which he stated that six specified laundromats, including the North Broadway Store, were the separate property of Dorothy and that in consideration of her forbearing instituting action to determine the true nature of the ownership, he assigned to her as her separate property any and all right, title, and interest which he might have in and to them.

On September 17, 1957 Jack and Dorothy executed a chattel mortgage in favor of Ardmore Chemical Company covering four laundries, including the North Broadway Store. On release of the attachment, Jack gave the sheriff a receipt for about $400, taken in the coin machines in the North Broadway Store while the sheriff was in possession.

Jack made the arrangements for the purchase of machinery and equipment for six stores, including the North Broadway Store, on conditional sales contracts. Dorothy did not know when the equipment was delivered to three of the stores.

Jack and Dorothy filed joint income tax returns every year during their marriage except 1956.

[2–5] The burden was on appellant to establish that the attached property was her separate property. Code Civ.Proc. § 689. The trial court found that Dorothy did not sustain that burden. The question was one of fact. Bruhnke v. Bowlus-Teller Mfg. Co., 21 Cal.App.2d 317, 318, 69 P.2d 208. It is presumed that a person is the owner of property from exercising acts of ownership over it. Code Civ.Proc. § 1963(12). Such presumption is evidence and supports a finding made in accordance

with it, even in the face of contrary evidence. (18 Cal.Jur.2d 490, § 67.) It is for the trier of fact to determine under the circumstances of the case whether to give greater weight to a disputable presumption or to contrary evidence. People By and Through Department of Public Works v. J. P. Loubet Co., 147 Cal.App.2d 566, 568, 305 P.2d 651. The conclusion of the trial court is amply supported by the evidence we have recited. There is evidence in the record which would have supported a contrary finding, but it cannot be said as a matter of law that the property attached was Dorothy's separate property.

[6] Appellant lays great stress on the letter of April 2, 1949 from Jack to Dorothy, an agreement of January 25, 1955 between Jack and Dorothy by which Jack agreed that one laundromat was Dorothy's separate property, a similar agreement of June 25, 1955 with respect to another laundromat, a similar agreement of March 22, 1956 with respect to two other laundromats, a grant deed dated March 14, 1956 conveying a parcel of realty to Dorothy, a quitclaim deed dated March 19, 1956 from Jack to Dorothy quitclaiming the same parcel to her, a statement dated February 10, 1957 addressed to Great Northern Trust signed by Dorothy stating she was the "sole and exclusive owner" of six laundromats including the North Broadway Store, a chattel mortgage executed by Dorothy on February 11, 1957 covering a Jaguar, the document of February 11, 1957 signed by Jack stating that six "automatic laundries" were Dorothy's separate property, and deposit books and records of bank accounts in the name of Dorothy alone. The trial court was not required to accept these documents at face value. Watwood v. Steur, 89 Cal.App.2d 620, 623, 624, 201 P.2d 460. In fact, the court may have inferred that because Jack signed successive documents stating the laundromats were Dorothy's separate property that they were signed for the sole purpose of making it appear he had no interest therein when in fact he had an interest.

[7] Appellant asserts the court in fact granted a judgment of nonsuit, and that a nonsuit was improper since there was evidence supporting the third party claim. The point is untenable. Appellant introduced evidence in support of her claim. One witness for respondent testified out of order. At the conclusion of appellant's evidence her counsel stated he had no further evidence to produce. He then asked leave to file an amended third party claim. The request was denied. The following then occurred: "Mr. Bernstein [attorney for respondent]: We rest, your Honor. The Court: You are at liberty, however, to add to the record, if you wish. Mr. Bernstein: No, your Honor. A lot of our testimony may be cumulative. We have put on the testimony of Mr. Drummond, only one witness on our side for the plaintiff, your Honor, and we would rest also." No motion for a judgment of nonsuit was made. The record clearly shows the cause was submitted on the merits.

[8, 9] Appellant contends the court erred in denying her leave to file an amended third party claim. The request to file the amended claim was made at the end of a 3-day hearing after all the evidence was in. In denying the request, the court stated that "regardless of what amendments might be filed there still would not be any adequate basis for asserting a Third Party Claim to the property which is in controversy." Whether such an amendment should be allowed is a matter in the discretion of the trial court, and its ruling will not be disturbed on review unless that discretion was abused. Bruce v. Bruce, 121 Cal.App.2d 661, 663, 263 P.2d 895. No abuse of discretion is shown.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

169 Cal.App.2d 125

Edwin D. BERL, Warren Harry Berl, John David Berl and Edward A. Loughrey, Individually and as co-partners doing business as Edwin D. Berl & Sons, Plaintiffs,

v.

Claude N. ROSENBERG, Individually and as Executor of the Estate of Melville C. Rosenberg, Deceased, and Barbara Andrews, Defendants, Cross-Complainants and Appellants,

and

Marion Clemens and Garrett H. Rosenberg, Defendants, Cross-Complainants and Respondents.

Civ. 18109.

District Court of Appeal, First District, Division 1, California.

March 26, 1959.

Hearing Denied May 20, 1959.

Interpleader action. From a judgment of the Superior Court, City & County of San Francisco, Milton D. Sapiro, J., two of the three claimants appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that where security brokers in regular course of business came into possession and held in decedent's account certain securities, and decedent on June 12, 1956 wrote a letter to broker stating that "I wish to make a joint ownership account with Marion Clemens * * * for sole survivor to receive all", such letter was mailed June 18, 1956, it was delivered prior to 8:30 A.M. on June 19, 1956, and decedent committed suicide sometime before 11 A.M. on June 19, 1956, under circumstances, court was justified in finding that word "wish" meant a present transfer creating a valid joint tenancy in securities.

Affirmed.

1. Gifts ⇐28(2)

Where decedent had placed securities in alleged joint tenancy account with claimant and no consideration passed from claimant to decedent, the joint tenancy, if it was created, constituted a gift to claimant of an undivided one-half interest in the property involved. West's Ann.Civ.Code, §§ 683, 1146–1151.

2. Gifts ⇐55

The only basic distinction between a gift causa mortis and one inter vivos is that a gift causa mortis is revocable if donor lives, while a gift inter vivos is not, but other than that, the basic rules applicable to the two types of gifts are the same. West's Ann.Civ.Code, §§ 1146–1151.

3. Gifts ⇐71

A gift causa mortis where contemplated death is suicide is not invalid as a matter of public policy where donor complies with all requirements of gift and then commits suicide. West's Ann.Civ.Code, §§ 1146–1151.

4. Gifts ⇐74

Once the basic requirements for a gift either inter vivos or causa mortis are complied with, title to donee passes, and gift is valid, and in case of a gift causa mortis, if donor lives, gift is revocable, but only revocable by donor if he lives.

5. Gifts ⇐4

The two basic elements of a gift are the intention of donor to make a voluntary transfer to donee, and a delivery, actual or constructive, by donor to donee or to someone in his behalf. West's Ann.Civ.Code, §§ 1146–1151.

6. Gifts ⇐21

In a proper case, delivery, either actual or symbolic, may be made to a third person on behalf of donee, and if donor parts with dominion and control, such a gift will be effective. West's Ann.Civ.Code, §§ 1146–1151.

7. Gifts ⇐22

Some sort of delivery is required even where gift is of an undivided one half of property in possession of third person, but delivery required is not a physical delivery, actual or symbolic, of the one-half undivided interest on the property but delivery of written instrument of joint tenancy to donee or to someone on his behalf is sufficient. West's Ann.Civ.Code, §§ 683, 1146–1151.

8. Gifts ⇐49(3)

The requirement for delivery in gifts protects the property of individual from ill-

founded and fraudulent claims of gift by requiring strong, concrete evidence that donor really intended to part with his property. West's Ann.Civ.Code, §§ 1146–1151.

9. Gifts ⇐28(2)

Where security brokers under written contract in regular course of business came into possession and held in decedent's account certain securities, and decedent on day prior to suicide informed brokers by letter that "I wish to make a joint ownership account" with designated person "for sole survivor to receive all" and intent to make a gift to designated person was clear, such intent, coupled with delivery of letter to brokers constituted a valid delivery which created a valid joint tenancy in securities if instrument involved was of the type that it created such an estate. West's Ann.Civ.Code, §§ 683, 1146–1151.

10. Joint Tenancy ⇐3

A joint tenancy in personalty can only be created by a writing and intention to create a joint tenancy must be specifically set forth in the writing. West's Ann.Civ. Code, § 683.

11. Gifts ⇐28(1)

In determining whether decedent's letter to brokers who in regular course of business came into possession and held in decedent's account certain securities, stating that "I wish to make a joint ownership account with Marion Clemens * * * for sole survivor to receive all" was operative as a present transfer of decedent's account into a joint tenancy, the primary question was donor's intent, and while word "wish" may be interpreted to express a desire that something will happen in the future it also can be interpreted as intending a present transfer, synonymous with the words "I hearby grant", so that lack of preciseness in use of term should not be used to frustrate that intent. West's Ann.Civ.Code, §§ 683, 1146–1151, 1860.

See publication Words and Phrases, for other judicial constructions and definitions of "Wish".

12. Joint Tenancy ⇐3

Where security brokers in regular course of business came into possession and held in decedent's account certain securities, and decedent on June 12, 1956 wrote a letter to brokers stating that "I wish to make a joint ownership account with Marion Clemens * * * for sole survivor to receive all", such letter was mailed June 18, 1956, it was delivered prior to 8:30 A.M. on June 19, 1956, and decedent committed suicide sometime before 11 A.M. on June 19, 1956, under circumstances, court was justified in finding that word "wish" meant a present transfer creating a valid joint tenancy in securities. West's Ann.Civ. Code, §§ 683, 1146–1151, 1860.

13. Joint Tenancy ⇐3

Where security brokers in regular course of business came into possession and held in decedent's account certain securities, and decedent wrote a letter to brokers stating "I wish to make a joint ownership account with Marion Clemens * * * for sole survivor to receive all" that brokers required certain forms to be filled out for creation of a joint tenancy account was not controlling on issue whether letter created a joint tenancy in the securities. West's Ann.Civ.Code, §§ 683, 1146–1151, 1860.

Francis M. Passalacqua, Healsburg, Golis & Fredericks, Santa Rosa, for appellants.

Jack Flinn, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiffs, partners, are security brokers. One Melville C. Rosenberg, under the terms of a written contract, engaged plaintiffs to act as his broker. In the regular course of business plaintiffs came into possession and held in Melville C. Rosenberg's account certain securities. Melville committed suicide by taking morphine sulphate. With the consent of all concerned plaintiffs sold the securities, deriving $8,003.68 from the sale. The three defendants claimed the fund. Plaintiffs interpleaded the three claimants. The trial court determined that defendant Marion Clemens was entitled to the money. The other two defendants appeal.

Defendant and appellant Claude N. Rosenberg is the executor of the estate of the decedent. He claims the money as part of the decedent's estate. Defendant and appellant Barbara Andrews is the sister of the decedent. She claims that the will of decedent is invalid, and that the money belongs to her as next of kin. Marion Clemens urges that before his death decedent placed the securities in a joint tenancy account with him, and claims the fund as surviving joint tenant. The trial court found that Marion Clemens was entitled to the fund as surviving joint tenant. The correctness of this holding is the basic point involved on this appeal.

The evidence relied on on the issue was practically stipulated to, and is as follows: Prior to his death decedent wrote two letters to the plaintiffs. They read as follows:

"330 Schroeder St.
"Sunnyvale, Cal.
"June 12, 1956

"Edwin D. Berl & Sons
"333 Montgomery St.
"San Francisco
"Dear Sir:

"I wish to make a joint ownership account with Marion Clemens of 72 Natoma St., S. F. for sole survivor to receive all.

"Signed M. Casper Rosenberg
"M. Casper Rosenberg"

"Sunnyvale, Cal.
"June 18, 1956

"Edwin D. Berl & Sons
"333 Montgomery St.
"San Francisco
"Dear Sir:

"Please send your check for $200. to Mrs. Mary Fallis, 325 Schroeder St. Sunnyvale, indicating for lawn care.

"Signed M. Casper Rosenberg"

These two letters were placed in the same envelope and mailed on June 18, 1956. They were delivered to plaintiff's office about 8:30 a. m. on June 19, 1956.

On June 19, 1956, the decedent committed suicide, his body being discovered at about 11 a. m. of that day. On the afternoon of June 19, 1956, at about 3:30 p. m. plaintiffs, in ignorance of the death of their client, took action on both letters. They wrote to decedent and advised him to fill out a certain form in order to set up the joint tenancy account. At the same time the plaintiffs acted on the second letter by sending the $200 check to Mrs. Fallis, as requested. The basic question presented is whether this evidence supports the holding that a joint tenancy was legally created.

[1] The answer to this question depends upon the application of well settled principles of law to this particular fact situation. Since no consideration passed from Clemens to decedent, the joint tenancy, if it was created, constituted a gift to Clemens of an undivided one-half interest in the property. In re Estate of Lissner, 27 Cal. App.2d 570, 81 P.2d 448. Thus, the basic questions are whether the requirements for the creation of a joint tenancy (§ 683, Civ. Code) and those for a valid gift (§§ 1146–1151 of the Civ.Code) are shown by the facts.

[2] Appellants first urge that the purported gift was one in contemplation of death and invalid because the contemplated death was suicide. The parties seem to argue that the requirements of a gift *causa mortis* and one *inter vivos* are fundamentally different. An examination of the law, however, demonstrates that the only basic distinction between the two types of gifts is that a gift *causa mortis* is revocable if the donor lives, while a gift *inter vivos* is not. But other than this, the basic rules applicable to the two types of gifts are the same. In Beebe v. Coffin, 153 Cal. 174, 177, 94 P. 766, 768, it is stated: "[I]t cannot be too clearly borne in mind that the single vital distinction between a gift *causa mortis* and a gift *inter vivos* is that the former, being in its nature testamentary, is subject to the donor's revocation while he lives. But the essential of delivery, of the immediate surrender of all dominion and control over the subject of the gift, is as absolutely necessary in the one class of gifts as in the other. Falling short of such unconditional delivery, a gift is incomplete.

If the transfer of such dominion and control is postponed to some future date, as until the date of the death of the donor, it becomes thereby no more than an unexecuted and unenforceable promise to make a future gift. [Citations] * * *. If, on the other hand, the thing given remains under the control of the donor, or, except in the case of a gift *causa mortis,* is subject to his revocation, his gift is not complete. *There is no difference, however, in this particular between a gift inter vivos and a gift causa mortis. In either case it is not complete unless there is an actual or symbolical delivery to the donee of the thing to be given.*" (Emphasis added.) See also Knight v. Tripp, 121 Cal. 674, 54 P. 267.

[3, 4] But appellants argue that a gift *causa mortis,* where the contemplated death is suicide, is invalid as a matter of public policy. They cite 24 Am.Jur. 735, § 9, and 28 Cor.Jur. 689, § 101, in support of this supposed rule. These texts contain statements to that effect. The cases cited in support of these texts, however, are cases where the suicide did not take place, and the donor was seeking to revoke. Some of these cases contain general language to the effect that a gift in contemplation of suicide is invalid as a matter of public policy. If these statements be interpreted to mean that such a gift will be set aside if the donor does not commit suicide, then these statements are undoubtedly correct. But if they mean that where the donor complies with all the requirements of a gift and then commits suicide that the donee will not be permitted to keep the property, they are clearly wrong. Once the basic requirements for a gift either *inter vivos* or *causa mortis* are complied with, title to the donee passes, and the gift is valid. In the case of a gift *causa mortis,* if the donor lives, the gift is revocable—but only revocable by the donor if he lives. Of course, there is a strong public policy against suicide, but this does not mean that public policy prevents an owner from giving away his property before committing suicide. Carried to its logical conclusion the argument of appellants, if sound, would mean that one contemplating suicide could not only not make a gift, but could not will his property away, or that his heirs could not inherit the property.

[5] Thus, we get back to the question of whether the basic elements of a gift were here shown to exist. The two basic elements are the intention of the donor to make a voluntary transfer to the donee, and a delivery, actual or constructive, by the donor to the donee or to someone on his behalf. (See cases collected 24 Cal. Jur.2d 33, § 18, et seq.) In the present case, the intent to make a gift was demonstrated. This is conceded. The real question is whether there was a delivery.

Under the facts there was not a delivery of the property involved to the donee. The delivery, if any, was of the letter to the plaintiffs who already were in possession of the securities. Did that constitute a symbolic delivery?

[6, 7] Of course, in a proper case, delivery, either actual or symbolic, may be made to a third person on behalf of the donee, and if the donor parts with dominion and control, such a gift will be effective. Spellacy v. Dauterman, 122 Cal.App. 416, 10 P.2d 114; Heitman v. Cutting, 37 Cal. App. 236, 174 P. 675. But the really difficult problem is what constitutes a proper delivery where the property, here the securities, is already in the possession of the third person, the plaintiffs, and the gift is not of the whole property but of an undivided one-half interest therein. At least two California cases have held that no delivery of anything is necessary to make such a gift as long as the joint tenancy is in fact created. Kennedy v. McMurray, 169 Cal. 287, 295, 146 P. 647, citing with approval Farrelly v. Emigrant Industrial Sav. Bank, 92 App.Div. 529, 87 N.Y.S. 54; Williams v. Union Trust Savings Bank of Santa Rosa, 33 Cal.App. 655, 166 P. 366. But the more recent and better reasoned cases require some sort of a delivery even where the gift is of an undivided one-half of the property. But the delivery required is not a physical delivery, actual or symbolic, of the one-half undivided interest on the proper-

ty. The delivery of the written instrument of joint tenancy to the donee or to someone on his behalf, is sufficient. In so holding, in Hausfelder v. Security-First Nat. Bank, 77 Cal.App.2d 478, 485, 176 P. 2d 84, 88, the court stated: "The further argument that surrender of all dominion over the contents of box 423 was indispensable to a completed gift is met by the fact that the gift to respondent was not a verbal gift but was effected by an instrument in writing. In such event the gift is complete upon delivery of the writing."

The same result was reached in Hill v. Donnelly, 56 Cal.App.2d 387, 132 P.2d 867. There real property was held in the decedent-donor's name. She conveyed the property to a stranger, who re-conveyed it to her and her brother as joint tenants. The decedent never "gave" anything to her brother, that is, nothing was ever delivered to him. The decedent gave the deed to a third party who took it to be recorded and returned the deed to the decedent who kept it in her possession until she died. The court held that there was an effective delivery of the deed, and that therefore a valid joint tenancy had been created so as to vest the property in the surviving brother at her death. See also White v. Bank of America, 53 Cal.App.2d 831, 128 P.2d 600.

[8] These cases are in accord with the realities of the situation and in accord with the fundamental purpose of the delivery requirement. That purpose was well expressed in Gordon v. Barr, 13 Cal.2d 596, 601, 91 P.2d 101, 103, where the Supreme Court stated: "The necessity for delivery in gifts of personal property has its genesis in the archaic doctrine of seisin. Brown on Personal Property, p. 76; 20 Col.L.R. 196; 21 Ill.L.R. 341. But in spite of the * * * formalistic character of its origin, the requirement has salutary features which fully justify its retention in the law. It protects the property of the individual from ill-founded and fraudulent claims of gift by requiring strong concrete evidence that he really intended to part with his property. Such a precaution is especially desirable when, as is frequently the case, the alleged donor is dead at the time the claim is asserted. Moreover, by requiring some positive act of relinquishment such as manual tradition of the subject of the gift, the significance of the donor's act is forcefully brought home to him, and he is thus protected from ill-considered or impulsive donations of his property. See Mechem, The Requirement of Delivery in Gifts of Chattels, 21 Ill.L.Rev. 341, 457, 568, at 348 et seq.

"In the light of these desiderata such vague terms as 'constructive delivery', 'symbolic delivery', and 'parting with dominion and control' take on a new aspect and become more certain and explainable. Where there has been unequivocal proof of a deliberate and well-considered donative intent on the part of the donor, many courts have been inclined to overlook the technical requirements and to hold that a 'constructive' or 'symbolic' delivery is sufficient to vest title in the donee. However, where this is allowed the evidence must clearly show an intention to part presently with some substantial attribute of ownership."

This court recently, in Oakland Bank of Commerce v. Hayes, 159 Cal.App.2d 257, 323 P.2d 509, adopted the rationale of the Gordon case in upholding the delivery of a joint tenancy deed. There a husband and wife held property in joint tenancy. They drew up a deed purporting to place the property in joint tenancy in the names of the husband, wife and their daughter. The deed was recorded and returned to the possession of the husband and wife. The daughter never claimed any interest in or exercised any dominion over the property. The court held that there had been a sufficient delivery. In so holding, Mr. Justice Bray, speaking for the court, stated (159 Cal.App.2d at page 262, 323 P.2d at page 512):

"There is no evidence of manual delivery, in the strict sense of the grantors' handing the deed to themselves and defendant as grantees. A lack of such manual delivery is not fatal to a delivery. It was said in Moore v. Trott, 1912, 162 Cal. 268,

274, 122 P. 462, 465: 'It has long, if not always, been the rule that the delivery of an instrument is a question of intent, and that to a complete delivery no precise form of words and no particular character of act is necessary. The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another.'"

The court also held that the fact that the deed, after recording, was returned to the physical possession of the husband and wife was not significant because their possession was not adverse to the title conveyed by the deed. Cases were cited in support of the rule that the fact the donee did not know of the joint tenancy deed did not preclude a valid delivery.

[9] Applying these rules to the facts here involved, it seems clear that the instrument alleged to create the joint tenancy was executed by decedent and was delivered to the plaintiffs who were already in possession of the securities. The intent to make a gift to respondent, as already pointed out, is clear. This, coupled with the delivery of the letter to plaintiffs, constituted a valid delivery. This created a valid joint tenancy in the securities if the instrument involved was of the type that it created such an estate. We turn now to a discussion of that problem.

[10, 11] The method of creating a joint tenancy is set forth in section 683 of the Civil Code. In interpreting that section it has been held that a joint tenancy in personal property can only be created by a writing (California Trust Co. v. Bennett, 33 Cal.2d 694, 204 P.2d 324) and the intention to create a joint tenancy must be specifically set forth in the writing. In re Estate of Dean, 68 Cal.App.2d 86, 155 P.2d 901. Both of these requirements here existed. The letter was a writing and such letter clearly states the intention of the donor to create a joint tenancy. The only debatable question is whether the instrument was operative as a present transfer of decedent's account into a joint tenancy. The precise words used in the letter were "I wish to make a joint ownership account with Marion Clemens * * * for sole survivor to receive all." Appellants argue that by the use of the verb "wish" decedent demonstrated that no present transfer was intended, and that he intended to complete the gift in the future. McGarrigle v. Roman Catholic Orphan Asylum of San Francisco, 145 Cal. 694, 79 P. 447, 1 L.R.A.,N.S., 315, cited with approval in California Trust Co. v. Bennett, 33 Cal.2d 694, 699, 204 P. 2d 324; Cordano v. Wright, 159 Cal. 610, 115 P. 227; Litten v. Warren, 11 Cal.App. 2d 635, 54 P.2d 39, are cited in support of such an interpretation.

The word "wish" can undoubtedly be interpreted to express a desire that something will happen in the future. But that is not its only interpretation. It can also be interpreted as intending a present transfer, synonymous with the words "I hereby grant," words that a lawyer would probably have used. How the word should be interpreted depends upon the language in the instrument itself and the circumstances surrounding the drawing of the instrument. § 1860, Code of Civ.Proc. The primary question is the donor's intent. Here the intent is obvious. Lack of preciseness in the use of terms should not be used to frustrate that intent.

[12] The circumstances here shown by the evidence are that the letter was written June 12, 1956; it was mailed June 18, 1956; it was delivered prior to 8:30 a. m. on June 19, 1956; decedent died sometime before 11 a. m. on June 19, 1956. Under these circumstances the trial court was justified in finding that the term "wish" meant a present transfer.

[13] The fact that the plaintiffs, as brokers, required certain forms to be filled out for the creation of a joint tenancy account is not controlling. It was so held in Donovan v. Hibernia Sav. & Loan Soc., 90 Cal.App. 489, 265 P. 995. The court, in that case, thoroughly reviewed the authori-

ties and then stated (90 Cal.App. at page 503, 265 P. at page 1001): "On principle, aside from authority, it seems manifest that no property right in money is lost by a deposit of the fund in a savings bank. The owner still retains all of his personal rights of transfer or assignment, and while the depositary bank may formulate and enforce certain rules relative to procedure and accounting, consistent with prudent management, yet the bank cannot in any sense restrict or take from the depositor any right of property. And it is elementary that the full right of property embraces the power of free disposition and control."

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; PETERS, J., not participating.



169 Cal.App.2d 174

In the Matter of the ESTATE of John J. FORD, Deceased.

Louis J. FORD, Individually, and Theresa Kratt, Appellants,

v.

Louis J. FORD and John B. Patton, as Administrators With the Will Annexed of the Estate of John J. Ford, Deceased, and John B. Patton, Individually, Respondents.

Civ. 5952.

District Court of Appeal, Fourth District, California.

March 26, 1959.

Proceeding on petition by administrators for interpretation of holographic will. From adverse order and decree of the Superior Court, Orange County, Raymond Thompson, J., the son and daughter of the testator appealed. The District Court of Appeal, Stone, J. pro tem., held that where testator made a number of specific devises and expressly denied anything other than the specific bequest to two of such devisees and he then provided that balance of pool should be divided among the children of the two families receiving the same amount as the parents and the parents should see that they spent their money wisely and mostly for their education, testator, by the specific limitation as to two of the devisees indicated that the other devisees were to share in the residuary estate and not that it should pass to only two of the specific devisees and their wives and children.

Order and decree reversed with directions.

1. Wills ⇐519

Where testator made a number of specific devises and expressly denied anything other than the specific bequest to two of such devisees and he then provided that balance of pool should be divided among the children of the two families receiving the same amount as the parents and the parents should see that they spent their money wisely and mostly for their education, testator, by the specific limitation as to two of the devisees indicated that the other devisees were to share in the residuary estate and not that it should pass to only two of the specific devisees and their wives and children. West's Ann. Prob.Code, §§ 102, 103, 105.

2. Wills ⇐488

In action for construction of a holographic will, which, after making specific devises, provided that balance of pool should be divided between children of two families receiving the same amount as the parents, such disposition of residue was ambiguous, and extrinsic evidence was properly admitted to determine intent of testator. West's Ann.Prob.Code, § 105.

Stephen F. Gallagher, Anaheim, and Burton & Hennessy, Yreka, for appellants.

McCabe & Schumacher, Fullerton, for respondents.

STONE, Justice pro tem.

John J. Ford wrote his holographic will when he was 94 years of age and died four years later. The will was admitted to probate and during the course of administration the administrators with the will annexed petitioned the court for instructions. The petition asked the court to interpret the will for the reason "that it is necessary that the will be interpreted so that inheritance tax proceedings can be commenced and the estate be put in a condition to be closed." This appeal is taken from the order and decree interpreting the will and directing the distribution of the estate by the administrators.

[1] The will is hand printed and without punctuation, but there is a period or dot after each word. The testator reared three foster children as his own, as stated in his will, and he refers to them as though they were his natural children. No question is raised as to the status of these foster children or their descendants, and all parties to this appeal have regarded them as testator's children. A copy of the hand printed will, omitting the dots after each word, reads as follows:

"Last Will and Testament

"In the name of God Amen I John J. Ford now of Inglewood Los Angeles Co California and being of sound and disposing mind and not under duress or undue influence of any person do make and declareth is my last will first declare that I am a widore that my wife and I have three foster children that we raised as our own children Louis Ford of Yreka California Will the American Mutual Fund Stock and the G E Sorling T D and the Mentone T D at No 2175 Colton Ave Calif I advise to sell the house and divide as follows Give Edd Mehegan and Elizabeth Mehegan one hundred $100.00 Dollars each no more of this will

"John B Patton and Elaine his wife $250.00 each

"Theresa Kratt Audry Patton $250.-00 each

"Eddie Kratt Louie Kratt $250.00 each

"Walter Collins and Marian his wife $150.00 each

"Mrs W J Caven (illegible) $100.00

"Bill Patton $100.00

"The ballance of the pool divide the children of the two families receiving the same amount as the parents Parents should see that they spend there money wisely and mostly toward there education

"There is money in Peoples Federal Savings and Loan in Inglewood Federal Savings a little in the Security First and a little in Bank of America at Placentia

"Anyone contesting this will must be cut off with just five $5.00 dollars

"I John J Ford Declare this
My Last and only Will
Dated December 21/1953"

This matter comes before the court on the question of the proper interpretation of the passage: "The ballance of the pool divide the children of the two families receiving the same amount as the parents Parents should see that they spend there money wisely and mostly toward there education."

The trial court found the words: "the ballance of the pool divide" to be a residuary clause which expressed an intent by the testator to dispose of all of his estate remaining after distribution of the preceding specific bequests. None of the parties find fault with this interpretation of those words, nor does this court. The controversy arises over the interpretation of the words immediately following, and their relation to the residuary clause.

When the testator directs "the ballance of the pool divide" the question arises, among whom is it to be divided? It must be borne in mind that there is no punctuation as a guide, but considering those words to be a complete sentence, the only

reasonable construction is that the residue should be divided among those previously named in the will as beneficiaries. Mr. and Mrs. Mehegan must be excepted, of course, as they were specifically denied anything other than the specific bequest to them. If such an interpretation is assumed, the next sentence would read: "The children of the two families receiving the same amount as the parents." This sentence gives the impression of being an afterthought for the purpose of including the children of John Patton and William Patton. The testator apparently realized that all other persons who were the natural objects of his bounty had been previously named in his will to share in his estate, but that he had omitted his great grandchildren. By the addition of this sentence, the great grandchildren shared in the estate along with the others. The trial court found that the words "The ballance of the pool divide the children of the two families receiving the same amount as the parents", did not constitute two separate sentences, but rather one, and that the entire residue should be distributed among his two grandchildren, John Patton and William Patton, their wives and their children, who were testator's great grandchildren. This, of course, would exclude the specific legatees, among whom were all of the children and the other grandchildren of the testator. This interpretation of the will does not appear to be justified when reference is made to the other provisions of the document. Testator made a number of specific bequests, all of them small, with the exception of those to his son, Louis Ford. As noted hereinbefore, testator limited his specific bequest to the Mehegans by the words "each no more of this will." This exclusion of the Mehegans evidences an intent that the others named as legatees should share in the residue. Otherwise, there would be no point in adding an exclusionary clause after the Mehegans' special bequest, and not limiting the other legatees to their respective special bequests.

Probate Code, section 102, provides in part: "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative, * * *." To hold that the specific exclusion of the Mehegans does not have reference to the residuary clause would render the expression inoperative and meaningless. The residuary clause standing alone is obviously ambiguous. Reference to the bequest to the Mehegans in another part of the will gives meaning to this otherwise ambiguous language. It is the duty of the court to construe all parts of the will in relation to each other to form one consistent whole. Probate Code, section 103, provides: "Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail."

Thus, by resort to the specific bequests and the exclusion of only the Mehegans, we get a somewhat meaningful interpretation of the expression, "the ballance of the pool divide." On the other hand, the language, "the ballance of the pool divide the children of the two families receiving the same amount as the parents", is ambiguous and unintelligible, and we find no way to resolve the ambiguity.

[2] The trial court properly resorted to extrinsic evidence in order to determine the intent of the testator. Prob.Code, sec. 105; In re Estate of Kurtz, 190 Cal. 146, 149, 210 P. 959. The evidence disclosed that only William Patton and John Patton had children of school age, although testator's daughter, Theresa Kratt, had two sets of children, one by her first marriage and another by her second marriage. Hence, the words "Parents should see that they spend there money wisely and mostly toward there education", clearly refer to the great grandchildren of

the testator, who are the children of William and John Patton. This interpretation of the meaning of the words "children of the two families" confirms, rather than conflicts with, the interpretation that the testator intended to divide the residue of his estate among all of the specifically named legatees, together with the children of his grandsons, William and John Patton. The children of William and John were added as an afterthought when testator realized that no provision had been made for them. Having thought of them, and realizing their youth, he suggested that their share be used for educational purposes.

The extrinsic evidence does not support an interpretation which would give the entire residue to William Patton and John Patton, their wives and their children, to the exclusion of the others named in the will. The testator had loaned William Patton $1,000 with which to buy a new automobile. William neglected to pay any part of the loan. The old gentleman had developed a wholesome respect for a man's word, as well as a dollar, and William's disregard of the obligation engendered a feeling of hostility toward him, which the testator harbored to the end. There is every reason to conclude that the testator never intended to favor William Patton, his grandson, as against his children. It would also appear, from the extrinsic evidence, that Mrs. Kratt had shared a close relationship with her father since her early childhood. Indeed, he lived with her during his last years. Testator apparently was fond of Mrs. Kratt's twin sons by her second marriage, who lived in the home with her and the testator. The evidence also indicated that the testator enjoyed a deep affection for his son, Louis Ford.

A construction of the residuary clause which would give to William Patton, a grandson, an unusually large share of the residue, and exclude Louis Ford, his son, Mrs. Kratt, his daughter, and Eddie Kratt and Louis Kratt, his grandsons, would be contrary to the extrinsic evidence adduced. We believe Probate Code, sections 102 and 103, together with the extrinsic evidence, support the same interpretation of the will, namely, that the residue should be divided as follows: An equal share to those named as beneficiaries of special bequests in the will, except the Mehegans; that is, one share to Louis Ford, one share to John B. Patton, one share to Elaine Patton, one share to Theresa Kratt, one share to Audry Patton, one share to Eddie Kratt, one share to Louis Kratt, one share to Walter Collins, one share to Marian Collins, one share to Mrs. W. J. Caven, one share to William Patton, one share to each of the children of William Patton, one share to each of the children of John Patton. This constitutes a division of the residue into 17 shares, as hereinabove specified.

The order and decree appealed from are reversed, with directions to the trial court to enter a decree in accordance with the foregoing.

GRIFFIN, P. J., and MUSSELL, J., concur.



169 Cal.App.2d 119

NAPAVALE, INC., a California corporation, and Audrey Roth, Plaintiffs, Appellants,

v.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, Transcontinental Insurance Company, a corporation, J. A. Cianciarulo, First Doe, Second Doe, Third Doe, A Company, a partnership, and B Company, a corporation, Defendants, Respondents.

Civ. 18036.

District Court of Appeal, First District, Division 1, California.

March 26, 1959.

Rehearing Denied April 24, 1959.

Hearing Denied May 20, 1959.

Action to recover under theft provisions of automobile policy. The Superior Court, County of Alameda, A. T. Shine,

J., rendered judgment adverse to insured, and she appealed. The District Court of Appeal, Hanson, J. pro tem., held that where insured in good faith paid price of automobile to alleged seller, insured received, only such interest as seller had, and in view of fact that seller had no interest in automobile, insured had no insurable interest and insured was not entitled to recover under theft provisions of policy when seller took automobile allegedly for purpose of having rattle in window eliminated and insured did not see the automobile again.

Affirmed.

1. Insurance ⇐146(2)

Understanding of an ordinary person and approved usage of words must be guides in construing a contract of insurance where phrase in policy is not defined.

2. Insurance ⇐282(13)

Where purchaser of automobile paid whole price to alleged seller but did not receive a bill of sale and was told by seller that title to automobile was registered in name of corporation and purchaser did not receive any papers of ownership or anything to indicate that she was owner of automobile, purchaser did not become an "owner" of the automobile within policy insuring owner of a newly acquired automobile, and insurer was not liable under theft provision of policy to purchaser when seller allegedly took automobile to dealer to have rattle in window eliminated and automobile was not seen by purchaser again.

See publication Words and Phrases, for other judicial constructions and definitions of "Owner".

3. Insurance ⇐645(2)

In action by purchaser of automobile to recover under theft provisions of policy which attached certain conditions to be met by insured with respect to newly acquired automobile, burden was on insured to allege and prove compliance with such conditions.

4. Insurance ⇐634(1), 665(3)

In action by purchaser of automobile to recover under theft provisions of policy which attached certain conditions to be met by insured to obtain coverage with respect to newly acquired automobile, insured failed to allege and prove compliance with such conditions.

5. Insurance ⇐114

An insurable interest in insured is a requisite to recovery for loss. West's Ann. Insurance Code, § 280.

6. Insurance ⇐115(6)

Where insured in good faith paid price of automobile to alleged seller, insured received only such interest as seller had, and, in view of fact that seller had no interest in automobile, insured had no insurable interest and insured was not entitled to recover under theft provisions of policy when seller took automobile allegedly for purpose of having rattle in window eliminated and insured did not see automobile again.

Lange & Rockwell, San Francisco, for appellants.

James C. Calkins, Alameda, for respondents.

HANSON, Justice pro tem.

The question presented for decision is whether the automobile insurance policy issued by defendant indemnity company provided coverage for the loss by theft of a Golden Goddess Cadillac which had allegedly been purchased by plaintiff-appellant.

The said policy is a so-called "blanket insurance policy" which, when issued, covered certain automobiles specifically scheduled therein against loss by theft. The Golden Goddess Cadillac was not one of the scheduled automobiles. However, the policy contained an automatic coverage provision for newly acquired automobiles. Coverage was automatically to attach to "*an* automobile, *ownership of which is acquired by the named insured who is the owner of the described automobile* [emphasis added], if the named insured notifies the company within thirty days following the date of its delivery to

him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date. * * * The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile. * * *"

The policy expressly provides and declares that it insures the *owner* of the automobiles listed in the policy and, in addition, the policy declares that the named insured is *the sole owner* thereof except with respect to bailment leases, conditional sales, mortgages or other encumbrances. As the policy is written in the singular, i. e., "named insured," we will for convenience refer to Mrs. Roth alone as being the named insured and ignore the two corporations which are designated as named insureds in the policy along with Mrs. Roth.

We now turn to a recital of the factual background which gave rise to the controversy before us. The plaintiff, Mrs. Roth, is the owner of five different corporations and she or the corporations owned a total of 11 automobiles at the time the policy was issued. While the policy was in force, Mrs. Roth learned that she could purchase automobiles, particularly Cadillacs, at what is known as the "fleet price" through a Mr. Leonard. She thereupon met Mr. Leonard and, as a result, agreed to purchase a new Cadillac for approximately $1,000 to $1,500 below the regular price and gave him a check for $250 as a down payment. Mrs. Roth testified that Leonard on Saturday, April 2, 1955, drove the car to her home for delivery; and that she advised Mr. Leonard that she did not have any blank checks on her Napavale bank but would give him her check thereon for the balance of $4,450 on Monday, April 4, 1955, when he called at her office; that he thereupon delivered the Cadillac to her along with the keys, and on Monday she gave him the check for $4,450, payable to his order. Mrs. Roth further testified that there was a rattle in the right door window and hence Leonard suggested he take the car to a Cadillac dealer to have the rattle eliminated; that she turned the Cadillac over to him along with the keys for that purpose. Whether this occurred on Saturday or on Monday following is not clear from her testimony, as she testified both ways. At all events she never saw the Cadillac again.

She testified that in her conversation with Leonard on Monday, April 4, 1955, she asked Leonard for a bill of sale, but did not receive one as Leonard stated that none could be given on a "fleet deal," but that he told her the Cadillac was registered in the name of Marsha Estates, Inc., and that the pink slip would come to him thus registered and he would then endorse it to her. She testified she never received a pink slip or any other papers of ownership or anything to indicate she was the owner of the Golden Goddess Cadillac. The automobile, at the time of the alleged purchase by plaintiff Roth was registered, as she had been told by Leonard, in the name of Marsha Estates, Inc., and, so far as it appears, that corporation never parted with title until it transferred the pink slip about a year later to a third party. Leonard, it appears, had no title to the car and no authority from Marsha Estates, Inc., to sell or transfer the automobile, and the court below so found. The automobile was never located after the transaction in question. The trial judge found for the defendant; the material findings are as follows: "[T]he court finds that Robert C. Leonard did purport to sell a certain 1955 Cadillac automobile, engine No. 556 262 409 to plaintiff for an agreed price of $4,750; that plaintiff did pay said Leonard said $4,750 and did receive physical possession [of the] vehicle for several days; that it is the further finding of this court that Robert C. Leonard did not deliver to plaintiff any bill of sale nor did he deliver any certificate of ownership to plaintiff; that none of the provisions of the Vehicle Code pertaining to transfer of title were complied with by said parties; that title to said vehicle at the time of said transaction was in Marcia [sic] Estates, Inc. as evidenced by certified copy of documents of the Department of Motor Vehicles of the State of California; that at the time of said

purported transaction, Robert C. Leonard was not acting as an agent for Marcia [sic] Estates, Inc. nor did said Robert C. Leonard have any indicia of ownership of said vehicle."

The trial court also found that Leonard did not steal, embezzle or convert the Cadillac from *the plaintiff*.

Only three errors are assigned: (1) did the plaintiff acquire ownership of the Cadillac; (2) did the plaintiff have an insurable interest in the Cadillac; (3) are the findings supported by the evidence.

Manifestly, the solution of the controversy presented to us must turn initially upon the meaning and effect of the above quoted language of the policy, unless there be error in the findings of fact which are challenged. We then turn first to a discussion of the terms of the policy.

Laying to one side, for the moment, the paragraph dealing with newly acquired automobiles, we find the policy declares that the automobiles listed and declared in the policy are insured by the insurer in favor of the named insured on the basis of the declarations of the insured that the insured *is the sole owner* of the automobiles listed except to the extent there may be bailment leases, mortgages, or other encumbrances against some one or more of them. As there is no issue with respect to encumbrances, we lay that to one side. We are therefore concerned only with that portion of the statement reading as follows: "the insured is the sole owner of the automobile," or automobiles, listed. With respect to any newly acquired automobiles, we observe again that such may be covered by the policy, (1) if *ownership* is acquired by the named insured (the plaintiff herein) and (2) if the named insured is the *owner* of the described automobile thus newly acquired and (3) if the named insured notifies the insurer within 30 days following delivery to the insured and (4) if either it replaces an automobile described in the policy or (5) if the insurer alone was the insurer of all automobiles *owned* by the insured at such delivery date.

It will thus be seen that the named insured was, by the terms of the policy, automatically covered by the policy as to the Cadillac from the date of its delivery, *if* it was delivered; *and if* at that time the named insured was the sole owner of the Cadillac; *and if*, within 30 days, the insured had so notified the insurer. What then is meant by the phrase "sole owner?" The policy does not define the term.

[1] Under such circumstances the standard used in construing a contract of insurance is the understanding of an ordinary person. Arenson v. Nat. Automobile & Cas. Ins. Co., 45 Cal.2d 81, 83, 286 P.2d 816. As it has otherwise been stated, the understanding of an ordinary person and the approved usage of words must be the guides in construing a contract of insurance. In the recent case of Oil Base, Inc. v. Transport Indem. Co., 143 Cal.App.2d 453, 463, 299 P.2d 952, 959 (petition for hearing denied), the court said: "The word *owner* as applied to motor vehicles is commonly understood to designate the person in whom title is vested either as a legal owner or as a registered owner. That it was so understood by the parties here is evident from the fact that no contention was made by counsel for any of the parties at the trial of this action that the word *owner* as used in the clause of the contract in question had any other meaning." (Court's emphasis.)

[2–4] Upon the facts as narrated it is indubitably clear that the appellant did not become an owner of the Cadillac within the purview of the terms of the policy. The continuing offer of the insurer to give coverage with respect to a newly acquired automobile attached certain conditions to be met by the insured. The burden was on the insured to comply therewith—and in the case before us to allege and prove compliance. This she has failed to do. Arnold v. American Insurance Co., 148 Cal. 660, 84 P. 182, 25 L.R.A.,N.S., 1192, 27 Cal. Jur.2d §§ 267 and 268.

[5] We come next to the question whether the appellant had an insurable in-

terest in the Golden Goddess Cadillac at any of the times herein narrated. That such an interest is requisite is well established in this state and seemingly in every other state. Our Insurance Code, section 280, provides: "If the insured has no insurable interest, the contract is void." And likewise in a comprehensive note in 9 A.L.R.2d 183 the editor says: "While there is little discussion now as to the necessity of the existence of an insurable interest in the insured, the question as to the nature and extent of the interest required in order to qualify as an insurable interest is still a matter of lively debate." Apropos of our discussion of insurable interest is the statement in 4 Appleman, Insurance Law and Practice, 17, where he says: "Since contracts of property insurance are essentially contracts of indemnity, if no loss is suffered, there can be no recovery. And, logically, if the insured has no interest in the property, he sustains no loss by its destruction.

"It is essential that the insured have an interest, therefore, for which the contract is to indemnify him. * * * The simple rule that one cannot insure for his own benefit the property of another in which he has no interest still governs.

"* * * No insurable interest existing, the contract is considered absolutely void. * * * As pointed out, the contract is, under circumstances showing no interest in the insured, purely a wager which will not be sanctioned by the courts."

[6] While it is true, as appellant contends, that she in good faith paid the price of the automobile to Leonard, the interest which she achieved thereby was such interest only as Leonard had, and he had none. Hence, she never had on the evidence adduced any interest in the car as such which was insurable. What the respondents are here contending is that Mrs. Roth had no title to the Cadillac, defective or otherwise, because (1) Leonard had no title to pass to her and (2) title was in a third party, to wit, Marsha Estates, Inc.

The cases cited by appellant need no discussion as they either are not in point or are distinguishable with one exception. In the case of Barnett v. London Assur. Corp., 138 Wash. 673, 245 P. 3, 46 A.L.R. 526, it was held that a person purchasing a stolen automobile in good faith may recover on a theft policy issued to him thereon. With respect to this case, in 4 Appleman, supra, under the topic "insurable interest" the following is stated: "One case even held that a person purchasing a stolen automobile in good faith may recover on a theft policy issued to him thereon." (P. 60.) In his footnote he said: "Many readers may raise the question, with justification, as to whether the court was not confused as to the true coverage of a theft policy." No general rule was laid down by Appleman as appellant would have us believe. We think the Washington court was confused and hence we cannot accept its doctrine.

Appellant's contention that the findings and conclusions are not sustained by the evidence is not well taken.

Judgment affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

PETERS, J., not participating.



169 Cal.App.2d 242

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

George Antonio MARTINEZ and Burton C. Challender, Defendants.

George Antonio Martinez, Defendant and Appellant.

Crim. 6342.

District Court of Appeal, Second District, Division 2, California.

March 30, 1959.

Rehearing Denied April 22, 1959.

The defendants were convicted of possession and sale of marijuana. From judgment and sentence of the Superior

Court of Los Angeles County, Thomas L. Ambrose, J., one of the defendants appealed. The District Court of Appeal, Herndon, J., held that the evidence was sufficient to support determination that officers had reasonable cause to believe that appellant was engaged in commission of felonious acts in apartment in which he was arrested and hence entry of apartment, arrest of appellant, and incidental search of appellant and apartment without a warrant were not illegal.

Judgment affirmed and purported appeal from sentence dismissed.

1. Poisons ⇐9

Evidence sustained conviction for possession and sale of marijuana.

2. Poisons ⇐9

In prosecution for possession and sale of marijuana, fact that marijuana was found in pocket of defendant's robe justified inference that defendant had knowledge of its presence despite his protestations of innocence.

3. Poisons ⇐9

In prosecution for possession and sale of marijuana, fact that, as officers approached him, defendant reached in pocket of robe in which package of marijuana was found was sufficient in itself to support inference that defendant had knowledge of presence of package and its illegal nature.

4. Poisons ⇐9

In prosecution for possession and sale of marijuana, testimony of one defendant tending to incriminate himself and exonerate codefendant and testimony of codefendant denying any dealings in marijuana and any knowledge of presence of marijuana found in his pocket merely raised a conflict in the evidence for trier of fact.

5. Arrest ⇐63(4)

In prosecution for possession and sale of marijuana, evidence was sufficient to support determination that officers had reasonable cause to believe that defendant was engaged in commission of felonious acts in apartment in which he was arrested.

6. Arrest ⇐63(4), 71

Where officers had reasonable cause to believe that occupant of apartment was engaged in commission of felonious acts in apartment in which he was arrested, entry of apartment, arrest of occupant, and search of occupant and apartment incident to arrest without a warrant were not illegal.

7. Criminal Law ⇐1036(1)

Where defendant made no contention in trial court that his arrest without a warrant, search incident thereto, or the seizure of evidence produced thereby was illegal and interposed no objection to incriminating evidence which search produced, such contention was unavailing when raised for the first time on appeal from conviction.

George Antonio Martinez, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

HERNDON, Justice.

[1] Convicted on two counts charging sale and possession of marijuana, appellant has presented to this court his contentions (1) that the evidence was insufficient to sustain the judgment on either count, and (2) that the arresting officers entered his apartment without a warrant and without reasonable cause, so that the ensuing search which resulted in the discovery of the contraband was illegal. We have reviewed the record and find that it contains abundant and convincing evidence of appellant's guilt. It also discloses the complete lack of merit in appellant's second contention.

On the evening of February 4, 1958, Inspector Conahan, who was in civilian attire and posing as an individual desiring to purchase marijuana, met appellant's co-defendant Challender, and the two drove in the officer's car to 537 S. Parkview in Los Angeles, the address of an apartment occupied by appellant. At the time of their

arrival, two other officers had the apartment under surveillance. The inspector had given Challender $12 with which to purchase a can of marijuana. Challender left the vehicle, walked across the street, and entered the premises at 537 via a driveway. About 15 minutes later he reappeared from the same driveway and upon re-entering the car placed on the seat a package wrapped in newspaper saying "The man gave you a good can". It was subsequently proved that the package contained marijuana.

After leaving appellant's address, the inspector told Challender that he had friends coming in from Las Vegas who would be interested in a "two pound deal". Two days later, on the evening of February 6, 1958, Inspector Conahan again met Challender and told him that his friends from Las Vegas "would not come up with enough 'bread' [money] for a two pound buy" without being assured that he could deliver the marijuana and without seeing its quality. He explained that his friends were about thirty minutes away, and that he wanted a can to deliver to them, and that he would then come back and arrange for the two pounds. The inspector and Challender again drove to appellant's Parkview address, parking across the street. The inspector gave Challender one five dollar bill and seven one dollar bills. The serial numbers of the bills had been recorded, and the currency had been processed with a fluorescent powder. Challender left the car and proceeded down the driveway. Another officer who had the premises under surveillance saw Challender enter appellant's apartment. A few minutes later Challender emerged from the apartment accompanied by appellant, who was wearing a "greyish" colored robe with a red stripe. At the entrance to the driveway Challender left appellant and re-entered the inspector's car. Challender told the inspector that the man had said to drive around for about ten minutes. At this point, another officer entered the car and Challender was placed under arrest. After driving to an adjacent street, the inspector asked Challender whether the two pounds were in the house. He answered that he didn't think so. The officers then inquired: "Is the money in the house? Did you give it to the connection George?" Challender replied, "Yes". They then asked "Why didn't you bring out the sample back?" and he replied, "Look, I don't want to testify against this fellow. I am not going to say anything. I would rather think it over. I am frightened." When the officers inquired "Does he have the can on hand?" Challender replied "I guess so. I don't know. I think he does."

While one of the officers remained with Challender, the other returned to the vicinity of appellant's apartment where he was joined by two other police officers. On approaching the entrance to appellant's apartment they found the door open but the screen door was closed. Observing appellant inside, one of the officers opened the screen door, announced that they were police officers and approached appellant who was wearing a robe. At that time appellant's left hand went into his robe pocket. The officer grabbed his left hand and said: "You are under arrest". The officer found in the left robe pocket a package wrapped in newspaper; the package contained a substance which proved to be marijuana. When appellant was asked: "Where did you get this" he replied "Oh, somebody left it here." When asked "Who else lives here" he answered "No one. Just myself."

Upon further search, the officers found currency lying on a dresser top. When asked whether this was his money, appellant answered in the affirmative. A comparison disclosed that the serial numbers on these bills corresponded with those on the bills which the officers had given to Challender. Appellant's hands were examined under a portable ultra-violet light and illuminations were observed on his hands. Appellant had not touched the processed currency while in the presence of the arresting officers.

Appellant, testifying in his own behalf, denied that he had ever dealt in marijuana and denied any knowledge of the presence of marijuana in the pocket of his bathrobe. Challender also testified in such a way as to exonerate appellant and incriminate himself. Among other things, he testified that he had placed the marijuana in the pocket of appellant's robe without appellant's knowledge, and that he had left the currency on the dresser.

[2–4] The foregoing abbreviated recital of the evidence is deemed sufficient to show that it afforded a more than adequate basis for all the essential inferences which the trial judge drew from it. People v. Richardson, 51 Cal.2d 445, 334 P.2d 573; People v. Winston, 46 Cal.2d 151, 161, 293 P.2d 40. The court could reasonably reject the patently questionable version of the transaction as testified to by appellant and Challender. The undisputed fact that the narcotics were found in the pocket of appellant's robe justified the inference that appellant had knowledge of their presence despite his protestations of innocence. People v. Douglas, 141 Cal.App.2d 33, 36, 296 P.2d 1; People v. Physioc, 86 Cal.App.2d 650, 652, 195 P.2d 23. Moreover, appellant's act in reaching for the pocket of the robe as the officers approached him in itself would support an inference that he had knowledge of the presence of the package and its illegal nature. Cf. People v. Walker, 121 Cal.App.2d 173, 175, 262 P.2d 640. The testimony of appellant and Challender merely raised a conflict in the evidence, and the conflict was resolved adversely to appellant by the trier of fact. People v. Rumley, 100 Cal.App.2d 6, 8–9, 222 P.2d 913; cf. People v. Gory, 28 Cal.2d 450, 457, 170 P.2d 433. The inferences reasonably to be drawn from the circumstances also support the judgment convicting appellant of offering to sell marijuana on February 6th. At a time when it is obvious that Challender, an admitted peddler, was unaware that he was dealing with police officers, he entered appellant's apartment and left there the marked money which the officers had given him. When arrested, appellant had possession of this marked money. In response to questioning by the officers, he made false statements as to its source and whether he had touched it. This conduct tended to indicate a consciousness of guilt. Rejecting Challender's testimony as an attempt to exonerate appellant, his conduct is explainable only on the basis of appellant's participation in a transaction involving the sale of contraband which included appellant's acceptance of the purchase money.

[5, 6] There is no merit in appellant's contention with respect to the conduct of the officers in entering his apartment and in making the arrest and the incidental search. It is manifest that the arresting officers had knowledge of facts more than sufficient to justify their belief that appellant was engaged in the commission of felonious acts in the apartment in which he was arrested. The question is resolved by the trial court's supportable determination that the officers acted upon the basis of reasonable cause. People v. Winston, supra, 46 Cal.2d 151, 162–163, 293 P.2d 40.

[7] Furthermore, appellant made no contention in the trial court that either the arrest, the search or the seizure was illegal, and he interposed no objection to the incriminating evidence which the search produced. For this additional reason, appellant's second contention must be regarded as unavailing. People v. Richardson, supra, 51 Cal.2d 445, 334 P.2d 573; People v. Barnett, 159 Cal.App.2d 22, 30, 323 P.2d 96.

The judgment is affirmed and the purported appeal from the sentence is dismissed.

FOX, P. J., and ASHBURN, J., concur.

169 Cal.App.2d 72

Elayne H. MOXLEY, Plaintiff,

Earl H. Briggs by Woodrow W. Baird, Executor of the Estate of Earl H. Briggs, Deceased, Plaintiff and Appellant,

v.

William ROBERTSON, dba Seal Beach Post and Wave, Defendant and Respondent.

Civ. 5987.

District Court of Appeal, Fourth District, California.

March 24, 1959.
Hearing Denied May 20, 1959.

Claim and delivery action involving certain printing machinery. The Superior Court, Orange County, Ronald M. Crookshank, J., entered judgment in favor of defendant for damages and for return of the machines. After judgment was entered one of the plaintiffs died and his executor was substituted in his place and appealed. The District Court of Appeal, Stone, J. pro tem., held that evidence presented a question for the jury as to whether one of the plaintiffs sold her interest in the machines to defendant prior to selling them to co-plaintiff, or whether she merely allowed the machines to be moved to defendant's printing establishment under an oral agreement of merger.

Judgment affirmed.

1. Attorney and Client ⇐20

Where in a claim and delivery action both coplaintiff who sold certain printing machinery to plaintiff, and plaintiff were intent upon wresting possession of printing machinery which was the subject of the sale, from defendant, in order to complete their transaction, fact that plaintiff was ill advised and that it might have been better for him to have refused to join coplaintiff in the action to obtain possession of the machinery did not constitute a conflict of interest between plaintiff and coplaintiff, and therefore plaintiff was not entitled to a reversal of judgment for defendant on theory that plaintiff's interests were not protected due to the fact the same attorney represented both plaintiffs until after the trial terminated. West's Ann.Bus. & Prof. Code, § 6068; Rules of Professional Conduct, rule 1 et seq.; West's Ann.Bus. & Prof.Code following section 6076.

2. Replevin ⇐85

Where defendant in his answer to a claim and delivery action alleged ownership of the property and demanded its return or its value, and asked to recover cost of installing the machinery and for loss of use, even though defendant pleaded such allegations by way of affirmative defense, they constituted pleadings for affirmative relief, and rule governing an attempted dismissal before trial but after issues were joined, applied, and plaintiff was not entitled to a dismissal of his complaint after such pleading was filed either in the trial court, or on appeal, on theory that there was a misjoinder of parties plaintiff, or on theory that complaint did not state a cause of action. West's Ann. Code Civ.Proc. § 581.

3. Sales ⇐53(1)

In claim and delivery action involving certain printing machinery, evidence presented a question for the jury as to whether one of the plaintiffs sold her interest in the machines to defendant prior to selling them to coplaintiff, or whether she merely allowed the machines to be moved to defendant's printing establishment under an oral agreement of merger.

4. Appeal and Error ⇐1011(1)

The District Court of Appeal will not disturb findings of the trial court when there is substantial evidence to support them, even though there is strong conflicting evidence to the contrary.

5. Sales ⇐482

In claim and delivery proceeding involving certain printing machinery which conditional buyer sold to defendant, evidence that conditional seller had knowledge of the sale by the original buyer, a subsequent buyer, and impliedly gave its consent, was sufficient to present a question for the trial court as to whether title

to the machinery passed to subsequent buyer, and as to whether such title was valid as against any subsequent title emanating from original buyer.

C. Duane Mooney, Long Beach, for appellant.

Stratton, Taylor & Battin and David H. Battin, Long Beach, for respondent.

STONE, Justice pro tem.

Plaintiff Elayne H. Moxley purchased two Intertype machines and appurtenant equipment from the Intertype Corporation on a conditional sales contract. The terms of this conditional sales contract prohibited removal of the machines from their location in Long Beach and further prohibited assignment of the vendee's interest. On July 21, 1956, the machinery was moved from Long Beach to defendant Robertson's place of business in Seal Beach. It appears from the record that the conditional vendor knew of and consented to the removal of the machinery.

There is conflicting evidence about the circumstances which led to the removal of the machines to defendant's place of business. Moxley contended that the move was made with an oral agreement that the Moxley and Robertson printing establishments would merge. Robertson contended that Moxley sold her interest in the machines to him. This was the principal issue involved in the trial and it was resolved by the court in favor of defendant Robertson.

The action was tried by the court sitting without a jury and judgment was entered in favor of the defendant for damages in the sum of $5,200 and for the return of the machines. If delivery should be unenforceable, additional damages were fixed in the sum of $9,827.

After the judgment had been entered plaintiff Briggs died and Woodrow W. Baird was appointed executor of his estate. As such executor he was substituted in the place of the plaintiff, Earl H. Briggs, and has perfected this appeal.

Shortly before filing this action Moxley agreed to sell her interest in the machines to Earl H. Briggs. Briggs paid $500 to Moxley's attorney on the purchase price and was to pay the balance of the purchase price after the machines were delivered to him. If the machines were not delivered to him, the $500 was to be returned to Briggs, the purchase of the machines being contingent upon possession being delivered to Briggs. The property was seized by the Sheriff, and after the seizure, the machines were delivered to Briggs. Briggs then paid the balance of the purchase price to Moxley. The Intertype Corporation subsequently made a new conditional sales contract for the machinery with Briggs. Briggs retained possession of the machines until the sheriff returned them to Robertson pursuant to a writ of execution issued upon the judgment in this action.

Appellant urges a reversal of the judgment upon the following grounds:

1. There was a conflict between the interests of appellant and his co-plaintiff and, as the same attorney represented both of them until after the trial had terminated, appellant's interests were not protected and he is entitled to a reversal.

2. Appellant urges that the action should be reversed and dismissed as to him because (a) There was a misjoinder of parties plaintiff; and (b) Appellant, as a plaintiff, failed to state a cause of action in his own complaint.

3. Insufficiency of the evidence to support the judgment.

[1] The first specification of error presents a serious charge against the attorney who represented appellant in all of the proceedings up to the motion for a new trial. He is alleged to have represented clients with conflicting interests, favoring the plaintiff Moxley, and preventing appellant from receiving a fair trial. This ground of appeal must be resolved by a determination of whether or not the interests of the two plaintiffs were conflict-

ing to the extent that an attorney could not conscientiously represent both of them.

The plaintiff Moxley agreed to sell her equity in the equipment to plaintiff Briggs, who made a down payment or a part payment on account. At that time defendant Robertson had possession of the equipment and unless Moxley could recover the property from the defendant, she could not complete the sale and transfer possession to appellant. Moxley elected to file a claim and delivery action for possession of the property in order to deliver it to appellant. Moxley, of course, was required to file a bond but she was unable to obtain one, apparently because of the condition of her financial affairs. Appellant Briggs agreed to join her as a plaintiff in the claim and delivery action. A bond was obtained and they filed a claim and delivery action as co-plaintiffs against the defendant. This maneuver was jointly planned and the sole purpose was to sell the equipment to plaintiff Briggs. Both plaintiffs were intent upon wresting possession from defendant in order to complete their transaction. They hired Moxley's attorney to execute the maneuver Because of their joint purpose, it does not appear that the interests of the two plaintiffs conflicted in the manner contemplated by the court in the case of Hammett v. McIntyre, 114 Cal.App.2d 148, 249 P.2d 885, which has been cited by appellant in support of his contention. In that case one firm of attorneys, at their own instance, suggested to joint defendants that the firm arrange to represent both defendants. The ultimate interests and objectives of the two defendants was in conflict and the attorneys should not have suggested that they represent both. In the case before us the two plaintiffs sought to accomplish a common end result and engaged the services of a single attorney to implement their joint plan. The grievous result is proof that the action was misconceived.

Appellant's argument in the final analysis is that he was ill advised and that he would have been wise to have refused to join his co-plaintiff in the action. The character and quality of the advice he received is not an issue before this court. That he would have been better off not to have entered into the transaction with his co-plaintiff does not in and of itself constitute a conflict of interest in the sense contemplated by Business and Professions Code, section 6068, or Rules of Professional Conduct, 33 Cal.2d 27–31.

Appellant's second contention consists of two assignments of error which are best considered together. They are (a) There has been a misjoinder of parties plaintiff; and (b) Appellant's complaint does not state a cause of action. Appellant contends he is entitled to raise both of these questions for the first time on appeal and that each ground warrants a reversal of the judgment and a dismissal of the action.

These alleged defects in the complaint were urged by the defendant-respondent by way of demurrer and the alleged failure to state a cause of action was raised a second time by defendant's motion for a nonsuit. Plaintiff-appellant successfully resisted these attacks against the sufficiency of these pleadings in the trial court. On this appeal the positions of the parties are reversed in that it is the plaintiff who now alleges that his own complaint is defective. He observes that no appellate court has decided whether a plaintiff can by appeal attack the sufficiency of his own complaint as to either a misjoinder of party plaintiffs or a failure to state a cause of action. We presume the observation to be correct in that no cases have been cited nor has the court by independent research been able to find any authority touching on these points. However, it seems clear that the questions must be answered in the same manner and for the same reasons as would be the case had the point been made in the trial court after the issues had been joined.

Section 581, subdivision 1, of the Code of Civil Procedure, insofar as is pertinent to this action, provides:

"*Dismissal.* An action may be dismissed in the following cases:

"1. *Plaintiff.* By plaintiff, by written request to the clerk, filed with the papers in the case, or by oral or written request to the judge where there is no clerk at any time before the actual commencement of trial, upon payment of the costs of the clerk or judge; provided, that a counter claim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant * * *."

Even a dismissal with prejudice may not be filed after the defendant has sought affirmative relief by his answer according to subdivision 5 of section 581, Code of Civil Procedure, which reads:

"* * * Provided, however, that no such dismissal with prejudice shall have the effect of dismissing a counterclaim or cross-complaint filed in said action or of depriving the defendant of affirmative relief sought by his answer therein. * * *"

[2] Defendant in his answer affirmatively alleged his ownership of the property and demanded its return or its value. Defendant also asked to recover the cost of installing the machinery in his premises and for loss of use covering the period plaintiffs withheld possession. Each of these affirmative allegations was directed to each plaintiff so that defendant did seek affirmative relief by his answer from this appellant. Although defendant pleaded these allegations by way of affirmative *defense*, they constitute pleadings for affirmative relief under the decisions in this state. In a similar pleading situation it was held in Re Guardianship of Lyle, 77 Cal.App.2d 153, 155, 174 P.2d 906, 908:

"Most of the California cases assume that a pleading seeking affirmative relief is in the form of a cross-complaint, but it is not the generally designated name of the pleading which controls—the controlling factor is whether affirmative relief is requested. In Rodgers v. Parker, 136 Cal. 313, 68 P. 975, an answer to a cross-complaint prayed for affirmative relief; it was held that the cross-complaint could not be dismissed without the consent of the parties who had prayed for affirmative relief in the answer. Similarly, in Aten v. Aten, 69 Cal. App.2d 589, 159 P.2d 672, an action to cancel a property settlement agreement for declaratory relief, an answer, praying that plaintiff take nothing and averring that plaintiff had no title or interest in the property other than as provided in a certain contract was a sufficient request for affirmative relief to preclude plaintiff from dismissing the action as a matter of right. * *"

The rule enunciated by section 581 of the Code of Civil Procedure, and cases cited, which govern an attempted dismissal before trial but after the issues are joined, applies when the case is in the appeal stage, for the same reasons and with more compelling force. The reasons are more compelling because the issues have been joined, litigated and, in this case, the affirmative relief prayed for has been granted. It would be a most unusual departure from settled principles of judicial procedure to permit an appellant to evade a judgment against him by a dismissal in the manner sought by appellant in this case.

[3] Appellant's final contention is that the judgment is not sustained by the evidence. In this connection he first asserts that respondent's testimony that he bought Mrs. Moxley's interest in the equipment, valued at many thousands of dollars, for the sum of $1 and the promise to assume the obligations of the conditional sales contract are so incredible that it can be said there is no substantial evidence to support the trial court's finding that Mrs. Moxley had sold her interest to him. However, there was testimony that the sale or assignment of the contract was part of a larger transaction, including other personal property. The court could have well believed the testimony of the defend-

ant regarding the sale of the items of equipment involved in this case. Certainly, there was conflicting evidence concerning the sale and as to what items of tangible or intangible personal property were sold in the course of the transaction. Then too, the defendant's testimony was corroborated by a woman who had been his secretary at the time the events occurred. She testified that she heard much of the conversation concerning the sale; that she typed up documents of transfer; and that she personally paid the $1 consideration to Mrs. Moxley.

[4] This court will not disturb the findings of the trial court when there is substantial evidence to support them, even though there is strong conflicting evidence to the contrary. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; In re Estate of Bristol, 23 Cal. 2d 221, 223, 143 P.2d 689.

[5] Appellant makes one other argument regarding the alleged insufficiency of the evidence which is based upon a point of law. The conditional sales contract by which Mrs. Moxley bought the machinery prohibits a sale or transfer by the conditional vendee without the consent of the conditional vendor. It is argued that the evidence does not disclose a consent by the conditional vendor of the Moxley sale to defendant. In support thereof appellant cites the fact that after he took possession of the property pursuant to the claim and delivery action, the conditional vendor did consent in writing to Moxley's sale to him. Thus appellant contends the evidence does not sustain the finding that title rested in the defendant. However, the evidence does disclose that the conditional vendor had knowledge of the sale by Moxley to defendant and impliedly gave its consent. Upon this evidence the trial court found that title did pass to defendant and such title was valid as against any subsequent title emanating from Moxley. Transactions between appellant and the conditional vendor occurring after seizure of the property through the claim and delivery action have no bearing on the issue of title at the time of the original taking.

The judgment is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.



169 Cal.App.2d 97

James HIMMEL, as Trustee of an Express Trust, and Burlingame Civic Improvement Club, Incorporated, a Corporation, Beneficiary of said Express Trust, Plaintiffs and Appellants,

v.

CITY COUNCIL OF The City of BURLINGAME, Lester B. Morgan, Andrew C. Byrd, Charles W. Rooth, Charlotte Johnson and Josephine Thayer, Members of said City Council, George J. Marr, City Engineer of the City of Burlingame, Burress Karmel, City Attorney of the City of Burlingame, Defendants and Respondents.

No. 17691.

District Court of Appeal, First District, Division 1, California.

March 26, 1959.

Hearing Denied May 20, 1959.

Action for injunctive and other relief. The Superior Court, San Mateo County, Louis B. DeMatteis, J., made determinations adverse to plaintiffs, and they appealed. The District Court of Appeal, Bray, J., held that a corporation may not sue in propria persona.

Affirmed.

1. Appeal and Error ⇐78(3)

Order striking complaint is an appealable final judgment if it operates to remove cause of action alleged and leaves no issues to be determined between plaintiffs and defendants. West's Ann.Code Civ.Proc. § 963.

2. Appeal and Error ⇐113(3)

Orders setting aside defaults and default judgments are appealable as orders made after judgment. West's Ann.Code Civ. Proc. § 963.

3. Corporations ⇐506

A corporation may not sue in propria persona.

4. Parties ⇐53, 61

Trustee of express trust for corporation was distinct from that corporation, and permission of court was required to amend complaint to add trustee either as an additional plaintiff or as a substitute for corporate plaintiff. West's Ann.Code Civ.Proc. § 473.

James Himmel, Burlingame, appellant, in pro. per.

Burress Karmel, City Atty., Burlingame, for respondents.

BRAY, Justice.

[1, 2] The notice of appeal states: "Plaintiffs are appealing all rulings, orders, and judgments, interlocutory or final, which in any way, or to any degree are adverse to the interests of the plaintiffs in the above-entitled action. Particular reference is made to proceedings in the above-entitled case of May 18, 1956 and March 16, 1956." *

Questions Presented.

1. May a corporation sue in propria persona?

2. After motion to strike complaint granted, may complaint be amended without leave of court?

Record.

May 16, 1955, complaint for injunction and petition for alternative writ of mandate and/or writ of review and/or writ of prohibition was filed entitled "Burlingame Civic Improvement Club, Incorporated, a Corporation and City of Burlingame, plaintiffs, vs. City Council of the City of Burlingame, defendants" (this complaint will be referred to as complaint No. 1), signed "Howard Watkinson, President, Burlingame Civic Improvement Club, James Himmel, First Vice-President, Burlingame Civic Improvement Club, Hugh Rosaaen, Jr., Secretary, Burlingame Civic Improvement Club," verified by Hugh Rosaaen, Jr. and Joy Ahren Rosaaen, designated as "interested parties to the above-entitled action as are other taxpayers, qualified electors and property owners in the City of Burlingame, who are similarly aggrieved * * *" No name of attorney nor designation of any person in propria persona appears.

The same day an application was made for a temporary restraining order and order to show cause. The proposed order, in the space ordinarily used for the name of the counsel for plaintiff, stated the name of the club, its president, first vice president and treasurer, and secretary, "Office of Secretary," address and telephone number "For the Plaintiff." June 6, amended complaint filed (herein designated complaint No. 2.) It is similar to the first complaint except that City of Burlingame is eliminated as a plaintiff and included as a defendant. Also designated members of the city council, the city attorney and city engineer are also the defendants. It is signed "James Himmel" and verified by him as "Founder, First Vice-President, and Treasurer" of the club. No attorney or person in propria persona appears. During the period June 6, 1955, to February 14, 1956, plaintiffs filed three amended complaints

* The only orders directly appealable among the above broad designation are those granting defendants' motions to strike the original and amended complaints and orders setting aside defaults and default judgments. While the order striking complaints are not any of those mentioned in section 963, Code of Civil Procedure, such an order has been held appealable under that section as a "final judgment" if the order granting the motion to strike operated to remove the cause of action alleged and to leave no issues to be determined between the plaintiff and the defendants. See Wilson v. Sharp, 1954, 42 Cal.2d 675, 268 P.2d 1062, and cases there cited. The orders setting aside defaults and default judgments are appealable under the section as they are orders made after judgment.

(herein designated as complaints number 3, 4 and 5), and innumerable notices of motion. All of these plaintiffs requested leave to withdraw and on February 14 were granted permission to withdraw. It might be added that a considerable part of the complexities and confusions of the record in this matter could have been avoided had the Burlingame Civic Improvement Club employed an attorney to handle its court proceedings instead of leaving them to a layman.

In complaint No. 3 the plaintiff was designated as "James Himmel, as Trustee of an Express Trust, Director and Founder of Burlingame Civic Improvement Club, Incorporated, a Corporation, Beneficiary of said Express Trust." In complaints No. 4 and No. 5 so withdrawn plaintiffs in each were "James Himmel, as Trustee of an Express Trust, and Burlingame Civic Improvement Club, Incorporated, a Corporation, Beneficiary of said Express Trust."

Finally, February 14, 1956, "First Amended Complaint for Injunction, Writ of Mandate and General Relief, Incorporating Modifications to all Prior Pleadings in Order to Correct Formal and Technical Defects" was filed (herein referred to as complaint No. 6). Here the plaintiffs are "James Himmel, as Trustee of an Express Trust, and Burlingame Civic Improvement Club, Incorporated, a Corporation, Beneficiary of said Express Trust." It is signed and verified, "James Himmel, in Propria Persona, Plaintiff as Trustee of an Express Trust for Burlingame Civic Improvement Club, Incorporated, a Corporation, Beneficiary of said Express Trust." Defendants failed to appear to complaints No. 2 and No. 6. Their defaults were taken and judgments entered against them. Later the defaults and judgments were set aside. Plaintiffs made several motions, other than those they withdrew, among others, motions to set aside the orders relieving defendants from default, which were denied. In view of our rulings on the major questions presented we deem it unnecessary to consider the actions of the court thereon.

The record is highly confused and in many instances it is difficult to determine just what the court's order was. Thus on June 24, 1955, a minute order entry appears, "It is ordered that the motion to strike be granted." At that time there were before the court a motion to strike the original complaint (complaint No. 1) and the amended complaint (complaint No. 2). Plaintiffs contend that the order referred to complaint No. 1, defendants that it referred to complaint No. 2. As nearly as we can figure out from the record, it was complaint No. 1 that was stricken. At the time of the hearing of the motion, complaint No. 1 had been superseded by complaint No. 2 filed on June 6. (See 2 Witkin, California Procedure, p. 1603, § 592, to the effect that an amended complaint supersedes the original one.) Plaintiffs had the right to amend their complaint once, of course, before answer or demurrer filed. Code Civ. Proc. § 472. Therefore, the striking of complaint No. 1 was an idle act, and of no importance. Later, the court ordered complaints No. 2 and No. 6 stricken from the record. This brings us to the question, was the court's action proper in striking complaint No. 2 and if so, were plaintiffs entitled to file their amended complaint (complaint No. 6) without leave of court?

1. Corporation In Propria Persona.

[3] Primarily the propriety of the court's order striking complaint No. 2 depends upon whether in California a corporation may sue in propria persona. That it may not has been flatly determined in this state. Paradise v. Nowlin, 1948, 86 Cal.App.2d 897, at page 898, 195 P.2d 867, at page 867, so holds: "A natural person may represent himself and present his own case to the court although he is not a licensed attorney. A corporation is not a natural person. It is an artificial entity created by law and as such it can neither practice law nor appear or act in person. Out of court it must act in its affairs through its agents and representatives and in matters in court it can act only through licensed attorneys. A corporation cannot appear in court by an

officer who is not an attorney and it cannot appear in propria persona. [Citations.]" Plaintiffs rely upon A. Victor & Co. v. Sleininger, 255 App.Div. 673, 9 N.Y.S.2d 323, holding that a corporation could be represented by a director who was not an attorney. The Paradise case expressly refused to follow that case, pointing out that "The later New York cases have negated this concept." 86 Cal.App.2d at page 899, 195 P.2d at page 868. The Paradise case distinguished Prudential Insurance Co. of America v. Small Claims Court, 76 Cal.App. 2d 379, 173 P.2d 38, 167 A.L.R. 820, which held that a corporation could appear in propria persona in the small claims court by pointing out that as attorneys are prohibited by law from appearing in that court, a corporation could not defend itself there unless it could appear in propria persona, but no such situation exists as to other trial courts. Therefore complaint No. 2 was properly stricken.

2. Right To Amend.

[4] Complaint No. 6 was filed without leave of court. In it the plaintiffs are James Himmel as Trustee of an Express Trust *and* the Burlingame Civic Improvement Club. Himmel purports to act in propria persona for himself as trustee. No one appears for the club. The club is again attempting to represent itself in propria persona, and the order of the court in striking the complaint as to the club was proper as a corporation may not appear in propria persona. Himmel as trustee is a new party plaintiff who did not appear in either complaints No. 1 or No. 2. Section 473, Code of Civil Procedure, states: "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding *by adding* or striking out *the name of any* party * * *" (Emphasis added.) The only allegation in the complaint dealing with the trust is the following: "That plaintiff, James Himmel, is appearing in this action as Trustee of an Express Trust for Burlingame Civic Improvement Club, Incorporated, a corporation, Beneficiary of said Express Trust, and is assessed for, liable to pay and has paid property taxes to the City of Burlingame, in his name, on behalf of said corporation." Just what the "express trust" is does not appear. Whatever it is, a trustee of an express trust for a corporation is distinct from that corporation and hence amending the complaint to add such trustee either as an additional plaintiff or as a substitution for the corporation plaintiff is the type of amendment which requires permission of the court under section 473. That plaintiffs consider that the trustee and the corporation are separate persons is shown by the fact that they are joined as plaintiffs in the 6th complaint. Schaefer v. Berinstein, 140 Cal. App.2d 278, 299, 295 P.2d 113, and the cases there cited, hold that a motion to strike will be granted where new parties are added to a pleading without permission of court.

Plaintiffs contend that on June 24, 1955, the court granted them leave to amend. Defendants deny that any such leave was granted. We have diligently searched the record and find no evidence of such grant. The minutes of that date do not show it, nor is there any reference to it in the narrative account of the proceedings on that day. We, of course, are bound by the record.

Plaintiffs contend that the striking of a complaint is equivalent to the sustaining of a special demurrer to a complaint, in which event, they contend, an amended complaint may be filed as a matter of course. There is, however, a great difference between striking a complaint under the circumstances of this case and the sustaining of a special demurrer. As we have heretofore shown, the order striking the complaint constitutes a judgment and is appealable, while the sustaining of a demurrer is not a judgment and in order to be appealable must be followed by a judgment.

Defendants heretofore moved to dismiss the appeal upon the ground that the issues are moot inasmuch as the proceedings sought to be enjoined are completed. That motion heretofore was denied by this court without prejudice to its being renewed. It

has been renewed. Plaintiffs concede that insofar as the complaints pray for an injunction or writ of mandate the action has become moot because the proceedings sought to be stopped have been completed. However, they contend that in the 6th complaint a money judgment is sought by plaintiffs for the city for moneys allegedly illegally expended. As we have determined that the complaints were properly stricken it becomes unnecessary to determine this question.

The orders are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; PETERS, J., not participating.



PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank J. MATULA, Jr., Defendant and Appellant.*

Cr. 6135.

District Court of Appeal, Second District, Division 1, California.

March 19, 1959.

Rehearing Denied April 9, 1959.

Hearing Granted May 13, 1959.

Defendant was convicted of perjury for giving false testimony before an Assembly Interim Committee making investigation in regard to rubbish collection and disposal service in Los Angeles area, and from the judgment of the Superior Court, Los Angeles County, H. Burton Noble, J., and from an order denying his motion for new trial, the defendant appealed. The District Court of Appeal, Lillie, J., held, inter alia, that where apart from chairman's "opening statement" declaring the purpose of the hearing, and testimony of defendant before Committee there was no evidence of any proceedings had before Committee or any testimony taken by it, such lack of evidence on issue of materiality was fatal to defendant's conviction since it deprived him of his right to have facts relative to an essential element of the crime submitted to jury, and denied him the right to be apprised of evidence used against him and the opportunity to meet it.

Judgment and order reversed and cause remanded for new trial.

* Opinion vacated 342 P.2d 252.

1. Criminal Law ⇐300

As in any criminal case, a plea of not guilty interposed to perjury charge traverses every material allegation of accusatory pleading, placing the burden of proving the same, to establish the guilt of defendant, upon the prosecution. West's Ann.Pen.Code, §§ 118, 1019.

2. Perjury ⇐11(1), 33(6)

Materiality of false testimony to some issue before tribunal in which it was given is an essential element of crime of perjury, which must be proved by competent evidence and beyond a reasonable doubt. West's Ann.Pen.Code, § 118.

3. Judgment ⇐648

Prior decision of District Court of Appeal denying petition for writ of prohibition to restrain Superior Court from taking further proceedings in regard to petitioner under indictment for perjury did not constitute law of the case as regards materiality of testimony given by petitioner before an Assembly Interim Committee so as to establish materiality of such testimony in perjury trial, in view of lack of identity of legal issues and absence of substantially identical facts appearing under same circumstances in the two cases. West's Ann. Pen.Code, § 118.

4. Judgment ⇐648

A prior decision of District Court of Appeal denying petition for writ of prohibition to restrain Superior Court from taking further proceedings in regard to petitioner under indictment for perjury in

testifying before Assembly Interim Committee did not constitute an adjudication on issue of materiality of such testimony so as to establish such materiality as a matter of law in subsequent perjury prosecution under doctrine of law of the case, where issue of materiality was in no way involved in prohibition proceeding, and any passing reference to materiality in opinion did not substantiate claim that it was intended to create or decide any "issue" thereon or that it constituted part of the law of the case. West's Ann.Pen.Code, § 118.

5. Judgment ⇐648

For a factual similarity between decision on petition for writ of prohibition and subsequent perjury prosecution sufficient to allow application of doctrine of law of the case, record must show that same facts upon which adjudication in prohibition proceeding was based were proved in trial of the perjury charge. West's Ann.Pen.Code, § 118.

6. Perjury ⇐29(2)

The allegations of materiality in indictment charging perjury for giving false testimony before an Assembly Interim Committee required proof on such factual matters. West's Ann.Pen.Code, § 118.

7. Perjury ⇐36

In prosecution for perjury for swearing falsely on a material matter in course of testimony before an Assembly Interim Committee, allegations of materiality of such testimony constituted questions of fact which should have been submitted to jury. West's Ann.Pen.Code, § 118.

8. Indictment and Information ⇐166

The prosecution was bound by specific allegations in indictment.

9. Perjury ⇐25(1)

False testimony as basis of perjury may be either directly or circumstantially material, and materiality may be pleaded either by setting out facts from which materiality appears as matter of law, or by direct averment, without setting forth the probative or circumstantial facts. West's Ann.Pen.Code, § 118.

10. Perjury ⇐29(2)

In prosecution against secretary-treasurer of union for perjury in giving false testimony before an Assembly Interim Committee conducting investigation in regard to garbage and rubbish collection and disposal service in Los Angeles area, the prosecution was not relieved of duty of making factual showing of materiality of testimony on ground that on face of indictment it was apparent that defendant's false testimony related directly to matter under investigation, where indictment was specific in pointing out those factual elements which, as matter of law, constituted defendant's testimony material to issues pending before Committee, spelling out in detail the circumstantial and probative facts upon which materiality depended, and indictment contained no general direct allegation of materiality, and determination of issue of materiality depended upon effect of testimony of other witnesses appearing before the Committee. West's Ann.Pen. Code, § 118.

11. Perjury ⇐33(6)

In prosecution for perjury for giving false testimony before an Assembly Interim Committee making investigation in regard to rubbish collection and disposal service in Los Angeles area, wherein apart from chairman's "opening statement" declaring the purpose of the hearing and testimony of defendant before Committee there was no evidence of any proceedings had before Committee or any testimony taken by it, such lack of evidence on issue of materiality was fatal to defendant's conviction, since it deprived him of his right to have facts relative to an essential element of the crime submitted to jury, and denied him the right to be apprised of evidence used against him and the opportunity to meet it. West's Ann.Pen.Code, § 118.

12. Perjury ⇐36

Even if materiality of false testimony forming basis for perjury charge is a question for court, trial judge, in making his determination thereof, is not at liberty to resort to something undisclosed outside of record or dispense with necessity for com-

petent evidence to support his finding, but he must submit to jury the facts upon which he predicates his finding. West's Ann.Pen.Code, § 118.

13. Perjury ⇐33(6)

In prosecution for perjury for swearing falsely on a material matter before an Assembly Interim Committee, the people having relied upon conflict between testimony of other witnesses before Committee and that of defendant to prove materiality, the trial court's conclusion of law that defendant's testimony was material must be based upon proof of existence, content and effect of testimony of other witnesses before the Committee. West's Ann.Pen. Code, § 118.

14. Criminal Law ⇐731

The duty of jury is to find the facts and to apply to them the law as expounded by the court.

15. Criminal Law ⇐763(1)

Where defendant was charged with perjury in testifying falsely before an Assembly Interim Committee, if in fact testimony of other witnesses was not given before Committee, as alleged, or, if it was, it was not as substantially pleaded in indictment, or did not establish a conflict with defendant's testimony relative to enforcement or attempted enforcement of rules of association involved in rubbish collection which was being investigated by Committee, then as matter of law defendant's testimony could not, under specific averments of indictment, have been material, and choice of finding existence of those facts belonged to jury, and defendant, by court's instruction that defendant's testimony was material as matter of law, was deprived of right to have jury reject, or accept as true, those facts upon which trial court's conclusion of law should have been predicated. West's Ann.Pen.Code, § 118.

16. Constitutional Law ⇐266
Criminal Law ⇐304(17)

In prosecution for perjury for testifying falsely before an Assembly Interim Committee, wherein without any reference to judicial notice trial judge charged jury that as matter of law defendant's testimony before Committee was material, and on motion for new trial prosecution submitted, for identification only, five volumes of reporter's transcript of Committee's proceedings, and in denying motion trial judge stated "the court is of the view that it has judicial notice of the proceedings" before the Committee and hence there was no error in instructing jury, the failure to introduce evidence by which legal conclusion of materiality could have been drawn was not remedied by judicial notice since the manner in which it was done deprived defendant of a fair and impartial trial, defeating his right to due process of law. West's Ann.Pen.Code, § 118; West's Ann. Code Civ.Proc. § 1875, subd. 3; West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

17. Perjury ⇐29(2)

In prosecution for perjury for testifying falsely before an Assembly Interim Committee making investigation in regard to garbage and rubbish collection and disposal service in the Los Angeles area, materiality of testimony being dependent, among other things, upon authority of Committee subject of inquiry, evidence offered before it, and tenor, nature and content of other testimony relied upon, it was incumbent on the people to prove a state of facts from which the conclusion of materiality could properly have been deduced. West's Ann.Pen.Code, § 118.

18. Constitutional Law ⇐268

A deprivation of a fair and impartial trial amounts to denial of due process of law. West's Ann.Const. art. 1, § 13; U.S. C.A.Const. Amend. 14, § 1.

19. Constitutional Law ⇐266

One of the fundamental requirements in conduct of a judicial proceeding is the right of a party to be informed of evidence against him that he may counter, question, explain, or be heard in opposition to it.

20. Constitutional Law ⇐266

Judicial notice, no matter how convenient or expedient in particular case, cannot

be exercised contrary to constitutional right to due process of law, nor can it eliminate necessity for evidence of a given fact or burden of proving it. West's Ann. Const. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

21. Constitutional Law ⇐266
Criminal Law ⇐304(1)

A statutory device for getting evidence of a fact expeditiously before the court, judicial notice is used to avoid delay and expense of conventional method of calling witnesses, and since it is a method of introducing a fact to court and is not a substitute for that fact, it can no more dispense with necessity of seasonably apprising the party against whom it is to be used of what fact is sought thereby to be proved, so he may meet it and be heard in opposition thereto, than can the formal method of calling witnesses to prove a fact, since such procedure is no better than secretly taking evidence outside presence of aggrieved party, or receiving evidence ex parte where party against whom it is used has no opportunity to know or challenge its effect, both of which practices violate due process. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

22. Criminal Law ⇐304(1)

Even if under statute a noticed fact, once it has been correctly ascertained, is indisputable, whether it has been correctly ascertained in first instance is open to question, and to properly ascertain a fact to be noticed, trial judge of necessity must, in most cases, resort to some source or authority, and party against whom fact is to be used, if he believes it to be disputable, is entitled to challenge the source, authority, or the fact in the form in which the judge believes it to exist, and to be heard on that matter. West's Ann.Code Civ.Proc. § 2102.

23. Criminal Law ⇐304(17)

In prosecution for perjury for testifying falsely before an Assembly Interim Committee, the failure to introduce evidence from which legal conclusion of materiality of testimony could have been drawn was not remedied on theory that since the trial court could take judicial notice of legislative hearings it "could base its findings of materiality upon an analysis of that testimony even though the transcript of such hearing had not been formally introduced at the trial", where there was nothing in record to support assumption that trial judge actually resorted to reporter's transcript or made an analysis of testimony, and if he used the reporter's transcript, defendant had right to challenge its accuracy, and record did not disclose what kind of analysis judge made, how it was made, or what it contained, and it was pure conjecture that trial court predicated its finding of materiality upon an analysis, or anything else. West's Ann.Code Civ.Proc. § 2102.

24. Constitutional Law ⇐271
Criminal Law ⇐1087(3)

In prosecution for perjury for testifying falsely before an Assembly Interim Committee, facts noticed by trial court could be of no probative value unless they supported ultimate conclusion of materiality of such testimony, and of importance was the defendant's right to argue before both the trial court and the appellate court their legal effect or sufficiency, which would require, especially in appellate court, that they be spread upon the record that appellate court might be advised in the premises, since as part of due process is the right to have in the record of court below the facts upon which a determination of law is based, so an appellate review may be properly and intelligently made. West's Ann. Code Civ.Proc. § 2102; West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

25. Criminal Law ⇐1134(3)

Materiality of false testimony, being a question of law in a perjury case, is subject to review on appeal. West's Ann.Pen. Code, § 118.

26. Criminal Law ⇐304(17)

On appeal from judgment of conviction of perjury in testifying falsely before an Assembly Interim Committee, appellate

court would not judicially notice the proceedings before Committee to remedy the failure to introduce any evidence from which legal conclusion of materiality of testimony could be drawn, where reporter's transcript of proceedings before Committee was never received in evidence, and was no part of record on appeal, and such notice ran counter to constitutional right of defendant to have the facts relating to essential element of crime passed on by a jury, to be apprised of those facts and to be heard thereon and his right to have trial court's conclusion reviewed on appeal. West's Ann. Pen.Code, § 118; West's Ann.Code Civ. Proc. § 1875, subd. 3.

27. Criminal Law ⇐1186(4)

The denial of a fair trial constitutes a miscarriage of justice within meaning of constitutional provision requiring reversals only for errors resulting in miscarriage of justice. West's Ann.Const. art. 6, § 4½.

28. Criminal Law ⇐1186(4)

The deprivation of constitutional right to a jury trial is in itself prejudicial. West's Ann.Const. art. 6, § 4½.

29. Criminal Law ⇐1186(4)

A failure to prove an essential element of an offense charged is a matter too serious to be cured by constitutional provision requiring reversals only for errors resulting in miscarriage of justice. West's Ann. Const. art. 6, § 4½.

30. Criminal Law ⇐1186(4)

In prosecution against secretary-treasurer of union for perjury in testifying falsely before an Assembly Interim Committee conducting an investigation in regard to garbage and rubbish collection and disposal service in Los Angeles area, wherein there was extensive testimony of numerous witnesses relating to defendant's activities in connection with rubbish collection business, although verdict of guilty might well have resulted even if erroneous procedure had not been indulged in during trial, such speculation could not justify overlooking any error which resulted in denial of defendant's right to a fair trial. West's Ann.Pen.Code, § 118; West's Ann. Const. art. 1, § 13, art. 6, § 4½; U.S.C.A. Const. Amend. 14, § 1.

31. Criminal Law ⇐1186(4)

While a departure from established recognized legal procedure may appear in an individual case to adequately serve the ends of justice, judicial approval of such a practice could only constitute a dangerous inroad into an orderly system of justice which protects the constitutional rights of every accused. West's Ann.Const. art. 1, § 13, art. 6, § 4½; U.S.C.A.Const. Amend. 14, § 1.

Cooper & Nelsen, Grant B. Cooper, Phyllis N. Cooper, Herman F. Selvin, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Fred Henderson, William E. McGinley, Deputy Dist. Attys., Los Angeles, for respondent.

LILLIE, Justice.

Defendant was charged by way of indictment with perjury in violation of Section 118, Penal Code, in that he swore falsely on a material matter in the course of his testimony as a witness before an Assembly Interim Committee. Upon his plea of not guilty, he unsuccessfully sought a writ of prohibition from this court (Matula v. Superior Court, 146 Cal.App.2d 93, 303 P.2d 871). After a somewhat lengthy trial, he was convicted by a jury and appeals from the judgment of conviction and order denying his motion for a new trial.

From the testimony of the prosecution witnesses, we briefly summarize Union and association activities in the rubbish collection business pertinent to the cause before us: Defendant was secretary-treasurer of Local 396, Teamster's Union, which includes drivers and swampers on trucks owned and operated by rubbish collectors, whose business consists of a regular pickup and disposal service for customers. Although

many are Union men, collectors are members of various associations, separate and distinct from the Union, rules and by-laws of which regulate business activities and provide for a method of adjusting differences arising out of taking customers away from each other, which include assessment of special fines. Local 396 has contracts with the associations for wages, hours, and conditions of work of drivers and swampers; and agreements with various dump operators whereby only Union members in good standing are permitted to dump at Union dumps. On occasion, the associations complained to defendant and the Union that various Union collectors were employing non-union labor, undercutting association service fees and taking customers away from unionized association collectors; and furnished to the Union lists of members who had lost customers to non-union collectors. The Union stopped, or attempted to stop, collectors who had taken customers from Union association members from dumping at Union dumps; and enforced, or attempted to enforce, the association by-laws and rules.

The indictment, an extensive document, charged in substance:

That on October 3, 1955, an Assembly Standing Committee, authorized to study state, county and city government relative to efficiency and reduction of costs, conducted hearings to recommend legislation governing the collection and disposal of rubbish;

That defendant, duly sworn, testified falsely before the Committee to certain matters (set out in detail in question and answer form) briefly summarized as follows: that he had no interest in, and took no action concerning, a situation in which a non-union collector took a customer away from a Union man, his only interest being to try to "put" the former in the Union, and neither he nor the Union took any "economic measures" against him; that if both parties were Union, neither he nor the Union was interested in any such dispute as long as Union wages were paid, the number of persons involved being so great they "couldn't even attempt to interfere"; that the Union contracts with the associations are strictly for wages, hours and conditions of employment, and the Union does not police, or attempt to police, association business, is not interested in association rules or problems, and has not attempted to enforce association rules or by-laws; and that he did not try to force Crowder, an association member, to "give back certain accounts" by stopping him from dumping, or interfere in a dispute between Agajanian and Pick, both association members, wherein one of the parties was fined for taking a customer away from the other;

That defendant's false testimony was material to the issues pending before the Committee in the following particulars: that the Committee heard testimony to the effect (the testimony of other witnesses before the Committee was pleaded in detail but for convenience is here briefly summarized) that many rubbish truck drivers and checkers at rubbish dumps in Los Angeles county are members of Local 396, of which defendant was secretary-treasurer; that many rubbish collectors in Los Angeles county are members of rubbish collectors' associations, with rules, regulations, by-laws and customs which, among other things, set out the manner of dealing with a situation in which one collector takes a customer away from another, and provide under certain circumstances not only for a return of the customer but require him to give one or more of his own customers to the aggrieved member for the one originally taken, and payment of a certain sum as compensation; that defendant enforced, and attempted to enforce, the association rules, regulations and by-laws by telling and threatening a collector, who had taken a customer, that if he did not comply with them he would be run out of business, not be permitted to join the Union or use the dumps, and his customer's place of business would be picketed; and that defendant enforced and attempted to enforce the association rules by driving collectors, who

had taken customers from others, out of business by preventing them from joining the Union and using the dumps, and picketing customers taken;

That the false testimony of defendant was material to the issues pending before the Committee in that it tended to show that he had not enforced and attempted to enforce the rules, regulations and by-laws of rubbish collectors' associations.

At the trial, the following pertinent evidence was received: 1—House resolution No. 177, constituting the Committee and authorizing it to conduct the hearing; 2—the "opening statement" of the Committee Chairman declaring the purpose of the hearing—to determine if in the public interest there existed a situation in the collection of rubbish requiring legislation; 3—defendant's alleged false testimony before the Committee, read into the record in question and answer form by the prosecutor from the reporter's transcript of the Committee proceedings, marked for identification but never received in evidence; and 4—the testimony of numerous prosecution witnesses on the issue of falsity, which constitutes the great bulk of the lengthy record before us.

With the exception of the Chairman's "opening statement" and the defendant's testimony before the Committee, there is before this court no evidence of any proceeding had before the Committee—the testimony of no other witness appearing before it having been read into the record, offered, or received in evidence; no request having been made at the trial that judicial notice be taken of the Committee proceedings; and no declaration of judicial notice having been made by the court below to the jury (Section 2102, Code of Civil Procedure) or to anyone else. The trial judge simply notified the parties he intended to instruct the jury as a matter of law that defendant's testimony was material to the issues pending before the Committee; and did so, over objection of defendant.

On the motion for a new trial, after defendant urged that there was no evidence of the testimony of other witnesses before the Committee, the prosecutor produced for identification the reporter's transcript of the Committee proceedings, whereupon the trial judge denied the motion on the ground he "has" judicial notice of the proceedings before the Committee.

The element of falsity not here in issue, since "it may be assumed" there is sufficient evidence to support a finding that some part of defendant's testimony before the Committee was false (App.O.B., page 6), it serves no purpose to recount the extensive testimony given by the numerous prosecution witnesses; nor are we concerned with certain limited portions of the testimony of the prosecution's witnesses before the Committee used by defendant at the trial for the sole purpose of impeachment, since respondent does not rely upon them to constitute any evidence on the issue of materiality (Resp.B., page 72).

Appellant's sole contention is that there was no evidence received in the court below establishing the materiality of his false testimony to any issue pending before the Committee; and in the absence thereof, the trial judge committed prejudicial error in his instruction to the jury that defendant's testimony "was material."

[1, 2] As in any criminal case, a plea of not guilty interposed to a perjury charge traverses every material allegation of the accusatory pleading (Section 1019, Penal Code; People v. Wong Sang Lung, 3 Cal. App. 221, 84 P. 843; People v. Williams, 27 Cal.2d 220, 163 P.2d 692; Luse v. United States, 9 Cir. 49 F.2d 241), placing the burden of proving the same, to establish the guilt of the defendant, upon the prosecution. People v. Ah Sing, 95 Cal. 657, 659, 30 P. 797; People v. Bradbury, 155 Cal. 808, 814, 103 P. 215; In re Blache, 40 Cal.App.2d 687, 693, 105 P.2d 635. Materiality of false testimony to some issue before the tribunal in which it was given is an essential element of the crime of perjury (Section 118, Penal Code; People v. Bradbury, 155 Cal. 808, 103 P. 215; People v. Jones, 123 Cal. 299, 55 P. 992), which

must be proved by competent evidence and beyond a reasonable doubt.

[3] Respondent contends that since materiality of false testimony is purely a question of law, and this court's opinion in Matula v. Superior Court, 146 Cal.App.2d 93, 303 P.2d 871, established as a matter of law that defendant's testimony before the Committee was material to the issues pending before it, constituting an adjudication binding on the court below, it was unnecessary to offer evidence of materiality. That Matula v. Superior Court, 146 Cal. App.2d 93, 303 P.2d 871 (hereinafter referred to as the writ proceeding) does not constitute the law of the case is obvious from the lack of identity of legal issues and the absence of substantially identical facts appearing under the same circumstances, in this and the instant case (People v. Harvey, 156 Cal.App.2d 516, 319 P.2d 689; Rutledge v. Rutledge, 134 Cal.App.2d 689, 286 P.2d 429).

[4, 5] The issue of materiality was in no way involved in the writ proceeding, not having been raised by the parties or dealt with by the court in deciding the cause. Any passing reference to materiality in the opinion lends no support to the claim that it was intended to create or decide any "issue" thereon, or that it constituted part of the law of the case. Stockton Theatres, Inc. v. Palermo, 47 Cal.2d 469, 304 P.2d 7; Tomaier v. Tomaier, 23 Cal.2d 754, 146 P. 2d 905; De Mirjian v. Ideal Heating Corp., 129 Cal.App.2d 758, 278 P.2d 114. The only issue was whether the legislative committee conducted a valid investigation in a matter over which it had jurisdiction. It was on this sole question the entire opinion and holding of this court was predicated. The state of facts existing in the writ proceeding clearly bears this out—defendant at the outset, and for the purpose of submitting the issue of jurisdiction, having conceded his testimony to be pertinent to issues raised by the Committee (146 Cal.App.2d 97, 303 P.2d 873); and this court, as it had a right to do, having assumed all allegations in the indictment to be true, including those relating to materiality and the testimony of other witnesses before the Committee. However, in the instant case, an entirely different situation exists. For a factual similarity sufficient to here allow the application of the doctrine of the law of the case, the record must show that the same facts upon which the adjudication in Matula v. Superior Court, 146 Cal.App.2d 93, 303 P.2d 871, was based, were proved in the trial below (Archer v. City of Los Angeles, 19 Cal.2d 19, 29, 119 P.2d 1; Allen v. California Mutual Bldg. & Loan Ass'n, 22 Cal.2d 474, 482, 139 P.2d 321). The allegations of the indictment which established the validity of the investigation in the writ proceeding do not have their counterpart in the present record by way of evidence.

[6, 7] Having concluded that Matula v. Superior Court, 146 Cal.App.2d 93, 303 P. 2d 871, does not constitute an adjudication on the issue of materiality, we find in the record before us no evidence to support the trial court's determination that defendant's testimony was material. The record is silent concerning any testimony of other witnesses before the Committee, its tenor and content, or any conflict with that given by defendant to the Committee. If the allegations of materiality in the indictment require proof on these factual matters, and we hold that they do, then they perforce constituted questions of fact which should have been submitted to the jury.

Respondent argues that defendant's testimony before the Committee was directly material because it was generally alleged to be so in the indictment, and required no factual showing because on its face it was apparent that defendant's false testimony related directly to the matter under investigation by the Committee; and, in any event, circumstantial materiality was proved in that the trial court took judicial notice of the conflict between defendant's false testimony and that of other witnesses before the Committee.

[8, 9] The specific allegations in the indictment, by which respondent is bound,

render untenable any reliance on the theory of direct materiality, for none was therein alleged. False testimony may be either directly or circumstantially material (People v. Macken, 32 Cal.App.2d 31, 89 P.2d 173; People v. Chand, 75 Cal.App. 459, 243 P. 38; People v. Schweichler, 16 Cal.App. 738, 117 P. 939), and materiality may be pleaded either by setting out facts from which materiality appears as a matter of law, or by direct averment, without setting forth the probative or circumstantial facts (People v. Low Ying, 20 Cal.App. 2d 39, 41, 66 P.2d 211; People v. Ah Bean, 77 Cal. 12, 18 P. 815; People v. Dunstan, 59 Cal.App. 574, 211 P. 813).

[10] Far from containing the general direct averment claimed by respondent, the indictment before us was specific in pointing up those factual elements which, as a matter of law, constituted defendant's testimony material to the issues pending before the Committee, spelling out in detail the circumstantial and probative facts upon which materiality depended. Immediately following the recitation of defendant's false testimony the indictment alleged: "That said false testimony sworn to and given in evidence by said defendant, Frank J. Matula, Jr., as aforesaid, was material to the issues and hearing then and there pending before said committee *in the following particulars: That said committee had heard testimony to the effect* that many of the men who drive the trucks which collect rubbish * * *" setting forth in detail the substance of the testimony given by other witnesses before the Committee, which it is claimed conflicted with that of defendant. (Emphasis added.) Following this, the indictment alleged further: "That the above quoted false testimony of the defendant, Frank J. Matula, Jr., was then and there material to the issues pending at the hearing then and there being conducted by said committee, in that it tended to show that the defendant, Frank J. Matula, Jr., said Union and its officers, agents, and employees *had not enforced and attempted to enforce the rules, regulations, and by-laws of said rubbish collectors' associations* mentioned above." (Emphasis added.)

It is clear that we are not here concerned with whether defendant's testimony on its face related directly to the matter under the Committee's investigation because the detailed specific averments in the indictment compel the conclusion, first, that the pleading contained no general direct allegation of materiality, and second, that the determination of the issue of materiality depended upon the effect of the testimony of the other witnesses appearing before the Committee. Therefore, the question is whether circumstantial materiality as alleged in the pleading has been proved by competent evidence and beyond a reasonable doubt. Respondent argues that since materiality is a question of law for the trial court, proof that defendant's testimony conflicted with that of other witnesses before the Committee was unnecessary; and that if evidence was necessary, it was supplied by the judicial notice the trial judge took of the conflict.

[11] Apart from the Chairman's "opening statement" and the testimony of defendant before the Committee, the record before us reveals no evidence of any proceedings had before the Committee or any testimony taken by it—in fact, it is expressly conceded "that no evidence of the testimony of other witnesses before the Committee was introduced at the trial" (Resp. B., p. 72). It plainly appears therefore, that there was nothing before him from which the trial judge could have determined, as a matter of law, that defendant's testimony before the Committee was material to any issue pending before it, unless recourse may be had to judicial notice. From the state of the record, we are persuaded that this lack of evidence on the issue of materiality was fatal to defendant's conviction for two reasons—it deprived him of his right to have the facts relative to an essential element of the crime with which he was charged submitted to the jury; and it denied him the right to be apprised of evidence used against him and the opportunity to meet it.

[12] Conceding that materiality is a question for the court, we nevertheless believe that the trial judge, in making his determination thereof, is not at liberty to resort to something undisclosed outside of the record or dispense with the necessity for competent evidence to support his finding; but that he must submit to the jury the facts upon which he predicates his finding. In the case of People v. Lem You, 97 Cal. 224, 32 P. 11, the court below, over objection, permitted the court reporter to read the testimony of other witnesses in the prior proceeding from the official transcript. Pointing out that although the question of materiality is always one of law for the court, it was nevertheless the jury's function to find the facts from which the court's conclusion was to be derived, the Supreme Court stated, 97 Cal. at page 228, 32 P. at page 12: "And on a trial for perjury it is the duty of the court to instruct the jury as to what facts would show material testimony (Citations). The proper course for the court to pursue in such a case is aptly stated on the kindred subject of malicious prosecution in the opinion of this court rendered by Mr. Justice Harrison in Ball v. Rawles, 93 Cal. 222, 228, 28 P. 937. Substituting the words 'materiality of testimony' for 'probable cause,' the following language from that opinion is a correct statement of the duty of the court on the trial of a defendant for perjury: 'It is necessary, for the court in each instance to determine whether the facts that they (the jury) may find from the evidence will or will not establish that issue. * * * The court should group in its instructions the facts which the evidence tends to prove and then instruct the jury that if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly. * * *"

To the same effect is People v. Chadwick, 4 Cal.App. 63, at page 67, 87 P. 384, at page 386: "Whether testimony given upon the trial of a cause is material to the issues then before the court is a question of law to be determined by the court; but, as is sometimes the case, especially upon a trial for perjury, the materiality of testimony will depend upon the existence of certain other facts, and if these facts are controverted their existence must be determined by the jury"; and Luse v. United States, 9 Cir., 49 F.2d 241, at page 245: "It is unquestionably true that the materiality of the evidence adduced upon the former trial was a question to be determined by the trial judge. This was a question of law, but in a charge of perjury the question of materiality of the evidence adduced upon the former trial is necessarily a mixed question of law and fact. That is, it is not an abstract question of law, but depends upon what occurred upon the former trial. Materiality depends primarily upon the issues involved in the former trial and upon the evidence adduced in support of these issues. What the evidence was, and what the pleadings were upon that trial is a question of fact. Whether the testimony alleged to be perjured was material to such issues is a question of law. * * * But the plea of not guilty interposed by the defendant traversed the fact that such testimony was given at all, and it was for the jury to say from all the evidence whether such testimony was given upon the former trial. The charge of the court to the jury as to the materiality of the testimony alleged to have been perjured must necessarily be predicated upon the assumption that the evidence and pleadings read before the jury were those involved in the previous trial, although the jury might have concluded otherwise. For the court to determine the materiality of the false testimony it was necessary for it to assume these facts in a hypothetical instruction. In the case at bar there was no serious contention as to what occurred upon the previous trial, court and counsel both apparently assuming that the pleadings and transcript presented and read before the jury in this case were virtually conclusive on the parties, but this assumption, in the absence of a stipulation to that effect, did not establish what evidence had

been actually introduced upon the fraud trial. * * *"

Other authorities following the general principle that involved in the trial court's determination of materiality are factual questions for the jury are People v. Clementshaw, 59 Cal. 385; People v. Brilliant, 58 Cal. 214; People v. Curtis, 36 Cal.App.2d 306, 98 P.2d 228, and People v. Sagehorn, 140 Cal.App.2d 138, 294 P.2d 1062; nor is there anything to the contrary in the cases relied upon by respondent, People v. Macken, 32 Cal.App.2d 31, 89 P.2d 173; People v. Brophy, 49 Cal.App. 2d 15, 120 P.2d 946; and People v. Bradbury, 155 Cal. 808, 103 P. 215.

No questions of fact relating to the issue of materiality were submitted to the jury in the instant case—on the contrary, the jury was briefly instructed, as proposed by the People, without further comment from the court, that "the question of materiality * * * is always one of law for the court and not one of fact for the jury," and the "testimony alleged in the perjury indictment of the defendant Matula to be false was material to the issues then pending before the Assembly Interim Committee on Governmental Efficiency and Economy * * *", completely taking from the jury the determination of any fact relating to an essential element of the crime of perjury. This was the only instruction given on the issue of materiality.

[13–15] Respondent having relied upon the conflict between the testimony of other witnesses before the Committee and that of defendant to prove materiality, citing People v. Low Ying, 20 Cal.App.2d 39, 66 P.2d 211 (Resp. Brief, p. 70), it follows that the trial court's conclusion of law that defendant's testimony was material must be based upon proof of the existence, content and effect of the testimony of the other witnesses before the Committee. The prosecution offered no evidence thereon for the record (People v. Sagehorn, 140 Cal.App.2d 138, 144, 294 P.2d 1062, 1073, "It was necessary for the trial judge to have this testimony in the record in order that he could judge of the materiality of the statements in the indictment made by appellant"), or to the jury (People v. Curtis, 36 Cal.App.2d 306, 320, 98 P.2d 228, 234: "The duty of the jury is to find the facts and to apply to them the law as expounded by the court"). There was nothing before the jury from which it could have determined that other witnesses actually testified before the Committee, that the testimony alleged in the indictment was in fact given, that it created any conflict with the testimony given by defendant, or that it had the factual or evidential effect attributed to it; and there appears in the record no basis upon which the trial court could have concluded, as a matter of law, that defendant's testimony was material. If, in fact, the testimony of other witnesses was not given before the Committee, as alleged; or if it was, it was not as substantially pleaded in the indictment, or did not establish a conflict with defendant's testimony relative to the enforcement or attempted enforcement of the association rules, then as a matter of law defendant's testimony could not, *under the specific averments in the indictment,* have been material. The choice of finding the existence of those facts belonged to the jury, and the defendant was deprived of the right to have the jury reject, or accept as true, those facts upon which the trial court's conclusion of law should have been predicated.

[16] Respondent's second contention, that the failure to introduce any evidence from which the legal conclusion of materiality could have been drawn was remedied by judicial notice of the Committee's proceedings, raises quite a different point, although closely related to that already discussed, and we conclude that if judicial notice was actually taken by the court below, the manner in which it was done deprived defendant of a fair and impartial trial, defeating his right to due process of law.

Without any reference to judicial notice, the trial judge announced he intended to charge the jury that as a matter of law the defendant's testimony before the Com-

mittee was material, and did so. The record does not disclose what he had in mind when he made his finding of materiality, how or in what manner he arrived at his conclusion, or the source of his information; nor does it reveal that defendant was apprised of the source or the circumstantial or probative facts under his consideration, or that defendant was given an opportunity to meet, rebut or argue them.

On the motion for new trial the deputy district attorney submitted, for identification only, five volumes of reporter's transcript of the Committee's proceedings, but at no time offered them in evidence making them a part of the record. In denying the motion, the trial judge said: "* * * the court is of the view that it *has* judicial notice of the proceedings before the Assembly Interim Committee, therefore, there was no error in instructing the jury. * * *" (Emphasis added.) Although we are unable to determine from this statement whether he intended to convey that he had taken judicial notice of the proceedings at the time of the trial, but failed to declare the same, or that he now "has" judicial notice thereof, we hold in the latter case the declaration of judicial notice cannot operate retroactively (Ohio Bell Teleph. Co. v. Public Utilities Comm., 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093), and in the former the trial court committed error.

Respondent advances the position that the trial judge was not required to apprise the jury he was taking judicial notice since it was not concerned with the issue of materiality (which, for reasons already stated, is without merit); and that since the trial court had power to take judicial notice of proceedings before a State Legislative Committee (Section 1875, subd. 3, Code of Civil Procedure; Wilson v. Loew's Inc., 142 Cal.App.2d 183, 298 P.2d 152), there could be no question as to whether "in fact" such testimony had been given, and evidence in that regard would have been improper.

It is not our conclusion that judicial notice of the Committee's proceedings could not have been properly taken by the trial judge, but we do hold that the manner in which it was allegedly taken was in direct violation of defendant's constitutional right to a fair trial in that—the source used and the facts adduced were neither seasonably disclosed to the accused that he might then have the opportunity to meet the evidence against him; nor made a part of the record that he might argue its legal effect to this court on appeal.

[17] Materiality here being dependent, among other things, upon the authority of the Committee, the subject of inquiry, the evidence offered before it, and the tenor, nature and content of the other testimony relied upon, it was incumbent on the People to prove a state of facts from which the conclusion of materiality could properly have been deduced. People v. Planer, 23 Cal.App.2d 251, 72 P.2d 767. At no time did the trial judge reveal the facts from which he derived his conclusion, nor indeed is there anything in the record to show that at the trial he ever consulted a transcript of the proceedings. But the real vice to this undisclosed process in the mind of the judge is that the accused has never known, nor do we know, what facts he considered in forming his opinion; and with this failure to apprise, comes the inevitable denial of the opportunity to test, refute, or explain them at the trial and argue their legal effect on appeal.

[18, 19] A deprivation of a fair and impartial trial amounts to a denial of due process of law (section 1, Fourteenth Amendment, United States Constitution, and section 13, Article I, California Constitution; People v. Lyons, 47 Cal.2d 311, 303 P.2d 329; People v. Duvernay, 43 Cal. App.2d 823, 111 P.2d 659; People v. Robarge, 111 Cal.App.2d 87, 244 P.2d 407), and one of the fundamental requirements in the conduct of a judicial proceeding is the right of a party to be informed of the evidence against him that he may counter, question, explain, or be heard in opposition to it. Morgan v. United States, 304 U.S. 1, 18, 58 S.Ct. 999, 82 L.Ed. 1129;

English v. City of Long Beach, 35 Cal.2d 155, 217 P.2d 22, 18 A.L.R.2d 547.

[20, 21] Judicial notice, no matter how convenient or expedient in the particular case, cannot be exercised contrary to the constitutional right to due process of law (Ohio Bell Teleph. Co. v. Public Utilities Comm., 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093); nor can it eliminate the necessity for evidence of a given fact or the burden of proving it (Shapleigh v. Mier, 299 U.S. 468, 57 S.Ct. 261, 81 L.Ed. 355). A statutory device for getting evidence of a fact expeditiously before the court, judicial notice is used to avoid the delay and expense of the conventional method of calling witnesses (Varcoe v. Lee, 180 Cal. 338, 181 P. 223; Communist Party of United States of America v. Peek, 20 Cal.2d 536, 127 P.2d 889; Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947), and since it is a method of introducing a fact to the court and is not a substitute for that fact, it can no more dispense with the necessity of seasonably apprising the party, against whom it is to be used, of what fact is sought thereby to be proved so he may meet it and be heard in opposition thereto, than can the formal method of calling witnesses to prove a fact. Such procedure is no better than secretly taking evidence outside the presence of the aggrieved party (Carstens v. Pillsbury, 172 Cal. 572, 158 P. 218; LaPrade v. Department of Water & Power, 27 Cal.2d 47, 162 P.2d 13; National Auto Ins. Co. v. Ind. Acc. Comm., 67 Cal.App.2d 178, 153 P.2d 808), or receiving evidence *ex parte* where the party against whom it is used has no opportunity to know or challenge its effect (English v. City of Long Beach, 35 Cal.2d 155, 158, 217 P.2d 22, 18 A.L.R.2d 547; Olive Proration Program Committee, etc. v. Agricultural etc., Comm., 17 Cal.2d 204, 109 P.2d 918; Bandini Estate Co. v. Los Angeles County, 28 Cal.App.2d 224, 82 P. 2d 185; United States v. Abilene & S. R. Co., 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016), both of which practices are contrary to all principles of justice and fairness and in clear violation of the constitutional right to due process of law.

Undisclosed evidence received by way of judicial notice was discussed at length and disapproved by the United States Supreme Court in Ohio Bell Teleph. Co. v. Public Utilities Comm., 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093. In a rate-fixing proceeding, the Public Utilities Commission, after hearing, but before decision, took judicial notice of price trends during certain years without introducing into evidence the data upon which it was based, or putting the same in the record. In holding this to be a violation of the constitutional guarantee of a fair and open hearing and due process of law, the court said at page 300 of 301 U.S., at page 729 of 57 S.Ct.: "An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. * * * Courts take judicial notice of matters of common knowledge * * * (But) notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. * * * 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' (Citations.) Such at least is the general rule, to be adhered to in the absence of exceptional conditions. * * * Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial.

"What was done by the Commission is subject, however, to an objection even deeper. * * * There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even governmental reports are put in evidence upon a trial, the

party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here."

[22, 23] Although section 2102 Code of Civil Procedure, appears to support the view that a noticed fact, once it has been correctly ascertained, is indisputable, whether it has been correctly ascertained in the first instance is open to question. To properly ascertain a fact to be noticed, the trial judge of necessity must, in most cases, resort to some source or authority, and the party against whom the fact is to be used, if he believes it to be disputable, is entitled to challenge the source, authority, or the fact in the form in which the judge believes it to exist; and to be heard on that matter. Obviously, too, if there is any error in reading, analyzing, or in the appreciation of the material read, examined, or considered by the trial judge, the fact ascertained is likely to be incorrect. The fallacy in respondent's position that since the trial court is empowered to take judicial notice of Legislative hearings it "could base its findings of materiality upon an analysis of that testimony even though the transcript of such hearing had not been formally introduced at the trial," lies in the fact that there is nothing in the record to support its assumption the trial judge actually resorted to the reporter's transcript or made an analysis of the testimony. If he did use the reporter's transcript, the defendant had the right to challenge its accuracy (McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691). Nor does the record disclose what kind of analysis he made, how it was made, or what it contained. Indeed, it is pure conjecture that the trial court predicated its finding of materiality upon an analysis, or anything else.

[24, 25] Obviously, the facts noticed by the trial court could be of no probative value unless they supported the ultimate conclusion of materiality; and of importance is the defendant's right to argue before both the trial court (Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288; Londoner v. City & County of Denver, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103), and the appellate court (Ohio Bell Teleph. Co. v. Public Utilities Comm., 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093) their legal effect or sufficiency, which would require, especially in this court, they be spread upon the record that we may be advised in the premises. For, as a part of due process is the right to have in the record of the court below the facts upon which a determination of law is based, so an appellate review may be properly and intelligently made. Referring again to Ohio Bell Teleph. Co. v. Public Utilities Comm., 301 U.S. 292, at page 303, 57 S.Ct. 724, at page 730, the court said: "* * * The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms * * * how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable? * * * 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.'" Materiality, being a question of law in a perjury charge, is subject to review on appeal (People v. Brophy, 49 Cal.App.2d 15, 120 P.2d 946). Here the appellant is precluded from arguing, and we are powerless to intelligently review the correctness of the trial court's conclusion thereon, because incorporated in the record before us are no facts upon which it predicated its finding.

[26] Any suggestion that we now judicially notice the proceedings before the Committee is not well taken. The reporter's transcript of the proceedings before

the Committee, having never been received in evidence, is no part of the record before this court. Furthermore, such a position runs counter to the constitutional right of defendant to have the facts relating to an essential element of the crime passed on by a jury, to be apprised of those facts and to be heard thereon. And of equal importance, it is the trial court's conclusion that defendant has a right to have reviewed on this appeal (People v. Brophy, 49 Cal.App. 2d 15, 24, 120 P.2d 946).

[27–29] Mindful of the rule that a denial of a fair trial constitutes a miscarriage of justice and a resulting conviction cannot be supported under section 4½, Article VI, California Constitution (People v. Lyons, 47 Cal.2d 311, 303 P.2d 329); that the deprivation of the constitutional right to a jury trial is in itself prejudicial (People v. Hall, 199 Cal. 451, 249 P. 859), and that a failure to prove an essential element of an offense charged is a matter too serious to be cured by section 4½ (People v. Burns, 75 Cal.App. 84, 85, 241 P. 935), we can only conclude that defendant's conviction must be reversed.

[30, 31] In the lengthy record before us there is extensive testimony of numerous witnesses relating to the defendant's activities in connection with the rubbish collection business, and although it may be apparent to one studying the evidence that had no erroneous procedure been indulged in during the trial, the same verdict might well have resulted, such speculation cannot justify overlooking any error which results in a denial of defendant's right to a fair trial (People v. Robarge, 111 Cal.App.2d 87, 94, 244 P.2d 407). While a departure from established recognized legal procedure may appear in an individual case to adequately serve the ends of justice, judicial approval of such a practice could only constitute a dangerous inroad into an orderly system of justice which protects the constitutional rights of every accused. People v. Wilson, 23 Cal.App. 513, 138 P. 971.

In view of our conclusion we deem it unnecessary to discuss the issue relative to whether the questions put to the defendant by the Committee were beyond its power as relating to private activities rather than the cost and efficiency of government.

For the foregoing reasons the judgment and order denying motion for a new trial are and each is reversed and the cause remanded for a new trial.

WHITE, P. J., and FOURT, J., concur.



169 Cal.App.2d 218

Grace B. BAZAURE, Plaintiff and Appellant,

v.

David RICHMAN, Mrs. David Richman, Shirley Oliet, Doe I to X, Black-White Company I and II, corporations, Defendants.

David Richman and Shirley Oliet, Respondents.

Civ. 23276.

District Court of Appeal, Second District, Division 2, California.

March 30, 1959.

Tenant's action against landlord for personal injuries received while attempting to extinguish fire in apartment which was allegedly caused by a defective gas range. The Superior Court of Los Angeles County, Robert H. Scott, J., entered judgment for landlord and tenant appealed. The District Court of Appeal, Herndon, J., held that there was substantial evidence to sustain finding that fire was caused by tenant's negligence in failing to turn off burner under kettle before leaving kitchen.

Affirmed.

1. Appeal and Error ⇐1010(2)

Where an appellant urges insufficiency of evidence to sustain findings, such contention requires him to demonstrate that

there is no substantial evidence to support the challenged findings.

2. Evidence ⇐594

Trier of fact may properly reject part of testimony of a witness although not directly contradicted, and combine accepted portions with bits of testimony or inferences from testimony of other witnesses thus weaving a cloth of truth out of selected available material.

3. Appeal and Error ⇐994(3)

Trier of fact is exclusive judge of credibility of witnesses. West's Ann.Code Civ.Proc. § 1847.

4. Evidence ⇐588, 594

Trial court is not obliged to accept as true testimony of a witness that is uncontradicted and their interest in result of the case, their motives, and the manner in which they testify may be such as to justify court in disbelieving their testimony.

5. Evidence ⇐589

In tenant's action against landlord for personal injuries received while attempting to extinguish fire in apartment allegedly caused by defective gas range, trial court was free to reject tenant's testimony that she had turned off stove before leaving kitchen, even though her testimony was otherwise uncontradicted and unimpeached.

6. Landlord and Tenant ⇐169(6)

In tenant's action against landlord for personal injuries sustained while attempting to extinguish fire in apartment allegedly caused by defective gas stove, evidence sustained finding of trial court as to tenant's negligence in failing to turn off burner under kettle of grease before leaving kitchen.

7. Landlord and Tenant ⇐169(6)

In tenant's action against landlord for personal injuries received in attempting to extinguish fire in apartment allegedly caused by defective gas range which tenant claimed was capable of relighting itself spontaneously, there was sufficient evidence to sustain finding of contributory negligence and assumption of risk by tenant in leaving kitchen with kettle of grease on stove which she had allegedly turned off.

Milan Medigovich and Ball, Hunt & Hart, Long Beach, for appellant.

Goebel & Donovan, Los Angeles, for respondents.

HERNDON, Justice.

Appellant, a tenant of a furnished apartment in respondent's building, was injured while attempting to extinguish a fire in her apartment. Alleging that the fire was caused by a defective gas range, she sued respondent on three theories: (1) Negligence in the maintenance of the appliance; (2) breach of express and implied warranties; and (3) the making by respondent of false and fraudulent misrepresentations to the effect that the appliance was in good condition.

The trial judge made findings of fact adverse to appellant. These findings included the following: (1) that appellant was a tenant in respondent's building, having rented a furnished apartment in June, 1956; that included in the furnishings of said apartment was a gas cooking range; that between June, 1956, and September 6, 1956, plaintiff had noticed that the range was defective and had reported the defect to her landlord, who promised to repair it. (2) That on or about September 6, 1956, plaintiff was cooking chicken in a Dutch oven which contained Wesson oil and bacon grease; that plaintiff turned the gas on under the kettle, left the room, was gone for approximately one-half hour and when she returned the grease in the kettle was on fire; that plaintiff attempted to extinguish the fire and sustained burns to her person. (3) That there was no breach of warranty by the defendants which in any way caused or contributed to the accident or injuries sustained by the plaintiff. (4) That plaintiff was not misled or deceived by any statements, fraudulent or otherwise, made by defendant's manager. (5) If there was a defect in the stove, said defect was known to the plaintiff in that she used it continually for a long period of time after she knew of the defect and thereby assumed the risk of any injury she may have sustained by reason thereof.

(6) Any injuries sustained by plaintiff were concurred in and contributed to directly and proximately by the carelessness and negligence of the plaintiff in that she so carelessly and negligently conducted and comported herself at the time and place alleged * * * as to cause said accident and any injuries or damages which she may have sustained. (7) Plaintiff assumed the hazard of any defect in the premises and all risks incidental thereto.

[1] As stated by appellant "[t]his appeal from the judgment is based upon the insufficiency of the evidence to support the findings and judgment." Thus, there is invoked at the outset the rule recently restated by this court in Roberts v. Salot, 166 Cal.App.2d 294, 333 P.2d 232, that where an appellant urges the insufficiency of the evidence to sustain the findings, such contention requires him to demonstrate that there is no substantial evidence to support the challenged findings. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550.

Plaintiff testified that she and her husband moved into the apartment on May 30, 1956; that she first used the stove two or three days later and noticed that one of the front burners did not light when she turned the handle, so that she had to use a match to light it. Several days later she had further trouble with the stove. This was about the 5th or 6th of June. She said: "* * * I turned the burner on and it didn't light again, so I turned it off. Then I turned it on again and it did not light, and as I was turning it off, well, sort of a shot out of flame from the burner and it just startled me, so I just turned the stove off and I didn't use it any more."

Appellant said she reported this trouble to Mrs. Muscatt, the apartment house manager, who replied that she would have it fixed, telling appellant to "go ahead and use it, that the people use it in the same condition and it wouldn't harm me or I wouldn't get hurt in any way." During the month of June she found that the other burners worked the same way, that is: "You have to jiggle the handles a few times for the light to go on * * *." She again reported this to the manager and was again promised that it would be fixed and was told in the meantime to go ahead and use it. Again in August appellant discovered that the burners of the stove would ignite without being turned on. She had this experience about a week before the accident with the same burner that was involved in the accident. She reported this to the manager on the day before the fire. She was again promised that the stove would be fixed immediately.

Appellant testified that on the day of the accident she had decided to prepare fried chicken for dinner; that she filled a Dutch oven approximately one-half full of Wesson oil and bacon grease. She put the oven on the right rear burner of the stove and had to jiggle the handle to light it. She set the burner for a medium degree of flame and cooked the chicken for approximately thirty minutes; she then removed the chicken from the Dutch oven, placing it on a plate. She turned off the burner, making certain that it was no longer burning. Since the grease was extremely hot, she did not remove the Dutch oven from the stove. She then went to the bathroom to take a bath; after about 30 minutes, when she finished her bath and entered the front room, she observed it was full of smoke; she went to the kitchen and saw the Dutch oven in flames. In attempting to smother the flames with a throw rug, she sustained the injuries for which she sought recovery.

The first finding which appellant attacks states, in substance, that after appellant turned on the gas under the Dutch oven containing the oil and grease, she left the kitchen and returned about 30 minutes later to find the contents on fire. Appellant points out that this finding, coupled with the court's failure to find that she turned off the gas, amounts to a finding that "plaintiff simply neglected to turn off the burner and that the fire started by reason of plaintiff's forgetfulness". If the record

discloses any evidentiary support for this finding, an affirmance is indicated, since the necessary effect of the finding is that appellant's neglect was the sole proximate cause of the fire. See Hunter v. Freeman, 105 Cal.App.2d 129, 233 P.2d 65; Wilson v. Ray, 100 Cal.App.2d 299, 223 P.2d 313.

[2–5] But appellant contends that the trial court was bound to find in accordance with her uncontradicted testimony that she turned off the burner, so that it must have reignited itself spontaneously as it had done on the previous occasions to which she testified. However, the trial court could reject appellant's testimony either in whole or in part. As we recently stated in Nevarov v. Caldwell, 161 Cal.App.2d 762, 327 P.2d 111, 121, the trier of the fact "* * * properly may reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected available material." Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 291–292, 105 P.2d 984; Cf. In re Estate of Pelton, 140 Cal.App.2d 512, 516, 295 P.2d 483.

The trier of fact is the exclusive judge of the credibility of witnesses. Code Civ. Proc. § 1847; Hicks v. Reis, 21 Cal.2d 654, 659–660, 134 P.2d 788. And as stated in Rolinson v. Rolinson, 132 Cal.App.2d 387, 390, 282 P.2d 98, 100: "It is not the law that a trial court must accept as true the testimony of witnesses that is uncontradicted. Their interest in the result of the case, their motives and the manner in which they testify may be such as to justify the court in disbelieving their testimony." In the instant case the plaintiff, of course, was an interested party, and the trial court was free to reject her testimony that she had turned off the stove even though her testimony was otherwise uncontradicted and unimpeached. Odenthal v. Lee, 113 Cal.App.2d 666, 669, 248 P.2d 937; Maslow v. Maslow, 117 Cal.App.2d 237, 243, 255 P.2d 65; see 8 A.L.R. 726.

[6] Appellant also relies on her own uncontradicted testimony to argue that there is no evidence to support the trial court's express finding that there was no breach of warranty. However, as we have pointed out, the trial court was not obligated to accept appellant's favorable version of the events anteceding her injury, and if the cause of the fire was her failure to turn off the gas under the kettle, then any negligence on the part of defendant or any breach of express or implied warranties was obviously immaterial. Cf. Stowe v. Fritzie Hotels, Inc., 44 Cal.2d 416, 422–423, 282 P.2d 890; Fisher v. Pennington, 116 Cal.App. 248, 250–251, 2 P.2d 518.

[7] Furthermore, the judgment is independently supported by findings of contributory negligence and assumption of risk—findings which become immune from further review by us once we have discovered in the record any substantial evidentiary basis for them. Appellant testified that on at least two occasions very shortly before the accident she had experiences with the range which taught her that the burners were capable of relighting themselves spontaneously, notwithstanding that the controls were turned to the "off" position. Accepting this testimony as entirely true, and giving full credit to appellant's further testimony that respondent's manager told her nevertheless to continue using the stove and assured her that the stove would not harm her, it still remained within the province of the trial judge to interpret the assurances and to decide whether appellant's conduct amounted to an assumption of a known risk or was consistent with the proper standard of ordinary care.

Respondent's manager did not undertake to tell appellant that the burners would not relight themselves spontaneously. If appellant's testimony is accepted, such a statement would have contradicted her own personal experience. Thus, the trial judge was justified in concluding that any assurances stated to have been given by the apartment house manager reasonably could

have been understood as meaning only that there was no danger of an explosion or of poisoning from escaping gas. It was the province of the trial judge to decide from this evidence whether appellant assumed a known risk when she left a pan of grease on a burner which she knew was capable of relighting itself spontaneously. Sherrard v. Lidyoff, 108 Cal.App.2d 325, 327, 239 P.2d 28; Dorswitt v. Wilson, 51 Cal.App.2d 623, 624–625, 125 P.2d 626; Colburn v. Shuravlev, 24 Cal.App.2d 298, 299, 74 P.2d 1060; see generally 35 Cal. Jur.2d 814, § 267. The same evidence afforded a sufficient basis for the trial court's finding that appellant was negligent. Sherrard v. Lidyoff, supra, 108 Cal.App.2d 325, 327, 239 P.2d 28; see 35 Cal.Jur.2d 783, § 244.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.



160 Cal.App.2d 223

Darlene Ruth CHRISTENSEN, a minor, by Ruth Christensen, her guardian ad litem, Plaintiff and Appellant,

v.

Eugene Francis BOCIAN, Defendant and Respondent.

Civ. 23281.

District Court of Appeal, Second District, Division 2, California.

March 30, 1959.

Hearing Denied May 27, 1959.

Action by guest passenger for personal injuries sustained when the automobile in which she was riding collided at an intersection with defendant's automobile. The Superior Court, Los Angeles County, Fred Miller, J., entered judgment for defendant and guest passenger appealed. The District Court of Appeal, Ashburn, J., held that where there was no evidence that guest passenger had any occasion to mistrust her host's driving or that she should have mistrusted his driving, or that her attention had been attracted to any excessive speed or other irregularity in his driving, she was not guilty of any contributory negligence, and giving of an instruction on contributory negligence was prejudicial error in view of fact that as a guest passenger she was not chargeable with negligence of her driver, and instruction on contributory negligence created an insoluble question of whether verdict for defendant was based on a finding of lack of defendant's negligence or on some assumed negligence of passenger.

Judgment reversed.

Opinion, 335 P.2d 171, vacated.

1. Appeal and Error ⇐882(12)

Where answer in a personal injury action arising out of an automobile accident alleged contributory negligence on part of plaintiff who was a guest passenger in one of the automobiles involved, and before the evidence was introduced her counsel submitted instructions embracing that subject, but before jury was instructed, her counsel objected to requested instructions of defendant relating to issue of defense of contributory negligence and did not request or consent to any instruction on contributory negligence at such time, his previous request pertaining to that subject was withdrawn at such time, in practical effect, and plaintiff was not precluded from raising issue of prejudicial error in giving instruction on contributory negligence on theory that such error was a case of invited error.

2. Appeal and Error ⇐1066
Automobiles ⇐224(1)
Trial ⇐252(10)

In action by guest passenger for personal injuries sustained when the automobile in which she was riding collided at an intersection with defendant's automobile, where there was no evidence that guest passenger had any occasion to mistrust her host's driving or that she should have

mistrusted his driving, or that her attention had been attracted to any excessive speed or other irregularity in his driving, she was not guilty of any contributory negligence, and giving of an instruction on contributory negligence was prejudicial error in view of fact that guest passenger was not chargeable with negligence of her driver, and instruction on contributory negligence created an insoluble question of whether verdict for defendant was based on a finding of lack of defendant's negligence or on some assumed negligence of passenger.

Robert H. Lund, Fred M. Nelson, Long Beach, for appellant.

Ball, Hunt & Hart, Long Beach, for respondent.

ASHBURN, Justice.

Plaintiff appeals from a judgment based upon an adverse jury verdict in a personal injury action. Her attorneys rely upon the single contention that the court prejudicially erred in giving instructions to the jury upon the subject of contributory negligence.

Plaintiff was injured in a collision of automobiles which took place on November 25, 1956, within the intersection of Elm and Burnett Streets, in the city of Long Beach. Plaintiff, 15 years of age, was riding as a guest in the front seat of a Mercury automobile owned and driven by Donald Seaborn, traveling southerly on Elm Street. She was in the middle, her brother Steve being to the right. The three were on their way to a skating rink where they intended to practice for a competition. They had just left the home of a friend who lived about two blocks from the place of accident. Defendant Bocian was driving east on Burnett Street. The intersection was within a residential district and was not controlled by stop signs or in any other manner. The view of each driver was obstructed to the extent that the 15 mile prima facie speed limit was applicable, under Vehicle Code § 511(a) (3), as the statute then stood. Each driver was traveling in excess of 15 miles an hour and saw the other car before the impact, but neither was able to stop in time to avoid a collision. The Bocian car ran into the side of Seaborn's. The facts in their entirety are such that either or both of the drivers could have been found negligent. It does not appear whether the verdict for defendant rested upon a finding of absence of negligence on his part or upon contributory negligence of plaintiff.

She had ridden with Seaborn some five to seven previous times, but there is no evidence that she had any occasion to mistrust his driving or that she did so. On this occasion her attention had not been attracted to any excessive speed or other irregularity in Seaborn's driving. She herself had never driven an automobile and was paying no attention to Seaborn's driving while they traveled along. As they entered the intersection she saw Bocian's car for the first time and realized it would hit the one in which she was riding, whereupon she screamed and told Seaborn the other car was going to hit them. She received injuries which were substantial.

Appellant's counsel argues that there was no evidence of negligence on her part and that instructions on contributory negligence were therefore inappropriate and prejudicial. The language of Murphy v. National Ice Cream Co., 114 Cal.App. 482, 489, 300 P. 91, 94, is apposite: "Mrs. Murphy as a guest was not charged with the responsibility for observing the condition of the traffic upon the highway, nor was there anything she could have done after the danger was imminent to avoid a collision. Martinelli v. Poley, 210 Cal. 450, 292 P. 451; Marchetti v. Southern Pac. Co., 204 Cal. 679, 269 P. 529, 531. The former case presented a somewhat similar situation, and in holding that the guest was not guilty of contributory negligence the court said: 'We find nothing in the evidence, either that admitted on behalf of the plaintiff, or that introduced by the defendants, that would tend to show that plaintiff was guilty of contributory

negligence. He was simply riding with the appellant as a guest of the latter, and had no power of control over the machine in which they were traveling. Nothing had happened during the trip, so far as the evidence shows, at least until the collision occurred, which indicated in any manner that the appellant was not driving his machine in a perfectly proper and careful manner. There was no reason for the plaintiff, therefore, to be apprehensive of his safety while riding with appellant, or to take any unusual precautions against their running into danger. Just before the accident happened, he was observing the houses along the highway and was not looking in front of the machine and therefore did not see Barlow's truck until it was about 5 feet from the car in which he was riding. It was then too late for him to caution appellant regarding the latter's driving, or to do anything else to avoid the collision. There is nothing in this conduct of the plaintiff which would tend in the least to prove that he was guilty of contributory negligence in causing the injury sustained by him as a result of the collision.' In the latter case, in holding that the responsibility for observing danger does not rest upon the guest, the doctrine is stated substantially the same. There the court apparently goes further in saying that, even when the danger of collision becomes suddenly imminent, the guest is not obliged to 'displace the driver, seize the operating levers and endeavor to avoid the impending catastrophe'." Crawford v. Rose, 2 Cal.App.2d 734, 738, 39 P.2d 217, 218: "It is not the law that under all possible circumstances one who is riding as a guest in such a vehicle must watch the road and the driver, and hold himself in readiness to give directions to the driver concerning the dangers of the road."

These are well-settled principles (see, 7 Cal.Jur.2d § 340, p. 239) and the divergence between the cases cited by the respective parties grows out of their application to varying factual situations rather than any uncertainty as to the state of the law; hence, further discussion of them would be without profit. We hold that as a matter of law plaintiff was not guilty of any contributory negligence.

The case is now before us upon rehearing. In our former opinion (335 P.2d 171, 172) we said: "Appellant complains of invited error. The case was argued to the jury but the arguments were not transcribed. The record does not affirmatively show any actual notice to the trial judge that plaintiff's counsel considered the evidence insufficient to justify submission of the issue of contributory negligence to the jury." Upon this predicate we held that appellant's requests for the giving of certain instructions upon contributory negligence precluded her from complaining of the fact that the court did instruct upon that subject. After the ruling was made counsel filed a stipulation which says: "[T]hat on about January 20, 1958, during the trial proceedings of the above entitled case and after the evidence had been taken, the Court and the attorneys representing the parties to said case retired to chambers to discuss the requested instructions theretofore submitted by the parties to be given to the jury at the conclusion of the case; that then and there Robert H. Lund, attorney representing the plaintiff in said action, made his objection to the Court as to the requested instructions of the defendant relating to the issue of the defense of contributory negligence of the plaintiff; that said Robert H. Lund grounded his objection on the theory that there was no evidence in the case on the issue of contributory negligence of the plaintiff; that said Robert H. Lund then cited to the Court California authorities in support of his contention; that the Court overruled Mr. Lund's objection and stated that he thought there was substantial evidence of contributory negligence to warrant the giving of such instructions on that issue as requested by the defendant through his counsel." In the interest of substantial justice we honored this stipulation and made an order incorporating it as a part of the record on appeal pursuant to Rule 12(c) of the Rules

on Appeal. In due course appellant's petition for rehearing was granted.

Under § 607a, Code of Civil Procedure,[1] it is the duty of each party to submit before the evidence begins appropriate requests for instructions upon the issues raised by the pleadings. The answer in this case alleged contributory negligence on the part of plaintiff. Her counsel could not know in advance what, if any, evidence defendant might produce in support of that plea. Accordingly he submitted instructions embracing that subject; he also asked for BAJI 112[2] which is constructed upon the hypothesis that there is no plea and no evidence of contributory negligence.

[1] The trial started on Thursday, January 16, 1958. The stipulation shows discussion of instructions to have occurred on Monday the 20th, the day before the jury was instructed, which event occurred at the beginning of the 21st. The stipulation states that this discussion of instructions occurred after the evidence had been taken. Plaintiff's attorney definitely did not at that time request or consent to any instruction on contributory negligence; his previous requests pertaining to that subject were withdrawn in practical effect. These facts do not present a case of invited error.

Williamson v. Pacific Greyhound Lines, 93 Cal.App.2d 484, 209 P.2d 146, is in point. In that case the court refused an instruction that there was no evidence to support a finding of contributory negligence and gave one predicated upon the existence of that issue of fact. In holding this to be reversible error the court said, 93 Cal. App.2d at pages 487–488, 209 P.2d at page 148: "Respondent contends that if error resulted from the instructions on contributory negligence it was invited and induced by the several instructions on the same subject tendered by appellant. It must be borne in mind that contributory negligence was introduced into the case by respondent's plea. The only way to remove it from the case was for the court to tell the jury (as appellant requested) that there was no evidence to support it. Once the court decided not to do so, instructions on that subject inevitably followed, including the one already quoted which runs counter to Prunty v. Allred [73 Cal.App.2d 67, 165 P.2d 935]. It can hardly be said however, that appellant invited them when she did everything within her power in the opposite direction by seeking the withdrawal of the entire question.

"Appellant's instructions on contributory negligence were purely defensive tendered provisionally of course (as happens every day) to be used only in case the court refused her withdrawal instruction. * * *

"Dowd v. Atlas Taxicab etc. Co., 69 Cal.App. 9, 14, 230 P. 958, 960, is in point. There it is said: 'Even where a party is

1. Code Civ.Proc. § 607a: "In every case which is being tried before the court with a jury, it shall be the duty of counsel for the respective parties, before the first witness is sworn, to deliver to the judge presiding at the trial, and serve upon opposing counsel, all proposed instructions to the jury covering the law as disclosed by the pleadings. Thereafter, and before the court has commenced instructing the jury, and before the commencement of the argument, counsel may deliver to such judge, and serve upon opposing counsel, additional proposed instructions to the jury upon questions of law developed by the evidence and not disclosed by the pleadings. * * *"

2. "The issues to be determined by you in this case are these:

"First: Was the defendant negligent?

"If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative, you have a second issue to determine, namely:

"Was that negligence the proximate cause of any injury to the plaintiff?

"If you answer that question in the negative, plaintiff is not entitled to recover, but if you answer it in the affirmative, you then will find what damage plaintiff thus has been caused to suffer, and you will return a verdict in (his) (her) favor for the amount thereof.

"(As indicated in this instruction, you should first determine the question of liability before you undertake to fix an amount that would compensate for damage (, if any,) found to have been suffered.")

unable to induce the court to instruct the jury according to his view of the law, "the fact that he asks instructions presenting the most favorable view of the law that the court will entertain does not estop him on appeal to assign error upon the action of the court." 38 Cyc. 1789.' The Supreme Court followed this in Huebotter v. Follett, 27 Cal.2d 765, 769, 770, 167 P.2d 193."

Weeks v. Raper, 139 Cal.App.2d 737, 741, 294 P.2d 178, 180: "Therefore, the trial court should have instructed the jury that she was not guilty of contributory negligence. Ramos v. Linggi, 125 Cal.App. 2d 632, 635–636, 270 P.2d 857. The refusal to do so constituted prejudicial error. Pierce v. Black, 131 Cal.App.2d 521, 528–529, 280 P.2d 913. Respondents contend that appellants invited the error by submitting instructions on contributory negligence at the outset of the trial. We do not agree. That issue was raised by the pleadings, but after the evidence was taken, the appellants sought to withdraw the issue from the jury by requesting an instruction that there was no evidence of contributory negligence. Under such circumstances, it cannot be said that appellants invited the error of submitting the question of contributory negligence to the jury. Williamson v. Pacific Greyhound Lines, 93 Cal. App.2d 484, 487, 209 P.2d 146. Such error cannot be deemed immaterial as it cannot be determined whether the jury's verdict was based on the theory that the appellant wife was guilty of contributory negligence or that the accident was unavoidable. Wright v. Sniffin, 80 Cal.App.2d 358, 363–364, 181 P.2d 675." Accord: Masterson v. Pig'n Whistle Corp., 161 Cal.App.2d 323, 326 P.2d 918; Hoel v. City of Los Angeles, 136 Cal.App.2d 295, 310–311, 288 P.2d 989.

[2] That the giving of the instruction on contributory negligence at bar was highly prejudicial is apparent when it is recalled that plaintiff was not chargeable with the negligence of her driver, Seaborn, and the instruction on contributory negligence created an insoluble question of whether the verdict was based on defendant Bocian's negligence or some assumed negligence of plaintiff. In similar circumstances such an error in the instructions has been held to be prejudicial and reversible. See, Williamson v. Pacific Greyhound Lines, supra, 93 Cal.App.2d 484, 487, 209 P.2d 146; Weeks v. Raper, supra, 139 Cal. App.2d 737, 742, 294 P.2d 178; Kollert v. Cundiff, 50 Cal.2d 768, 771, 329 P.2d 897.

The judgment is reversed.

FOX, P. J., and HERNDON, J., concur.

Hearing denied; SCHAUER, J., dissenting.



169 Cal.App.2d 291

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Spencer FRENCH, Defendant and Appellant.

Cr. 2822.

District Court of Appeal, Third District, California.

March 31, 1959.

Defendant was convicted of the robbery in the first degree and from a judgment of the Superior Court, Sacramento County, Raymond T. Coughlin, J., the defendant appeals. The District Court of Appeal, Schottky, J., held that the evidence sustained conviction.

Judgment affirmed.

Robbery ⇐24(1)

Evidence sustained conviction of robbery in the first degree.

Hugh F. Melvin, Jr., Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Appellant above-named has appealed from the judgment entered after a jury found him guilty of robbery in the first degree. Appellant requested this court to appoint counsel to represent him, and this court appointed Mr. Hugh F. Melvin, Jr. of the Sacramento Bar. Mr. Melvin has informed this court that after a careful review of the record he has concluded that no meritorious grounds for appeal exist. Although no briefs have been filed, we have carefully reviewed the entire record.

It appears from the record that about 8:30 p. m., Sunday, December 30, 1956, two men walked into the Riverside Market in Sacramento. One of the men walked over to the check stand. The other, who was about six feet tall and had gray hair, was later identified at the trial as appellant. He walked over to the produce department where one of the proprietors, Benjamin Erhardt, was. He was carrying a gun which was described as smaller than a .45. He told Ben Erhardt to "Take it easy and nobody will get hurt." Ben Erhardt was forced to go to the check stand where he and his brother were compelled to remove the money from two cash registers. The two robbers then fled. The total amount taken in the robbery was $460. Several weeks later appellant was arrested. In the interim he had dyed his hair black or dark brown. Near where he was arrested was an automobile belonging to a Paul Isom in which was found a Belgian automatic similar to a .32 caliber and a pair of dark glasses. The gun was identified as the one used in the robbery, and the glasses were similar to those worn by the gunman.

The defense was an alibi. French testified that he and a Paul Isom and a Betty Johnson left the Welcome Grove Motel about 7:00 p. m. the evening of the 30th en route to Portland. They stopped at a restaurant south of Williams where they ate dinner. They then drove to Red Bluff where they stopped at a gas station. After leaving Red Bluff they made an incorrect turn and traveled some distance south on 99–E until French was aware of the error, and they then turned and drove to Redding, which they reached about midnight. They went to the Old Crow Bar where they had a few drinks. Isom then went to the Western Union office where he transacted some business, and then they registered at the Golden Eagle Hotel. The next morning they left for Portland where French had his hair dyed. French denied ever seeing the gun or the glasses.

In support of French's testimony the defense introduced a registration card of the Golden Eagle Hotel, dated December 30, 1956, which was signed by French and Isom. The desk clerk, however, testified that the parties had registered about 2:00 a. m. on the 31st. The practice of the hotel was not to change the date until 7:00 a. m. the following morning. The defense established that Isom sent a money order from the Western Union office sometime after 11:00 p. m. of the 30th. The clerk testified that the transaction took place about 1:30 a. m. There was also testimony from which the jury could have found that French was in a restaurant in Dunnigan about 8:00 p. m. and in Red Bluff about 10:00 p. m.

While the testimony presented by the appellant created a conflict, the testimony of Erhardt identifying appellant as the man who had the gun was in itself sufficient to sustain the verdict.

We are convinced that the appellant was ably defended, that he received a fair trial, that the jury was fully and correctly instructed, and that the evidence is sufficient to support the judgment.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

169 Cal.App.2d 112

BOGDANICH CONSTRUCTION COMPANY, a corp., Plaintiff and Cross-Defendant,

v.

Leonard SEMAS, Defendant, Cross-Complainant and Respondent,

Bogdanich Building Company, a corp., Cross-Defendant and Appellant.

Leonard SEMAS, Plaintiff and Respondent,

v.

BOGDANICH BUILDING COMPANY, a corp., Defendant and Appellant.

1 Civ. 18020.

District Court of Appeal, First District, Division 1, California.

March 26, 1959.

Action by construction company against construction superintendent for refund of that portion of advanced salary paid to superintendent over one-third of the net profits which was to be compensation of superintendent, who filed a cross-complaint against building company. From adverse judgment of the Superior Court, Santa Clara County, Ralph McGee, J., the building company appealed. The District Court of Appeal, Hanson, Justice pro tem., held that where contract between superintendent and building company and construction company provided that superintendent should receive as compensation 33⅓% of net profits from operation of business of construction company and that construction company should pay to superintendent $250 at end of each week but if payments exceeded 33⅓% of profits reimbursement of deficiency was required to be made to construction company by superintendent and officers of construction company drawing salaries in equal amounts, and payments to superintendent exceeded his share of profits, superintendent was required to repay all over that amount which he received and other officers were obligated to return same percentage of their salaries which superintendent was required to return out of his advancements.

Judgment reversed.

1. Corporations ⇐308(10)

Where contract between superintendent and building company and construction company provided that superintendent should receive as compensation 33⅓% of net profits from operation of business of construction company and that construction company should pay to superintendent $250 at end of each week but in event such payments exceeded 33⅓% of profits of company reimbursement of deficiency was required to be made to construction company by superintendent and officers of the construction company drawing salaries in equal amounts, and profits of company amounted to less than superintendent's 33⅓% share, he was required to repay all over that amount which he received and other officers were obligated to return same percentage of their salaries which superintendent was required to return out of his advancements.

2. Contracts ⇐155

In case of uncertainty in a contract, it is to be construed most strongly against the party who caused the uncertainty to exist.

Rankin, O'Neal, Luckhardt & Center, Maurice J. Rankin, San Jose, for appellant.

Machado, Feeley & Machado, John H. Machado, San Jose, for respondent.

HANSON, Justice pro tem.

The controlling question in this case, as we view it, is whether the trial court correctly interpreted the meaning of the language italicized in paragraph 6 of the contract (set forth below) entered into by and between Semas on the one side and Bogdanich Construction Company and Bogdanich Building Company on the other.

[1] The trial court found that Semas, through weekly advances, had been overpaid the sum of $13,338.70 in excess of his one-third share of the net profits of Construction Company but, by reason of the language italicized in paragraph 6, he was required to repay only one-fifth thereof. The paragraph reads as follows: "6. Construction shall pay to Semas $250 at the

end of each week of his employment, such payments to be on account of the compensation herein provided, and in the event such compensation shall be less than such weekly payments, reimbursement of the deficiency shall be required to be returned to Construction by Semas, *and officers of Construction drawing salaries, to reimburse in equal amounts.* All money paid by Construction to Semas as salary from November 2, 1953, to date, shall be applied to the credit of Construction under the terms hereof."

The material facts necessary to a decision on this point may now be stated. Bogdanich Building Company, a corporation, and Bogdanich Construction Company, a corporation, were two family corporations. Paul Bogdanich was president of and controlled both corporations. The family associates were officers of both. The Bogdanich Construction Company, a corporation, hereinafter referred to as Construction Company, or Construction, and the Bogdanich Building Company, a corporation, hereinafter referred to as Building Company or Building, were both engaged in commercial and residential construction, although Building Company was principally engaged in residential construction and Construction Company in commercial construction. Under the terms of a written contract of date June 23, 1952, Semas, respondent herein, was employed as a construction superintendent for Building Company. Under this agreement which, by its terms, was to run for a period of two years, it was agreed that a salary of $250 per week would be paid to Semas and in addition he was to receive 13% of the net profit of Building less the advance salary which had been paid to him. Until November 2, 1953, Semas continued to be employed by Building as superintendent of residential construction which employment, however, terminated as of November 2, 1953, when, through mutual agreement of the parties, he transferred to Construction as superintendent of commercial construction for that corporation. After the termination of Semas' employment as superintendent of Building, that company in payment of the percentages due gave him its promissory note dated January 2, 1954, for $17,000, payable ten years after date or upon the sooner termination of his employment by Construction Company. While Semas' transfer from Building Company to Construction Company was agreed to take effect as of November 2, 1953, and seems actually to have taken effect on that date, the written agreement containing the terms agreed upon by the parties was not signed until June 30, 1954. It is not clear whether the note mentioned above was delivered prior to June 30, 1954, or not. The June 30, 1954, contract which was signed by Semas and the two corporations, expressly provided that the Semas-Building contract of June 23, 1952, should terminate as of November 2, 1953, and, likewise, that the written agreement between the parties for the employment of Semas by Construction Company was to run from and as of the date of November 2, 1953.

The written contract between Semas on the one hand and Building Company and Construction Company on the other expressly provides that Semas is employed as general superintendent of commercial construction at a compensation of 33⅓% of the "*net profits*" from the operation of the "*business*" of Construction Company to be ascertained at the end of each fiscal year (March 1).

The contract also provides that either Semas, or Construction Company could terminate the contract upon 90 days notice. Such a notice was served upon Semas by Construction Company on September 27, 1954.

The trial judge recognized, and he so stated in his memorandum opinion, in construing the language emphasized above in paragraph 6, that, "It seems to be inescapable, if somewhat fantastic, that Semas is required to repay only a portion of his weekly salary." He nevertheless felt that the language used in paragraph 6 did not warrant any other conclusion than to hold Semas liable to repay only a certain fraction of the overpayment which he found had been made to him. And upon that con-

struction of the contract he determined that Semas had been overpaid through the weekly advancements of $250 the sum of $13,338.70 for the two fiscal periods; but, as stated, he was required to repay to Construction Company only a fraction thereof, the rest being repayable by the four officers of Construction Company who had received salaries from that corporation.

Building construes paragraph 6 to require that, in case of loss suffered by Construction in any one fiscal year, all "advances" paid to Semas were to be returned by him [to the extent of the deficiency]. Semas, on the other hand, contends that he was to return only a pro rata share enough to make up any *deficiency* up to the amount he received along with the officers of the corporation who drew salaries. That is, if four drew salaries Semas was to make up only one-fifth of the deficiency and each officer was to make up one-fifth; that if three drew salaries in any one fiscal year, then Semas was to make up one-fourth only and each officer was to make up one-fourth, and the court, as stated, so found. On this basis of computation, the court found that he had been paid for the two fiscal years $13,338.70 more than his one-third share of the profits and required him to repay $3,122.17 for the two fiscal years (his one-fifth share for the first fiscal year and his one-fourth share for the second fiscal year—there being four officers drawing salaries in the first fiscal year and three in the second). The court awarded judgment to Semas for the difference between $3,122.17 and the amount due on Building's $17,000 note or $13,877.83 from which judgment this appeal has been taken.

Turning now to the terms of the contract, we find that for the purpose of determining the 33⅓% of the net profits to which Semas was entitled, the contract expressly provides that none of the salaries paid to the officers of Construction during the first fiscal year (which had only four months to run) should be deducted in computing the net profits other than such salary as was paid to Anthony Bogdanich and in his case not to exceed the rate of $100 per week. Moreover, the advancements made to Semas were not to be deducted. With respect to the second fiscal year and each fiscal year thereafter the contract sets forth like provisions except that the salary payment to Anthony could be increased but not to exceed $250 per week. Another provision with respect to salaries is not here involved. Salaries actually paid to officers other than Anthony were not to be deducted and were not deducted in arriving at the net income. During the first fiscal year there were three such officers whose salaries were not deducted, that is to say, Paul, Jacobina, and Gregory Vistica. During the second fiscal year, there were only two officers who were paid salaries other than Anthony. It is of interest at this point to note that Jacobina, who was employed as a salaried officer during the first fiscal year, received for the four-month period November 1 to March 1 a salary totalling $433 but, by virtue of the construction given to paragraph 6 by the trial judge, she is required to repay the sum of $850, more than twice the amount of salary she received. That nothing of this character was contemplated by the parties would seem clear for such arrangement would be preposterous. In truth, the contract as interpreted would require the repayment by every officer who had received only $1 per fiscal year at the end of the two fiscal periods the sum of $3,122.17.

During the second fiscal year (it ran for 10 months when all connection between Construction and Semas was severed) the three officers who received salaries in that year received approximately $12,433 for the 10 months, but of this amount Anthony received $5,500 (and Semas the sum of $10,750 as advancements) while Paul and Gregory together received $6,933 or $3,466 each. Yet, these latter sums were not deducted from the net profits. It follows that while Semas received advancements in the two periods aggregating $15,000 he is charged with only one-fifth thereof, or $3,000, or 20%, while Gregory and Paul are each required to pay more than 50% of what they had received by way of salary. The illustrations above show the absurdity of con-

struing the contract in the manner that respondent would have us do.

Appellant contends: (1) "* * * that the provisions of paragraph 6 of the contract were for the purpose of requiring Semas to refund such moneys as he was advanced in excess of the share of the profits to which he was entitled. Otherwise the loss to the company would be increased by the amounts advanced to Semas and not repaid by him, to wit, $14,750.00"; and (2) "The provisions of paragraph 6 requiring reimbursement to the company obviously meant that such officer or officers as were paid salaries that affected the profit or loss of the venture, and there was only one, Anthony Bogdanich, should refund to the corporation such salary as he had received, and it was solely to the corporation that he owed this duty, and it would be unreasonable to so construe this provision as to require the one officer, Anthony Bogdanich, to repay to the corporation moneys which had been advanced to Semas. We respectfully submit that the trial Judge's application of this paragraph of the contract is contrary to its intent and purpose and untenable."

Respondent argues that the paragraph could not refer only to the salary paid to Anthony Bogdanich because of the use of the plural, to wit, "Officers of Construction" and "drawing salaries."

We think that a probable interpretation of this provision is that it meant, if there should have been profits from the enterprise but amounting to less than Semas' 33⅓% share, that Semas should have to repay all over that amount which he received, and the other officers (whose salaries like Semas' were not deducted from profits in determining net profits) would have to return the same *percentage* of their salaries which Semas would have to return out of his advancements. That is, if Semas were required by the terms of the contract to return 50% of what he has received, then the other officers would have to return an "equal amount," to wit, 50% of what they had received. This would account for the use of both the words "equal amount" and the plural and at the same time appear to be in accordance with the intent of the parties which was that Semas was to get one-third of the net profits.

The solution of the ambiguity created by the language used in paragraph 6 of the contract was not aided by any of the testimony of the parties and we think it is clear that the trial court was of the same opinion.

The comma after the name Semas in paragraph 6 is unquestionably intended to separate what Semas was to do in respect to his overpayment and what the officers were to do with respect to their salaries, i. e., to refund proportionately out of their salaries when such salaries had been deducted in computing net income. But, be that as it may, it cannot be said that the officers were to assume or pay any part of the overpayment which had been received by Semas.

Furthermore, we think that the use of the comma and the conjunction "and" prevents "Semas and officers of Construction" from being a double object of the preposition "by" immediately preceding the word "Semas"; that in fact the words do constitute an independent clause with the auxiliary verb "are" being understood before the infinitive "to reimburse." If it is an independent clause, there is no reason at all why it should have to be read as modifying the clause preceding it beginning with the word "reimbursement." If it were so construed, such construction would tend to support appellant's interpretation.

[2] Another contention made by the respondent deserves a word or two. He cites Pacific Lbr. Co. v. Industrial Acc. Comm., 1943, 22 Cal.2d 410, 422, 139 P.2d 892; In re Estate of Rule, 1944, 25 Cal.2d 1, 13, 152 P.2d 1003, 155 A.L.R. 1319, and Taylor v. J. B. Hill Co., 1948, 31 Cal.2d 373, 374, for the well known proposition that in case of uncertainty in a contract it is to be construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument.

In this case the contract was drawn by Gregory Vistica, an officer of Construction,

and consequently uncertainties should be construed in favor of respondent, provided the construction rendered is not absurd. (See 12 Cal.Jur.2d 330.) But here, as we think we have sufficiently shown, the construction contended for by respondent is absurd and cannot be sustained.

Judgment reversed.

PETERS, P. J., and BRAY, J., concur.



169 Cal.App.2d 63

A. T. DAVINROY, Plaintiff, Cross-Defendant and Respondent,

v.

W. C. THOMPSON and Opal Fern Thompson, his wife, Defendants, Cross-Complainants and Appellants.

Civ. 17993.

District Court of Appeal, First District, Division 2, California.

March 24, 1959.

Rehearing Denied April 23, 1959.

Hearing Denied May 20, 1959.

Action for real estate broker's commission allegedly earned in negotiating an exchange of real estate. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered judgment for plaintiff, and the defendants appealed. The District Court of Appeal, Kaufman, P. J., held that provision in written agreement for exchange real estate, that plaintiff broker represented the defendants and that commissions were to be settled and paid for outside of the escrow, established the fact of employment with certainty and was sufficient to satisfy the statute of frauds.

Affirmed

1. Brokers ⇐9

Provision in written agreement for exchange of real estate, that plaintiff broker represented the defendants and that commissions were to be settled and paid for outside of the escrow was not rescinded by escrow instructions providing that no agent's or broker's commission or other compensation was due or payable by the escrow holder or otherwise.

2. Brokers ⇐43(3)

Provision in written agreement for exchange of real estate, that plaintiff broker represented the defendants and that commissions were to be settled and paid for outside of the escrow, established the fact of employment with certainty and was sufficient to satisfy the statute of frauds. West's Ann.Civ.Code, § 1624, and subd. 5.

3. Brokers ⇐43(3)

The statute of frauds does not require that the writing contain all the terms of employment of real estate broker, and it is sufficient if the fact of employment is certain, and the contract need not state the amount of compensation to be paid. West's Ann.Civ.Code, § 1624, and subd. 5.

4. Brokers ⇐43(3)

Where the memorandum authorizing a broker to sell property required by the statute of frauds is established, an agreement for and the amount of a commission may be shown by parol. West's Ann.Civ. Code, § 1624, and subd. 5.

5. Husband and Wife ⇐25(6)

In action to recover real estate broker's commission for negotiating exchange of real estate for defendants, who were husband and wife, there was ample evidence to support the trial court's finding that the husband, who signed the writings, was acting as his wife's agent.

6. Husband and Wife ⇐21, 25(1)

A husband and wife may act as agent for one another.

7. Husband and Wife ⇐24, 25(6)

The agency of one spouse to act for the other spouse may be proved by circumstantial as well as direct evidence, and may

be shown by less evidence than in other kinds of agency.

8. Brokers ⇐43(1)

Where a broker spends his time and money for the benefit of a wife, assuming she has given proper authority to her husband to act as her agent, and she signs deeds and accepts the benefit of the completed transaction, the courts will not permit her to use the statute of frauds to deprive the broker of his commission. West's Ann.Civ.Code, § 1624, and subd. 5.

Leon H. Sorell, San Francisco, for appellants.

James D. Lucey, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

In this action for recovery of a real estate broker's commission earned in negotiating an exchange of real estate, defendants appeal from a judgment in favor of the plaintiff broker. The trial court found that the defendants entered into a written agreement of exchange with Charles W. Beeler about September 1, 1954; that this agreement was not rescinded; that pursuant to this agreement, the exchanges were completed and consummated through the City Title Insurance Company, acting as escrow; that plaintiff performed services for the defendants as a real estate broker at their written request and authorization in connection with the said agreement and consummation of the exchange; that the reasonable and agreed value of plaintiff's services was $30,000 which the defendants promised to pay, and of which amount defendants have paid $1,710.

Defendants challenge the sufficiency of the evidence to support the findings and the judgment, contending: that the written agreements provide that no broker's commission was to be paid to the plaintiff; that testimony to establish an oral agreement was inadmissible as it was barred by the Statute of Frauds, (Civil Code, § 1624); that therefore, the finding that there was an agreement to pay a commission is unsupported by the evidence, and that neither of the writings was signed by defendant Opal Fern Thompson.

The exchange agreement dated September 1, 1954, reads in part as follows: "The real estate brokers in this transaction are recognized as A. T. Davinroy, representing parties of the first part, and Hubert Rice, representing party of the second part. Commissions are to be settled and paid for outside of the escrow." The escrow instructions dated September 10, 1954, provide in part as follows: "3. That no agent's or brokers' commission or other compensation are due or payable by the escrow holder or otherwise." Both instruments are typed out for W. C. Thompson and Opal Fern Thompson, his wife, and signed only by W. C. Thompson.

[1] Defendants argue that the escrow instructions rescind the provision quoted above in the exchange agreement. There is, however, no evidence to support this contention. The trial court correctly concluded that the agreement of September 1, 1954 was never rescinded.

[2–4] Defendants next argue that the agreement of September 1, 1954 is not a sufficient writing to satisfy Civil Code, § 1624, subd. 5. The portion quoted above, however, establishes the fact of employment with certainty. The statute does not require that the writing contain all of the terms of employment. It is sufficient if the fact of employment is certain, and the contract need not state the amount of compensation to be paid. Cramer v. Lee Wa Corporation, 109 Cal.App.2d 691, 241 P.2d 550; Bruner v. Van's Markets, 103 Cal. App.2d 135, 229 P.2d 56; Lathrop v. Gauger, 127 Cal.App.2d 754, 274 P.2d 730. Where the memorandum authorizing a broker to sell property required by the Statute of Frauds is established, an agreement for and the amount of a commission may be shown by parol. Herring v. Fisher, 110 Cal.App.2d 322, 242 P.2d 963. The trial court therefore properly admitted oral

evidence as to the agreement between the plaintiff and the defendants, and its conclusion as to the existence of the agreement and the amount of compensation agreed upon is supported by the evidence.

[5–8] Defendant's final contention on appeal is that as neither of the writings was signed by defendant Opal Fern Thompson, there is no evidence to support the finding that the plaintiff performed services for her as a real estate broker and at her written request and authorization. There is ample evidence to support the trial court's finding that Mr. Thompson was acting as his wife's agent. He testified that his wife knew about and consented to the contemplated exchange. Her signature appeared on the deed and some of the escrow instructions. Mrs. Thompson testified that her husband handled the transaction for her and whatever he did was satisfactory to her. A husband and wife may act as agent for one another. Such agency may be proved by circumstantial as well as direct evidence, and may be shown by less evidence than in other kinds of agency. Stegeman v. Vandeventer, 57 Cal.App.2d 753, 135 P.2d 186. Where a broker spends his time and money for the benefit of a wife, assuming she has given proper authority to her husband to act as her agent, and she signs deeds and accepts the benefit of the completed transaction, the courts will not permit her to use the Statute of Frauds to deprive the broker of his commission. Laack v. Dimmick, 95 Cal.App. 456, at page 467, 273 P. 50, at page 54.

In view of the foregoing the judgment finds support in the record before us and must be affirmed.

Judgment affirmed.

DRAPER, J., concurs.

DOOLING, Justice.

I concur. The opinion disposes fairly of all questions raised in appellants' opening brief. In a brief in letter form filed by appellant by leave of court in lieu of oral argument additional points are presented for the first time. Appellant should present all points upon which he relies for reversal in his opening brief and we are fully justified in refusing to consider the other arguments so tardily made. Monk v. Ehret, 192 Cal. 186, 190, 219 P. 452; Grayson v. Grayson, 132 Cal.App.2d 471, 472, 282 P. 2d 565; 4 Cal.Jur.2d 324.



Paul W. YARROW and Edna Yarrow, his wife, Plaintiffs and Appellants,

v.

STATE of California, Defendant and Respondent.*

Civ. 17835.

District Court of Appeal, First District, Division 1, California.

March 18, 1959.

Rehearing Granted April 17, 1959.

Action for injuries sustained by plaintiffs when their automobile went out of control as the driver thereof was endeavoring to avoid a situation which the public employees working on the highway had created. The Superior Court, San Mateo County, Edmund Scott, J., granted defendant a new trial after a jury verdict for plaintiffs and the plaintiffs appeal. The District Court of Appeal, St. Clair, J. pro tem., held that the order granting a new trial was granted because of insufficiency of the evidence to show negligent operation of a vehicle under § 400 of the Vehicle Code and that the appellate court had the power and duty to reverse the order granting a new trial because of error in interpretation of the applicable law and that the statute did not give the state immunity from suit for negligent operation of vehicles engaged in work on the surface of a highway.

Order granting a new trial reversed with instructions.

Opinion, 332 P.2d 857, vacated.

* Opinion vacated 343 P.2d 359.

1. Courts ⇐117

A trial court's minutes are presumably a trustworthy chronicle of events as they transpired at trial and are ordinarily controlling as to what was done there.

2. Courts ⇐117

It is the minute order of the court that constitutes the action of the court.

3. Judgment ⇐524

An order of a court is subject to the same rules of interpretation as any other written instrument.

4. Judgment ⇐524

If the language of an order is in any degree uncertain, reference may be had to the circumstances surrounding.

5. Appeal and Error ⇐717

A trial judge's opinion cannot be used to impeach his order.

6. Appeal and Error ⇐662(1)

An appellate court has no power to disregard the minute order of the trial court.

7. Appeal and Error ⇐717

Appellate courts will use the trial court's written, separate opinion to interpret his order under certain circumstances, but such opinions cannot be used to impeach the order.

8. Appeal and Error ⇐662(2)

The entire order appealed from is to be used in interpreting it and if the order contains a limitation in the ultimate order granting a new trial, the legality of that limitation is properly before the appellate court.

9. Appeal and Error ⇐662(1)

Minute order of the trial court indicated that the court granted a new trial because of insufficiency of evidence to show negligent operation of a vehicle under § 400 in view of § 453(b) as such statutes were interpreted by the trial court. West's Ann.Vehicle Code, §§ 400, 453(b).

10. Appeal and Error ⇐1169(9)

If trial court erred in interpretation of the applicable law, the appellate court had the power and the duty to reverse an order granting a new trial.

11. Statutes ⇐197

The word "and" as used in a statute means with, along with, together with or joined with.

See publication Words and Phrases, for other judicial constructions and definitions of "And".

12. Statutes ⇐158

Repeals by implication are never favored nor can such rule be invoked where the interpretive rule of the Civil Code applies. West's Ann.Civ.Code, § 23.4.

13. Statutes ⇐211

The title of an act creating or amending a code is not excluded as a constructional aid by § 7 of the Vehicle Code. West's Ann.Vehicle Code, § 7.

14. Statutes ⇐211

The marginal aids that are included in the act passed by the Legislature are available as a constructional aid for the interpretation of statutes.

15. Automobiles ⇐187

Vehicle Code section requiring public employees to obey the Code but making provisions inapplicable to public employees engaged in work upon surface of highways applies to and concerns only public employees operating teams, motor vehicles and equipment and does not give the state immunity from a suit for negligent operation of vehicles engaged in work on the surface of a highway. West's Ann.Vehicle Code, §§ 31, 32, 400, 401, 453(b), 454.

16. Automobiles ⇐187

Under the statute requiring public employees to obey the Vehicle Code but making the provisions inapplicable to public employees engaged in work upon surfaces of highways, the Legislature has not spelled out what is not negligent operation of motor vehicles working on a highway and the state is liable for negligent operation of publicly owned teams, motor vehicles and other equipment while actually engaged in work on the surface of the highway.

West's Ann.Vehicle Code, §§ 400, 401, 453 (b).

17. Automobiles ⇐1

A bulldozer is a "motor vehicle" within the provisions of the Motor Vehicle Code. West's Ann.Vehicle Code, §§ 31, 32, 400.

See publication Words and Phrases, for other judicial constructions and definitions of "Motor Vehicle".

18. Automobiles ⇐245(2)

In action for injuries sustained by plaintiffs when their automobile went out of control as driver thereof was endeavoring to avoid a situation which the public employees working on the highway had created, evidence of negligence of the employees was sufficient for the jury. West's Ann.Vehicle Code, §§ 400, 453.

Carr, McClellan, Ingersoll & Thompson, Burlingame, for appellants.

Stanley Mosk, Atty. Gen., John E. Fourt, Deputy Atty. Gen., Robert E. Reed, Robert F. Carlson, Sacramento, Ropers & Majeski, Redwood City, for respondent.

ST. CLAIR, Justice pro tem.

Plaintiffs appeal from an order granting a new trial to defendant State of California. Judgments on the verdicts in favor of plaintiff Edna Yarrow in the amount of $13,534.38 and plaintiff Paul Yarrow in the amount of $772.06 had been entered. Thereupon the defendant moved for a new trial upon all the statutory grounds. The court granted the motion for new trial. The minute order from which the appeal was taken ended with the statement that it was on the ground of insufficiency of the evidence.

Plaintiffs furnished us with a statement of facts and advanced the contention that they were not disputed. Defendant does not dispute the same but sets forth some additions. Plaintiffs do not challenge the additions.

Statement of facts.

Plaintiffs Yarrow and wife were driving westerly on state highway 198 in the afternoon of September 6, 1955. At a point some 25 miles west of Coalinga, said highway curves rather sharply to the right and cuts through a hill. This cut left banks sufficiently high to hide vehicles in the cut from westbound travelers, and the highway inclines to a crest in the cut and then declines towards the west as it leaves the cut or defile. The pavement in this cut is 20 feet wide with a white line down the middle and the gravel shoulders are five feet wide from the edges of the pavement to the toe of the banks. The cut is in an area designated as Priest Valley Maintenance District 5 by the State Highway Department.

A three man crew, foreman Fairbanks and employees Clayton and Folkes, were building up and enlarging the gravel shoulder on the southerly side of the highway just beyond the west end of this cut, and at the time of this accident, Fairbanks was sitting in a dump truck loaded with dirt fill, on the southerly shoulder in the cut, waiting to unload, while Clayton was backing the bulldozer, fitted with a 10 ft. 6 in. scraper blade, out of the truck's way and onto the pavement. Folkes had been loading the trucks at a point about ¾ of a mile east along 198, but at the time in question he was driving the loader towards the cut, having finished his job with the load in Fairbanks' truck.

There was a "Men and Equipment Working" sign at the edge of the highway some 900 to 1200 feet east of the site of the accident, and an empty, unattended highway truck was parked near this sign. There was a similar sign posted at the site of the loading operations ¾ of a mile east, but no sign closer to the cut than 900 feet.

As plaintiff Yarrow drove into this combination curve-incline-cut, from the east, he had concluded that whatever work was indicated by the sign had been finished because of the unattended truck and the distance between the last sign and the cut.

As the plaintiff entered the cut, he saw the bulldozer 60 or 70 feet ahead of him in his lane, as it appeared to him on this curve and over the crest of the incline, and he saw the highway truck parked opposite the bulldozer on the left shoulder, effectively blocking the highway, with the narrow shoulders and steep banks on both sides. Fairbanks and Clayton both testified that the end of the 10 ft. 6 in. blade on the bulldozer was about a foot over the white center line.

Plaintiff Yarrow immediately applied his brakes and pulled to the right but felt the car skidding on gravel or dirt on the pavement, and then with the right wheels on the gravelled shoulder, he lost control of the car, struck the bank and rolled over. Both plaintiffs were injured, Mrs. Yarrow going out the right front door as it flew open.

Clayton, State Highway Department employee, testified that he was in the act of backing the bulldozer out on the pavement to let Fairbanks drive the truck out on the new shoulder to unload when he saw the plaintiff's car coming; that he was 8 or 10 feet east of the end of the cut; and when he saw the plaintiff coming, he reversed directions and "got ahead, right quick, to give him more room"; and tried to wave him to stop. He testified the dump truck was 5 or 6 feet wide; and that he had flagged down an eastbound car to stop until he had completed his maneuver; but there was no one posted at the east end of the cut to warn westbound vehicles such as plaintiff; and that he reversed his dozer in a hurry because, "I just wanted to get more room; the way he was coming, I thought I had better run ahead to keep him from hitting into our machinery." Clayton further testified that the maximum speed of the dozer was five miles an hour in high gear and that he moved westerly about 10 feet, leaving the dozer still on the pavement; but didn't "pull out" to try and clear the pavement.

Fairbanks, the foreman, testified that the box on his truck was 5½ feet wide or possibly a few inches wider; that they had hauled 50 yards of dirt to the new shoulder through this cut that day; that when the dozer had backed up out of his view to the east, "all at once, the cat seemed to jump forward * * * and I could tell, by the expression on his face [Clayton], that something was wrong." He then jumped out and saw Mrs. Yarrow sitting on the pavement, and the dozer had stopped five or six feet in front of his truck with the scraper blade still "some 10 to 12 inches over the white line," and wholly on the pavement. Mr. Fairbanks told Mr. Yarrow that "the job didn't warrant a flagman," because there was "[n]o work on the travelway." He swept off the pavement the night of the accident, and the dump trucks were "old" and he was not sure they didn't leak.

Defendant's additions to and comments on the above facts.

The blade of the bulldozer obstructed at most one foot of the westbound lane. In other words, most of the westbound lane (nine out of ten feet) and all of the shoulder next to that lane (five feet) were available for plaintiff to go through.

There was no dirt or gravel on the highway at or near the point where the accident occurred. Mr. Fairbanks did sweep the highway after the accident but only to remove some broken glass that apparently came from plaintiff's car.

Although plaintiff claims that he could not see the bulldozer until he was 60 or 70 feet away from it, he probably could have seen it from a distance of 300 or 400 feet.

Although he admittedly had seen at least one of the two signs posted by defendant and although he unquestionably had just passed the loader on the highway, plaintiff entered the cut at a speed of 60 miles per hour.

Although plaintiff makes much of the fact that an eastbound automobile was flagged by the bulldozer operator immediately before the accident and implies that defendant took special steps for the protection of eastbound traffic which it did not take for the protection of westbound traf-

fic, the evidence simply shows that Mr. Clayton (the operator) flagged the eastbound automobile from his bulldozer in exactly the same way as he attempted to flag plaintiff as soon as he saw him approaching the cut.

The order granting a new trial.

Plaintiffs contend that the learned trial judge did not grant the new trial on the ground of insufficiency of the evidence but on the ground that the verdicts were contrary to law and that he abused his discretion in so doing.

Defendant just as earnestly contends that because the order from which an appeal was taken ends up with the magic words "Motion for new trial is granted upon the ground of insufficiency of the evidence to sustain or justify the verdict" this court is precluded from examining any further into the order, or its effect.

The trial judge wrote and filed an opinion, which is part of the record before us. On brief, both parties seemed to assume that the applicable rule was that an opinion rendered by the trial judge cannot be used to impeach an order granting a motion for a new trial. Stone v. Los Angeles County Flood Control Dist., 81 Cal.App.2d 902, 185 P.2d 396.

Plaintiffs agree that such a rule exists, but claim to be within an exception, to wit, that an opinion can be used as an aid in the interpretation of an uncertain decision or the discovery of the grounds thereof, either for the purpose of sustaining it or reversing it. 3 Witkin, California Procedure, pages 2234–2237.

An examination of the record indicates an unusual situation. As we have said, the trial judge wrote and filed an opinion. *He then repeated the entire opinion in the minute order from which this appeal was taken.*

The notice of appeal contains the wording amongst others, that the appeal is "from the whole of said Order." The minute order, *not the opinion,* reads:

"Minutes Civil and Criminal, Department No. 2 Vol. 90 Page 433

"(Title of Court)

"April 5, 1957

"Present: Hon. Edmund Scott, Judge

"70821 (Title of Cause)

"Motion for a New Trial (Heretofore submitted)

"Plaintiffs admit that if they can recover, the recovery must be under Section 400 of the Vehicle Code

"Section 400 of the Vehicle Code waives the common law immunity of the State and Municipal bodies for damages because of negligence of public employees; but limits such waiver to damages occasioned by the operation of vehicles.

"In our opinion, Sections 400 and 453 must be read together. Section 453B exempts public employees and '—Motor Vehicles and other equipment, while actually engaged in work upon the surface of the highway, etc.' from the provisions of the Vehicle Code.

"In our opinion, the Section shows no intention by the Legislature to exempt from the provisions of the Vehicle Code not only public employees, but the public employer.

"The evidence is clear that the State employees were engaged in work upon the surface of the highway and were operating motor vehicles. Therefore plaintiffs must prove some negligence in the operation of motor vehicle not arising from a violation of a Section of the Vehicle Code, in order to recover against the defendant, State of California. In our opinion, the evidence does not show any such negligence. Plaintiffs suggest that State Employees were negligent in not waving a warning to plaintiffs, as was done to a vehicle approaching from the west, or that they were negligent in not sweeping loose dirt from the surface of the highway.

"Perhaps such omissions were acts of negligence, but we cannot see how they constitute any part of the operation of a motor vehicle, as required by Section 400.

"Motion for judgment notwithstanding the verdict is denied.

"Motion for new trial is granted upon the ground of insufficiency of the evidence to sustain or justify the verdict.

"Done in open court this 4 day of April, 1957.

"Edmund Scott, Judge."

[1] A trial court's minutes are presumably a trustworthy chronicle of events as they transpired at the trial, and are ordinarily controlling as to what was done there. Smith v. Smith, 115 Cal.App.2d 92, 251 P. 2d 720.

[2] It is the minute order of the court that constitutes the action of the court. Whitney v. Northwestern Pac. R. R. Co., 39 Cal.App. 139, 178 P. 326; Fechtner v. Costa, 16 Cal.App.2d 691, 61 P.2d 473; Birch v. Mahaney, 137 Cal.App.2d 584, 290 P.2d 579.

[3] The rules governing the interpretation of orders, vis-à-vis judgments are well set. An order of a court is subject to the same rules of interpretation as any other written instrument. Maxwell v. Perkins, 116 Cal.App.2d 752, 255 P.2d 10, citing Ex parte Ambrose, 72 Cal. 398, 14 P. 33. To the same effect, see Gardner v. Rich Mfg. Co., 68 Cal.App.2d 725, 158 P.2d 23 and Roraback v. Roraback, 38 Cal.App.2d 592, 101 P.2d 772.

[4] There is a collateral rule, running through all the last cited cases, commencing with Ex parte Ambrose, supra (1887), to the effect that if the language of the order be in any degree uncertain, then reference may be had to the circumstances surrounding. In Gardner v. Rich Mfg. Co., supra, quoting from Roraback v. Roraback, supra, 68 Cal.App.2d at page 740, 158 P.2d at page 31, the court said: "In such circumstances the statement of the court in Roraback v. Roraback, 1940, 38 Cal.App.2d 592, at page 596, 101 P.2d 772, is pointedly applicable. It is there said: 'The true measure of an order, however, is not an isolated phrase appearing therein, but its effect when considered as a whole. [Citing cases.] In construing orders they must always be considered in their entirety, and the same rules of interpretation will apply in ascertaining the meaning of a court's order as in ascertaining the meaning of any other writing. If the language of the order be in any degree uncertain, then reference may be had to the circumstances surrounding, and the court's intention in the making of the same. [Citing cases.]' Applying this rule to the circumstances surrounding the making of the order and the action of the court pursuant thereto it is apparent that it was the court's intention to set aside the findings of fact, conclusions of law and judgments and to decide the cases upon all the evidence, including that which had been received upon the cases being re-opened, for the plaintiffs."

[5] The "circumstances surrounding" in the instant case are that the learned trial judge did *not* merely file his opinion but he went one step further and set forth his statements of fact and reasoning on which he explained and qualified the ultimate finding. The rule that the trial judge's *opinion* cannot be used to impeach his *order* is long established and well known. One can only conclude that the trial court, having filed both, desired to have the basis for his decision before this court in the order itself, if an appeal should be taken.

[6] We come back to the question of whether or not this court should consider the minute order appealed from by its four corners, or whether we are limited to the last paragraph thereof. Preliminarily, it should be noted that this court has no power to disregard the minute order of the trial court. Govea v. Superior Court, 26 Cal. App.2d 27, 78 P.2d 433.

Again preliminarily, we should clarify what the plaintiffs seek to do, insofar as the order itself is concerned.

Plaintiffs cite Long v. Newlin, 144 Cal. App.2d 509, 301 P.2d 271, 272. There the court entered an *order* reading: "'the motion of defendant Rhae E. Foust for a new trial herein, and the motion of defendants George E. Newlin and J. C. Theriot for a

New Trial herein heretofore submitted July 22, 1955, *are granted upon the grounds of insufficiency of the evidence to show that it was not necessary to have an accounting.'"*

It would appear that plaintiff's position, here, is that the order appealed from is, on its face, expressly limited to the ground of insufficiency of the evidence to support a finding or verdict of negligent operation of a motor vehicle not arising from a violation of a section of the Vehicle Code.

There is some confusion in the cases and in this case occasioned by using, interchangeably, three separate lines of authority. One is definitely not involved here, to wit: the use of oral opinions of the trial judge in interpreting his orders, where the reasons set forth furnish the basis of the court's action. See Coakley v. Ajuria, 209 Cal. 745, 290 P. 33 and In re Oster, 135 Cal. App.2d 769, 287 P.2d 859.

Another line of cases is where there is a written opinion of the trial judge and an attempt is made to use the opinion to interpret the order. This rule is applicable here, presumably because the defendant relies on one of the leading California cases on the point, to wit, Stone v. Los Angeles County Flood Control Dist., supra, 81 Cal.App.2d 902, 185 P.2d 396.

[7] There appears to be no question that the appellate courts will and do use the trial court's written, separate opinion to interpret his order under certain circumstances. See Stone v. Los Angeles County Flood Control Dist., supra; Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273; Smith v. Fetterhoff, 140 Cal.App. 2d 471, 295 P.2d 474.

However, there is no question but that all of last cited cases, and others where the court uses the written opinion of the trial judge to interpret his separate order, also accept the corollary that such separate opinion cannot be used to *impeach* the order. Many of the cases cited in the previous paragraph are examined and followed in Oldis v. La Societe Francaise, 130 Cal.App.2d 461, 279 P.2d 184.

It is clear that the plaintiffs can neither seek nor find solace in either of the two lines of cases just examined, i. e., as exemplified by Coakley v. Ajuria, supra, 209 Cal. 745, 290 P. 33 (oral opinion of trial judge), or as by Stone v. Los Angeles County Flood Control Dist., supra, 81 Cal.App.2d 902, 185 P.2d 396 (written opinion separate from the order appealed from).

We now turn and examine a line of cases that bear directly on the problem of the instant case, to wit, where the order appealed from contains recitals that bear, or if used, would bear, on the interpretation of the order.

In Mathews v. Mathews, 49 Cal.App. 497, 193 P. 586, there had been an award of alimony in the interlocutory decree.

A final decree was duly entered but it was silent on the subject of maintenance of alimony. Both parties made appropriate motions. The trial court made the following order: " 'Payment of alimony provided in the interlocutory decree herein was not carried into the final decree and hence alimony herein cannot now be collected.' " 49 Cal.App. at page 499, 193 P. at page 586. At page 501 of 49 Cal.App., at page 587, 193 P. the appellate court said: "This appeal is prosecuted from the special order of the trial court above quoted. The proceeding was instituted by defendant's motion. The court did not grant such motion, but made an order which shows by its very terms that it was based upon the proposition that a provision for the payment of alimony in an interlocutory judgment of divorce cannot be enforced unless it is carried into the final decree. Such is not the law. The trial court's order was erroneously made, and is reversed."

At the oral argument, plaintiffs cited In re Estate of Baird, 198 Cal. 490, 246 P. 324. The opinion in 198 Cal. 490, 246 P. 324, was on the fourth appeal in re the Estate of Baird and a great deal revolved around what was, or was not, the law of the case. We permitted the defendant to file written comments on the Baird case. Therein the defendant concedes that in the Baird case

the Supreme Court did reverse an order granting a new trial for insufficiency of the evidence (and, the defendant asserts, other reasons) and argues the case is not controlling here.

It is difficult to assess the contribution of the Baird case to the rule now under discussion. However, as is perfectly clear at page 502 et seq. of 198 Cal., 246 P. 324, the Supreme Court in the Baird case did use the recitals in the trial court's order, other than the ultimate recital of granting a new trial for insufficiency of the evidence, to interpret what the trial court had done.

Lincoln v. Superior Court, 22 Cal.2d 304, 139 P.2d 13, was an application for a writ of mandate to force a trial court, in a divorce proceeding, to grant a hearing (or a further hearing) in an order to show cause. The court said: "After receiving the evidence of the parties, as above related, the superior court made an order which is reflected in its minutes as follows: 'Order to Show Cause re Alimony Pendente Lite, Costs, Attorney's Fees and Restraining Order *comes on for hearing:* plaintiff is present with her attorney, Roger Macrhetti, and defendant is also present *with his attorney, Jerry Giesler, who appears specially on the Motion to Quash.* Defendant's Motion to Quash *and Dismiss* is granted.'" 22 Cal.2d at page 308, 139 P.2d at page 15.

The situation was rather confused but in 22 Cal.2d at page 309, 139 P.2d at page 16, the court said: "However, by reason of both the form of defendant's motion to quash and the language of the court's order, the action actually taken by the court is confusingly portrayed. But the fact remains that the court did exercise jurisdiction in the premises when it (1) issued the order to show cause, (2) conducted the hearing thereon, receiving and considering defendant's evidence as to the Virginia court suit, as well as plaintiff's affidavit and her complaint, and (3) entertained the motion for and made its order dismissing the proceeding."

The applicability of the Lincoln case is that the Supreme Court did use all four corners of the trial court's order to interpret the trial court's action.

Bridgford v. Sawyer, 105 Cal.App.2d 631, 234 P.2d 95, was an action for damages for personal injuries sustained when an automobile overturned as a result of the flooding of a highway. The order granting the defendant irrigation district a new trial was affirmed. The court said:

> "Appellants' principal contention is that the order granting a new trial does not specify insufficiency of the evidence to justify the verdicts within the meaning of section 657 of the Code of Civil Procedure, both because it was not the 'usual unequivocal order' and because a reading of the order as a whole demonstrates that insufficiency of the evidence was not the true basis of the order.
>
> "The written order granting the new trial contained a short discussion by the court on some aspects of the case and concluded with these two sentences: 'For the foregoing reasons the Court is of the opinion that the evidence is insufficient to justify the verdict of the jury and for that reason is against the law. It Is, Therefore, Ordered that the verdict of the jury in this case be set aside and the defendant, Merced Irrigation District is hereby granted a new trial.'
>
> "There can be no question but that the import of the language quoted from the order was that the basis of granting the new trial was insufficiency of the evidence." 105 Cal.App.2d at pages 632–633, 234 P.2d at page 97.

While the recitals of the trial court are not given, it is clear that the appellate court reviewed the recitals and used them to interpret the ultimate recital that "the evidence is insufficient to justify the verdict of the jury."

It is true that the court in the Bridgford case goes on to discuss the rule as to whether or not the opinion of the trial court can be used to impeach the ultimate order. Although it would not appear to have been

necessary, in the light of the above quoted language, the court cited Diaz v. Shultz, 81 Cal.App.2d 328, 183 P.2d 717, and Stone v. Los Angeles County Flood Control Dist., supra, 81 Cal.App.2d 902, 185 P.2d 396. As we have seen, the Stone case is one of a separate written opinion. The Diaz case comes within the first group cited above, to wit, oral statements of the court cannot be used to impeach the ultimate order.

Boling v. Wood, 161 Cal.App.2d 381, 327 P.2d 65, was an action for damages for personal injuries. There was a square conflict between plaintiffs and defendants as to the existence of a roll of roofing paper which plaintiffs claimed had struck Mrs. Boling. Defendant put in certain evidence from which the jury could infer that plaintiffs had conjured the roll out of thin air.

The court said:

"In rebuttal, appellants called two witnesses to rebut the inference of fabrication. The issue on appeal revolves around the receipt in evidence of the testimony of one of them. A Mr. Ludy testified, over objection, that a day or so after the accident he met with his fellow worker, Warren Boling, and in a conversation that ensued had been told by him that his wife had suffered an accident in which a roll of roofing paper had fallen on her through the skylights over their living room. Another witness testified that shortly after the accident she had received a letter from Mrs. Boling stating that she had been hit on the head with a roll of roofing paper, and that her landlord, while roofing the house, had let it drop through two skylights.

"A motion for a new trial was made and was granted. We quote the memorandum and order granting new trial: 'In my opinion there was not sufficient foundation for the admission of the statement by Mr. Boling to the witness Ludy. The only party as to whom the direct charge of fabrication could be leveled was not shown to be present and did not participate in the conversation. We assume the court referred to Mrs. Boling as the only party to whom the direct charge of fabrication could be leveled. It was, therefore, pure hearsay and not competent under the rehabilitation rule. * * * The motion for new trial should be granted and it is so ordered.'" 161 Cal.App.2d at page 383, 327 P.2d at page 67.

The order granting the new trial was reversed. The appellate court used the recitals of the trial judge to interpret his ultimate action. Because his recitals set forth an incorrect theory of the law and hence an erroneous basis or reason for the order, the ultimate order granting the new trial was reversed.

[8] In view of the above discussion it would appear that the entire order appealed from is to be used in interpreting the same. Also, that if the order contains a limitation in the ultimate order granting a new trial, the legality of that limitation is properly before this court.

[9] Once we examine the order in question throughout its four corners, it is perfectly clear that there is a limitation, i. e., the court granted a new trial because of the insufficiency of the evidence to show negligent operation of a vehicle under section 400 of the Vehicle Code, in view of the provisions of section 453(b) of the same code, as the two sections, singly and together, were interpreted by the trial court.

[10] We hold that if the trial court erred in its interpretatoin of the applicable law, we have the power and it would be our duty to reverse the order granting a new trial.

Does section 453(b) give the state (vis-à-vis its employees) immunity from suit for the negligent operation of vehicles engaged in work on the surface of a highway?

Section 400 of the Vehicle Code reads in part as follows: "The State * * * is responsible to every person who sustains any damage * * * as the result of the negligent operation of any * * * motor vehicle by an * * * employee * * *."

The section goes on to give the state the right of subrogation against any such employee.

Section 453 of the Vehicle Code reads as follows:

"Public Officers and Employees to Obey Code. (a) The provisions of this code applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles while engaged in the course of employment by this State or any political subdivision thereof or any municipal corporation or district therein including authorized emergency vehicles subject to those exemptions granted such authorized emergency vehicles in this code.

"(b) The provisions of this code shall not apply to public employees and publicly owned teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway, or work of installation, removal, repairing or maintaining traffic signs, signals or other traffic control devices, but shall apply to such persons and vehicles when traveling to or from such work.

"(c) The provisions of this division of the code shall not apply to the duly authorized representatives of any public agency while actually engaged in performing any of the work described in subdivision (b) hereof but shall apply to such persons when traveling to and from such work. (Stats.1935, c. 27, p. 163, § 453, as amended Stats. 1937, c. 69, p. 167, § 1; Stats. 1947, c. 897, p. 2095, § 1; Stats.1951, c. 690, p. 1902, § 1.)"

The state contends here and in the trial court, and the trial judge agreed, that said section 453, or at least subsection (b) thereof shows an intention on the part of the Legislature to exempt from the provisions of the Vehicle Code not only public employees but the public employer also. To the defendant State the situation is very simple, as set forth in its brief:

"Since the bulldozer was actually engaged in work upon the surface of the highway at the time of the accident (see section 81 of the Vehicle Code) and since section 400 is one of the 'provisions of this code' to which section 453 (b) refers, it necessarily follows (1) that section 400 is inapplicable in this case and (2) that plaintiff cannot recover.

"In other words, the State waived its sovereign immunity in connection with the operation of motor vehicles generally (section 400) but it did not waive that immunity in connection with the operation of a motor vehicle actually engaged in work upon the surface of a highway (section 453 (b))."

A study of sections 400 and 453 indicates that the matter is not as simple and clear cut as the defendant contends. In fact, the plaintiffs just as vigorously contend that there is a conflict between the two sections. Certainly the trial judge felt that a search for legislative intent was needed and involved. To this we agree.

As we turn to subsection (b) of section 453 to see if there is any internal evidence therein as to the legislative intent, the first thing that is apparent is that there is no mention of public agencies in said subsection.

If the subsection read "The provisions of this code shall not apply to public employees * * * while actually engaged in work upon the surface of a highway * * *" it would be no different from section 454 (referring to drivers of authorized emergency vehicles) i.e., it refers to employees only and not to the employer. We will refer later to the case holding that while section 454 relieves the employee of liability, it does not relieve the governmental unit that is the employer.

It has been suggested that it is the addition, in the subsection of "* * * the publicly owned teams, motor vehicles and other equipment * * *" that shows a legislative intent to have the subsection apply to the employer. It is quite true that motor vehicles cannot be sued; if one reads the subsection in the following manner, "The provisions of this code shall not apply to * * * publicly owned * * * motor vehicles * * *," one can argue that it must apply to the owner of the vehicle because of the inanimate and nonmobile nature of a vehicle, by itself.

The last clause of the sections reads "* * * but shall apply to such persons and vehicles when traveling to or from such work." It is obvious that, here, the reference is to the employee operating the vehicle to and from work. The use of "such persons" in an operating capacity would point strongly to the fact that, earlier in the subsection the Legislature was talking about "public employees" in their capacity or function of operating "the publicly owned * * * motor vehicles * * *." It is interesting to note that the defendant in the quotation from its brief, supra, apparently assumes this.

Another piece of internal evidence is the use of the word "and" between "public employees" and "publicly owned * * * motor vehicles."

[11] Webster's New International Dictionary, Second Edition, and the cases point to the connotation of addition and connection between two classes (as in this case) connected by the word "and." See In re Estate of Harker, 88 Cal.App.2d 6, 198 P.2d 51. Other cases stress the meaning "with," "along with" and "together with." Heald v. City of Cleveland, 27 Ohio Dec. 435, 19 Ohio N.P.,N.S., 305. Other meanings are "together with" and "joined with." Business Men's Building & Loan Ass'n v. Tumulty, 180 A. 772, 13 N.J.Misc. 638.

Section 400 is a formal and express waiver of sovereign immunity insofar as negligent operation of motor vehicles is concerned. The section was passed as section 1714½ of the Civil Code, in 1929. It has remained unchanged since that time, except for the addition of the insurance fund and, at the time it was put in the Vehicle Code, the dropping of the first word in the statute, to wit, "Hereafter" and the change of words "shall be" in the fifth line to "is." It does not seem probable that the Legislature would amend or put back into effect a solemn waiver of sovereign immunity in the way suggested by the defendant. One must completely divorce "public employees" from "publicly owned * * * motor vehicles," even though the two clauses are joined by "and," to reach such a conclusion. One must say that, by using the piecemeal reading "* * shall not apply * * * to publicly owned * * * motor vehicles" we reach or find a legislative intent to repeal section 400 insofar as it applies to the class in question.

[12] Such repeals by implication are never favored. Fay v. District Court of Appeal, 200 Cal. 522, 254 P. 896; Rexstrew v. City of Huntington Park, 20 Cal.2d 630, 128 P.2d 23. Moreover, it has been held that the rule of repeal by implication cannot be invoked where the interpretive rule of Civil Code section 23.4 (see infra) applies. Kerrigan v. Maloof, 98 Cal.App.2d 605, 221 P.2d 153.

In addition to internal evidence of legislative intent, we turn to such other constructional aids as are available. Preliminarily, note should be taken of section 7 of the Vehicle Code, reading:

> "Effect of Headings. Division, chapter, article, and section headings contained herein shall not be deemed to govern, limit, modify or in any manner affect the scope, meaning or intent of the provisions of any division, chapter, article or section hereof."

In referring to this, and other sections, in other codes of similar import, 45 California Jurisprudence 2d 672, has this to say: "Most of the codes themselves provide specifically that the division, chapter, article, and section headings contained

therein may not be deemed to govern, limit, modify, or in any manner affect the scope, meaning, or intent of the provisions of any division, chapter, article, or section. The effect of these provisions is to repeal by legislative enactment a firmly established rule of construction."

In Cavalli v. Luckett, 40 Cal.App.2d 250, 104 P.2d 708, the court held that section 7 precluded the use of headings as constructional aids. The Cavalli case was cited and quoted from with approval in People v. Trout, 137 Cal.App.2d 794, 291 P.2d 83, but, as in the Cavalli case, limited its application to headings. See, also, In re Halcomb, 21 Cal.2d 126, 130 P.2d 384.

In an earlier case, People v. Stanley, 13 Cal.App.2d 559, 57 P.2d 146, the court by way of dictum referred to section 7 as applying to the *title* of acts, instead of *headings*. In view of the constitutional discussion, infra, the dictum would not seem applicable here.

[13] The title of an act creating or amending a code is not excluded as a constructional aid by said section 7 of the Vehicle Code. Article IV, section 24, of the California Constitution, provides, in part, that "[e]very act shall embrace but one subject, which subject shall be expressed in its title. * * *" This phrase has been extensively construed, and usually liberally. Mason, California Constitution, Annotated, 1953, Vol. 1, page 439 et seq.

It is interesting to note that Rule 7 of the Joint Rules of the Assembly and Senate of the California Legislature provides: "The title of every bill introduced shall convey an accurate idea of the contents of the bill and shall be indicative of the scope of the act and the object to be accomplished. In amending a code section, the mere reference to the section by number shall not be deemed sufficient."

Courts must look to the title of an act to determine if it violates the last quoted section of the Constitution. Section 7 of the Vehicle Code is no bar to use of *titles* of acts for constructional purposes.

[14] The marginal notes that are included in the act passed by the Legislature are available as another constructional aid for the interpretation of statutes. Bettencourt v. Sheehy, 157 Cal. 698, 109 P. 89. The propriety of using marginal notes, vis-à-vis, the attempted improper use of Deering's headings, was noted in Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 82 P.2d 29.

We turn now to the legislative history of sections 400 and 453 to see if any constructional aids can therein be found.

Section 453 came into the law as section 144 of the California Vehicle Act, adopted by the 1923 Legislature, Stats.1923, ch. 266, p. 563. There is no mention of its contents in the general title but the section itself reads as follows: "Certain provisions of act applicable to vehicles of state, counties and cities. The provisions of this act applicable to drivers of vehicles upon the public highways shall apply to the drivers of all vehicles operated by the state or any political subdivision thereof, or of any incorporated city, subject to such specific exceptions as are set forth in this act." On the margin the subject matter was described as follows: "Provisions applicable to drivers of public vehicles."

In 1935 the Legislature passed an act establishing a Vehicle Code, Stats.1935, chapter 27. Section 453 thereof read: "Public Officers and Employees to Obey Code. The provisions of this code applicable to the drivers of vehicles upon the highways apply to the drivers of all vehicles while engaged in the course of employment by this State or any political subdivision thereof or any municipal corporation therein, subject to such specific exceptions as are set forth in this code with reference to authorized emergency vehicles." The description of section 453 in the margin read: "Code applies to public officers and employees."

Stats. of 1937, chapter 69, p. 167, made some changes. The 1935 act had made the Vehicle Code applicable to state vehicles, subject to specific exceptions in the code as to emergency vehicles. The 1937 act

made the code directly applicable to emergency vehicles subject to *exemption* granted such vehicles by the code. The 1937 act then added section 454, of which more later. The marginal description of section 453 in the 1937 act again said "Code applies to public officers and employees."

In 1947 the Legislature passed an act entitled "An act to amend Sections 453, 607.7, 623.5, 640 and 650.6 of the Vehicle Code, relating to persons and equipment engaged in highway work, declaring the urgency thereof and providing that this act shall take effect immediately." Stats.1947, ch. 897, p. 2095. This act added subsection (b) reading as follows: "(b) The provisions of this code shall not apply to public employees and publicly owned teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway, but shall apply to such persons and vehicles when traveling to or from such work."

The marginal description of section 453 in the 1947 act, now containing the above subsection (b) read: "Public officers and employees to obey code."

In 1951 there was passed an act entitled: "An act to amend Section 453 of the Vehicle Code, relating to the applicability of the provisions of said code to public employees and publicly owned motor vehicles and other equipment during the installation, removal, repair or maintenance of traffic signs, signals or other traffic control devices." Stats.1951, ch. 690, p. 1902. This act added to subsection (b) the reference to traffic signs, etc. and added subsection (c). The marginal description of section 453 read "Application of code."

Turning now to the history of section 400 of the Vehicle Code, we find it originated as section 1714½ of the Civil Code, in Stats. 1929, ch. 260, p. 565. The title to the act reads: "An act to add a new section to the Civil Code to be numbered 1714½, relating to negligence upon the part of officers, agents and employees of the state, counties, cities and counties, municipal corporations, school districts, irrigation districts, districts established by law and political subdivisions of the state and authorizing the issuance of insurance covering such liability."

The 1929 act is identical with the present section 400 of the Vehicle Code, except for a 1931 amendment adding the State Compensation Insurance Fund as one of the political subdivisions for whom sovereign immunity was waived insofar as negligent operation of a motor vehicle is concerned, and except for two hereinafter referred to grammatical changes.

In the 1929 act, the marginal description of the first paragraph was "Liability of state and political subdivisions for negligent operation of vehicles."

Stats.1931, ch. 122, p. 168, is the 1931 amendment referred to above. The title of the 1931 act reads: "An act to amend section 1714½ of the Civil Code, relating to negligence on the part of state officers, agents and employees of the state, counties, cities and counties, municipal corporations, the state compensation insurance fund, irrigation districts, school districts, districts established by law and political subdivisions of the state, and authorizing the issuance of insurance covering such liability."

The marginal note to paragraph one in the 1931 act reads: "Liability of state, districts and political subdivisions for negligent operation of motor vehicles."

In 1935, when the Vehicle Code was created by the Legislature, section 1714½ of the Civil Code was transferred into the new code as section 400 thereof. The marginal description of section 400 in the 1935 act was "Liability of governmental agencies."

It is quite apparent that the subject matter of section 400 is quite different from that of section 453. This is quite clear from the above quoted titles to the acts passed to the Legislature and from the Legislature's description of the contents of each section, as set forth in the hereinabove quoted marginal descriptions contained in the acts in question.

The relevancy of the difference in subject matter is that the Legislature has laid

down a guide for the courts to use where there is a conflict between two chapters of the same code. Section 23.4 of the Civil Code (formerly Pol.Code, § 4482) reads: "If the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of each chapter shall prevail as to all matters and questions arising out of the subject matter of the chapter."

It follows that section 400 shall prevail as to the matters and questions arising out of the subject matter of liability of governmental agencies for negligent operation of motor vehicles. Section 453 shall prevail as to all matters and questions arising out of the subject matter of the application of the code to public employees.

It thus appears that both the internal evidence contained in the statutes and the applicable constructional acts point to the validity of the plaintiffs' position on the question here last under discussion.

[15] We hold that section 453 of the Vehicle Code applies to and concerns only public employees operating teams, motor vehicles and equipment and does not give the state immunity from suit for the negligent operation of vehicles engaged in work on the surface of a highway.

Assuming, arguendo, the position we held, supra, that section 453 applies to public employees only and not to the state, defendant forcibly contends that no conduct which would otherwise be a violation of any provisions of the Vehicle Code can be the basis of an action for the "negligent operation" of a motor vehicle within the meaning of section 400.

The plaintiffs do not concede the entirety of defendant's position. They quote 6 California Jurisprudence 2d 585, section 131, to the effect that our interpretation of section 453(b) acts to exempt public employees and equipment from the operation of traffic rules while engaged in work upon the surface of the highway. They further contend that this leaves the public body still liable for the injurious results of the general negligence of its employees while operating public vehicles in the manner in question, even though they cannot be said to be violating any of the express traffic rules contained in the Vehicle Code.

An interesting question is posed. Violation of safety sections of the Vehicle Code is negligence per se. 35 Cal.Jur.2d 502. A public employee is excused, by statute, from obeying a safety provision of the Vehicle Code. The employee negligently performs an act that, amongst other things, would be a violation of the Vehicle Code. Is the negligence actionable?

The defendant cites no cases, simply making the flat statement above referred to. Plaintiffs found one case that is squarely in point. In Rebmann v. Heesch, 227 Iowa 566, 288 N.W. 695, a laborer on a highway construction project was backed into and run over by a cement mix truck, which backed off a highway in use on to the new construction work and ran over the laborer. The defense was made that the rules of the road requiring a signal or horn under certain circumstances and other rules of the road did not apply during work on the surface of the highway (see § 264 of ch. 134 of the Acts of the 47th Gen.Assem., Iowa). The Iowa Supreme Court said in 288 N.W. at page 700:

> "Defendant's counsel also contended that under Section 264 of Chapter 134 of the Acts of the 47th General Assembly, the defendant was exempted from using a horn on the road under construction. * * *
>
> "While said section does exempt those referred to therein, from certain requirements specified in the chapter, it does not release such persons from the use of ordinary care nor absolve them from their negligence, nor was it ever, in our judgment, so intended by the legislature. If under the facts in this case, ordinary care required the defendant to sound his horn, while working on this road under construction, or to give some warning to the plain-

tiff, said Section 264 will not excuse his failure to do so."

Headnotes 2 and 3 of the opinion at page 695 state the matter a little more succinctly as follows: "The provision of Motor Vehicle Law that it shall not apply to persons and motor vehicles while actually engaged in work on surface of highway did not exempt truck driver from using horn while on used highway, from which he was backing onto highway under construction, if required in exercise of ordinary care for safety of laborer under circumstances," and "The provision of Motor Vehicle Law that it shall not apply to persons actually engaged in work on surface of highway does not release them from use of ordinary care, nor absolve them from liability for their negligence."

It would seem, in logic, that the rule in the Rebmann case is the correct one. The rule is really foreshadowed in Raynor v. City of Arcata, 11 Cal.2d 113, 77 P.2d 1054. The case was cited by plaintiffs as a necessary precedent to hold the state liable even though a statute frees the employee from liability. In the Raynor case the employee was the fire chief. Section 401 of the Vehicle Code expressly holds that such employee is not liable "for civil damages" if performing his emergency duties. Section 454 of the Vehicle Code and the Raynor case spell out what is and is not such negligent operation of an emergency vehicle as to make the public employer liable.

Section 453(b) does not expressly free the public employee from civil liability for damages, as section 401 does the emergency driver. The employees in the instant case were not made parties defendant so we make no ruling as to whether or not they would be liable.

[16] In any event, the Legislature has not gone as far in freeing the employees working on the surface of the highway from liability as it has the emergency vehicle driver. Nor has the Legislature spelled out what is *not* negligent operation of motor vehicles working on the highway as it has for emergency vehicles. The rationale of the Raynor case is that the employer is liable for any negligent operation of a motor vehicle that is not specifically labeled as a permitted method of operation.

It follows from the above that the state is liable for the negligent operation of publicly owned teams, motor vehicles and other equipment while actually engaged in work on the surface of a highway.

[17] The plaintiffs seeks to get around defendant's position by a showing that there was negligent operation of the bulldozer and the truck outside of any provision of the Vehicle Code. A bulldozer is a motor vehicle under the Vehicle Code. Sections 31 and 32, and Behling v. County of Los Angeles, 139 Cal.App.2d 684, 294 P.2d 534.

It is the plaintiffs' position that the entire combination of situations created a natural trap. The failure to learn of this natural trap, alone, would not have damaged the Yarrows; nor would the operation of this dozer a foot or so over the white line have necessarily constituted "negligent operation" standing alone, but the combination of the physical surroundings, the physical and mechanical properties of the dozer, and the failure to warn, made the operation of this dozer then and there a "negligent operation." Or, to put it in reverse, all these other factors would have caused no harm, "but for" the operation of the dozer into the position obviously recognized by Clayton as dangerous. Brandenburg v. Pacific Gas & Elec. Co., 28 Cal.2d 282, 285, 169 P.2d 909.

Acts outside the Vehicle Code have been held to be "negligent operation" of a vehicle in California, within Vehicle Code, section 400: dropping a bulldozer scraper blade on a man's hand (Behling v. Los Angeles County, supra, 139 Cal.App. 684, 294 P.2d 534); shaking a dump truck to empty it while a county jail inmate was on board. Marshall v. County of Los Angeles, 131 Cal.App.2d 812, 814, 281 P.2d 544.

In the Marshall case the court said:

"This Court is unable to agree with the argument of the county that the truck was not in 'operation' when the accident occurred, as that word is used in the statute.

"In the enactment of Section 400 of the Vehicle Code the state imposed liability for damages when the exercise of governmental functions in the operation of motor vehicles results in injury to its people. Lossman v. Stockton, 6 Cal.App.2d 324, 44 P.2d 397.

"It was designed to end the common-law rule of governmental non-liability so far as the operation of motor vehicles by public agencies is concerned. Willoughby v. Zylstra, 5 Cal.App.2d 297, 42 P.2d 685.

"To be in operation within the meaning of the law the vehicle must be in a 'state of being at work' or 'in the active exercise of some specific function'. Chilcote v. San Bernardino County, 218 Cal. 444, 23 P.2d 748.

"Applying these rules, it seems clear that the dump truck was in operation within the meaning of Section 400 of the Vehicle Code. Therefore the complaint states a cause of action against the county of Los Angeles, and the driver of the truck." 131 Cal.App.2d at pages 814–815, 281 P.2d at page 545.

[18] In view of our interpretation of section 453(b), supra, it probably is not necessary to decide this last point. However, we have not been furnished with the trial court's instructions to the jury so we do not know the theory thereof. We hold that the record contains facts upon which the jury could have found negligence both within and outside of the Vehicle Code.

The order granting a new trial is reversed with instructions to the trial court to enter judgments on the verdicts of the jury.

PETERS, P. J., and BRAY, J., concur.

169 Cal.App.2d 46

Louis A. CHIAPPE, Plaintiff and Respondent,

v.

Eugene EICHENBAUM et al., Defendants and Appellants.

No. 17964.

District Court of Appeal, First District, Division 1, California.

March 24, 1959.

As Modified on Denial of Rehearing April 23, 1959.

Hearing Denied May 20, 1959.

Action by building maintenance man against building owner for personal injuries received when he stepped into elevator shaft in back of building and fell to the bottom of shaft. The Superior Court, City and County of San Francisco, Charles S. Peery, J., entered judgment for maintenance man and building owner appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained finding of negligence on part of building owner in knowing or knowledgeable maintenance of elevator doors which, in violation of applicable safety regulations, could be unlocked from outside hoistway even though car was not at or within 30 inches of landing.

Affirmed.

1. Master and Servant ⇐278(12)

In building maintenance man's action against building owner for personal injuries received when maintenance man, in belief that elevator was at first floor level as shown by outside indicator, stepped into dark elevator shaft and fell to the bottom thereof, evidence sustained finding of negligence on part of building owner for maintenance of elevator doors in nonconformity with applicable safety regulations which required that doors should be arranged so they could not be unlocked from outside except where elevator is at or within 30 inches of landing.

2. Negligence ⇐32(1)

Building owner owed a duty of care to building maintenance man who was a business invitee.

3. Negligence ⇐32(1), 52

As to business invitee, property owner was obliged to exercise ordinary care to keep premises in a reasonably safe condition or to warn invitee of the danger, and duty was not limited to conditions actually known by owner to be dangerous but also extended to conditions which might have been found dangerous by exercise of ordinary care.

4. Master and Servant ⇐286(18)

In building maintenance man's action against building owner for personal injuries received when building maintenance man, believing that elevator was at the first floor as shown by indicator, opened doors and stepped into dark shaft and fell, question of whether building owner relying upon inspection of certified elevator inspector had discharged his duty of exercising reasonable care and was absolved from negligence, was for the jury.

5. Negligence ⇐28

Court in exercising judicial function of interpreting meaning of applicable elevator safety regulation was not bound or governed by testimony of safety engineer and inspector as to meaning of regulation.

6. Contracts ⇐189

Contract between building owner and maintenance man defining maintenance man's responsibility for operation and cleaning of elevators could not be construed as an undertaking on part of maintenance man to provide a safe elevator or to authorize reconstruction of elevators by him.

7. Master and Servant ⇐285(5)

In building maintenance man's action against building owner for personal injuries received by maintenance man, who, under belief that elevator was at the first floor level as shown by indicator, stepped from a darkened lobby into a dark elevator shaft and fell, what causative bearing, if any, absence of light in lobby had upon occurrence of accident was for the jury to determine.

8. Master and Servant ⇐289(19)

Where building maintenance man turned off lights in lobby in order to enable tenant to install air conditioning without danger of shock, and in belief that elevator was at the first floor level as shown by outside indicator opened doors and stepped into dark shaft and fell, action of maintenance man in entering a place of impenetrable darkness and in turning off lobby lights, could not be said to constitute contributory negligence as a matter of law.

9. Administrative Law and Procedure ⇐413
Statutes ⇐219

Courts when interpreting a statute or regulation give attention and weight to interpretation placed thereon by agency charged with its administration, but question of interpretation is one of law for determination by court and not a question of fact for determination by jury. West's Ann.Code Civ.Proc. § 2102.

10. Appeal and Error ⇐1068(1)

In action by building maintenance man against building owner for personal injuries received in fall down shaft of elevator which was maintained in violation of applicable safety regulations, giving of instruction which submitted to jury question as to interpretation of safety regulation, was not prejudicial error where it appeared that jury had followed interpretation of court.

11. Appeal and Error ⇐207

In building maintenance man's action against building owner for personal injuries received in fall down elevator shaft, where maintenance man joined as defendant the owner's insurer and its engineer inspector on the theory that inspector, acting within scope of his employment, negligently inspected and failed to discover unsafe condition of elevator, and there was nothing to indicate that maintenance man did not urge matter in good faith and owner did not interpose objections at trial to testimony relative to inspection by insurance company, it could not be said that

owner was prejudiced by wrongful injection of insurance issue into trial.

Bronson, Bronson & McKinnon, San Francisco, for appellants.

Lewis, Field, De Goff & Stein, San Francisco, Morgan & Beauzay, San Jose, for respondent.

FRED B. WOOD, Justice.

Plaintiff opened an elevator door in defendants' building, at the ground floor level. He stepped in, fell to the bottom of the shaft and was seriously injured. Defendants in support of their appeal claim insufficiency of the evidence, error in an instruction and prejudicial mention of insurance.

There were two elevators, designated No. 1 and No. 2. The latter had an auxiliary lock on the hoistway door at the ground floor level, intended to prevent the doors from being opened from the outside whenever the car was more than 30 inches above or below the car landing.

The No. 1 elevator had no auxiliary lock. Its hoistway doors could be unlocked from the outside, regardless of the distance of the car from the landing, by inserting a wire hook (called a "cheater") between the doors, hooking it onto a bar inside the doors and pulling down on the bar.

Prior to the accident, plaintiff had been engaged in building maintenance, doing general janitorial work. He had been taking care of this building for about a month. On this account he went to the building at 8 a. m. to meet the Ferrari family there and take them to the 10th floor to clean venetian blinds. He had been the last person in the building the day before, leaving about 1 o'clock in the morning. In doing so he used elevator No. 1, leaving it on the main floor. He turned off the first floor lights by the main switch so that a tenant might install air conditioning equipment without risk of electric shock.

Upon returning in the morning he found the Ferraris in the lobby, which was dark. He looked at the elevator indicators. Observing that the No. 2 elevator was on the 8th floor and the No. 1 elevator was on the main floor, he got the "cheater" from the closet and opened the No. 1 elevator door. He then stepped into what he thought was the elevator, to turn on the elevator light, and fell into the basement, the car not being on that floor.

At the time of the accident, the elevator floor was covered with a black rubber mat. Plaintiff testified he thought the elevator car was there when he stepped in. He "was positive the elevator is right there or the door don't open."

(1) *Does the evidence support the implied finding that defendants negligently caused the accident?*

[1] The doors of the hoistway of the No. 1 elevator were not in conformity with the requirements of the applicable safety regulation, section 3022(e) of the Administrative Code: "Elevator hoistway doors or gates shall not be arranged to be unlocked from outside the hoistway except where the unlock-means is of a type which cannot function unless the car is at or within thirty (30) inches of the landing. * *"

Knowing or knowledgeable maintenance of the No. 1 elevator doors in nonconformity with section 3022(e) would be a continuing violation of the safety regulation and as such a continuing act of negligence toward persons to whom the building owners owe a duty of care.

[2–4] Plaintiff was such a person. He was a business invitee. (Rest. Torts, § 332; Hinds v. Wheadon, 19 Cal.2d 458, 460, 121 P.2d 724.) As to business invitees, "the property owner was obliged to exercise ordinary care to keep the premises in a reasonably safe condition, or to warn them of danger. The duty was not limited to conditions actually known by the owner to be dangerous, but extended also to conditions which might have been found dangerous by the exercise of reasonable care." Blumberg v. M. & T. Inc., 34 Cal.2d 226, 229, 209 P.2d 1, 3. Here, the fact that the

elevator doors were capable of being opened when the car was not on the landing was undoubtedly dangerous. See Jacobi v. Builders' Realty Co., 174 Cal. 708, 710–711, 164 P. 394, L.R.A.1917E, 696; DeGraf v. Anglo California Nat. Bank, 14 Cal.2d 87, 96–97, 92 P.2d 899. The defendant Mr. Eichenbaum testified that he relied upon the inspection of Mr. Bateman, a certified elevator inspector and insurance company representative. Whether or not this discharged his duty of reasonable care and absolved him from negligence was a question for the jury. See DeGraf v. Anglo California Nat. Bank, supra, 14 Cal. 2d at pages 97–98, 92 P.2d at pages 904–905.

[5] Defendants argue that plaintiff's unhooking of the doors from the outside was a violation of the regulation, not the condition of the doors themselves. The basis of their interpretation is not clear. It seems to depend in part upon construing the word "arranged" as meaning "designed" and the concept that these doors were not "designed" for unlocking from the outside. Such a view imports a subjective element into the picture that is neither necessary nor reasonable in the light of the manifest purpose of the regulation and the words used to express that purpose. The regulation deals with doors capable of being unlocked or unfastened or opened from the outside.*

[6] Defendants also argue that the violation of the safety regulation was plaintiff's responsibility because he undertook by contract "responsibility for the operation of the elevators and the performance of acts necessary for the upkeep of the building." The contract referred to is a contract to perform usual janitorial services in the building. The only references to elevators in the specifications are to "Polish inside of elevator cabs nightly; clean and wax elevator cabs nightly," "vacuum elevator cabs twice daily, or as required," "damp mop elevator cabs once in the morning and once in the afternoon," and provide elevator operators during certain hours. The contract can not be construed as an undertaking to provide a safe elevator, nor to authorize the reconstruction of the elevators.

[7] Defendants also would shift to plaintiff the responsibility for lighting the lobby. Whatever his general obligation in that regard may have been, the jury had before it the question of the need for temporary discontinuance of the main lighting circuit for the protection of workmen making certain electrical installations. Also, it was for the jury to determine what causative bearing, if any, the absence of light in the lobby had upon the occurrence of this accident.

(2) *Does the evidence support the implied finding that plaintiff did not negligently contribute to the accident?*

[8] Defendants argue that the plaintiff was contributorily negligent as a matter of law because he unreasonably selected the more dangerous of several alternatives, entered a place of impenetrable darkness, and committed an illegal act proximately contributing to his injuries. They also apparently argue that stepping into an empty elevator shaft is negligence as a matter of law, citing Globe Indemnity Co. v. Hook, 46 Cal.App. 700, 189 P. 797, where two men stepped into an elevator shaft, looking backward, having made no effort to ascertain whether the elevator was on the floor, and knowing that at the time the elevator was customarily on the upper floors, and Kauffman v. Machin Shirt Co., 167 Cal. 506, 140 P. 15, where the plaintiff's decedent went up in the elevator, found the door partly open, opened it a little further, delivered a package, returned and stepped through the door into the empty elevator shaft. The court stated that plain-

* Defendants rely also upon the testimony of a certain safety engineer and inspector for an insurance company, who expressed his opinion as to the meaning of section 3022(e).

Neither the trial court nor this court, in exercising the judicial function of interpreting this writing, is bound or governed by the expert's opinion on that subject.

tiff knew it was possible to leave the door partly open and that it was possible to move the car when the door was open, since he had just done so. (167 Cal. at page 510, 140 P. at page 16.) The facts of neither of these cases are comparable to those of our case.

Plaintiff's testimony was that he looked at the indicators, saw elevator car No. 1 was at the lobby floor, opened the doors, and believed that the doors could not be opened unless the car was at the landing. It was dark in the lobby and the floor of the elevator was covered with black rubber mats. Although his conduct ultimately proved to have been hazardous, his actions do not appear to have been so unreasonable as to constitute contributory negligence as a matter of law.

Defendants argue that plaintiff should have turned on the lobby lights. The first floor lights had been turned off by plaintiff by the main switch so that a tenant might install air conditioning equipment. Under these circumstances, it would not appear to be negligent not to turn the lights on, since this might have been dangerous to other workmen on the premises.

Defendants argue that plaintiff could have rung the bell and waited for the person who had taken the elevator to bring it back. Why should he? It appeared to him at the time that the No. 1 car was at his floor. Using that car instead of signaling for the other was not negligence as a matter of law.

Defendants also suggest that plaintiff could have left the elevator doors open the night before. Of what benefit this would have been is not apparent.

Defendants contend that it is contributory negligence as a matter of law to enter a place of impenetrable darkness. In Cheyney v. City of Los Angeles, 119 Cal.App.2d 75, 78, 258 P.2d 1099, plaintiff walked down steps leading from a parking lot to a beach and fell 29 inches from the last step to the sand. She was aware that the waves and tides were eroding beaches in Southern California at that time. The court affirmed a nonsuit, invoking the rule that an invitee unfamiliar with the premises is contributorily negligent, in proceeding into a place of impenetrable darkness. In Robinson v. King, 113 Cal.App.2d 455, 457, 248 P.2d 477, an invitee, unfamiliar with the premises, reached inside a doorway to find a light switch. Finding none, he stepped through and fell down a flight of stairs. In Wolfe v. Green Mears Construction Co., 134 Cal.App.2d 654, 658, 286 P.2d 433, the plaintiff walked in impenetrable darkness in unfamiliar desert territory for a distance of approximately 141 feet and then fell into a ditch. In Mitchell v. A. J. Bayer Co., 126 Cal.App.2d 501, 504, 272 P.2d 870, the plaintiff construction worker walked through a hole which was pitch dark, being unable to see anything inside the hole, and not knowing what was inside. He fell down a stairway.

None of these cases is applicable. In each of them the plaintiff was unfamiliar with the premises and had no reasonable expectation of safety upon entry into darkness. Here, according to the plaintiff, the appearances were consistent with safety and with what plaintiff had been led by prior experience and his knowledge of the premises to expect. These facts are more comparable to those in DeGraf v. Anglo California Nat. Bank, supra, 14 Cal.2d 87, 98, 92 P.2d 899, where the plaintiff fell into a dimly lighted freight elevator shaft, believing the elevator would not operate with the doors open, and, therefore, that the cab was at the landing. The opening was "very dark." (14 Cal.2d at page 92, 92 P. 2d at page 901.) The court held, affirming a judgment for plaintiff, that there was no contributory negligence as a matter of law.

Defendant also argues that the means plaintiff used to open the door was illegal and unlawful, again mistakenly relying upon the engineer-inspector's interpretation of section 3022(e), the administrative regulation.

(3) *Did the court commit prejudicial error when it submitted the administrative regulation, § 3022(e), to the jury for its interpretation?*

The questioned instruction read as follows: "You are instructed that where a safety order or regulation is ambiguous, an expert may be called to testify as to the practical interpretation by the department charged with the administration and enforcement. This practical interpretation is entitled to the highest respect.

"You are instructed that the interpretation given to a rule or regulation such as Section 3022(e) of the Division of Industrial Safety, State of California, Elevator Safety Orders, the same section which I read to you, by those charged with its execution, is entitled to the greatest weight, and such interpretation will be followed, unless it appears to you to be clearly unreasonable or arbitrary."

[9, 10] It is true that courts when interpreting a statute or regulation give attention and weight to the interpretation placed thereon by the agency charged with its administration. The question, however, is one of law for determination by the court; not a question of fact for determination by the jury. Code Civ.Proc. § 2102; In re Estate of Madison, 26 Cal.2d 453, 456–457, 159 P.2d 630.

It happened in this case that the administrative agency, the Division of Industrial Safety, interpreted the administrative regulation the same as does this court. It appears that the jury in fact followed that interpretation. We conclude that the defendants suffered no prejudice by reason of the submission of this question to the jury. Defendants mistakenly argue that the giving of this instruction shifted the burden of proof. The instruction dealt solely with interpretation of the regulation, not with the burden of proof nor the function of the jury in weighing evidence and determining disputed questions of fact.

(4) *Were defendants prejudiced by the wrongful injection of a false issue of insurance into the trial?*

[11] Plaintiff joined as defendants the building owners' insurer and its engineer-inspector upon the theory that the latter, acting within the scope of his employment, negligently inspected and failed to discover the unsafe condition of the elevator. This theory had some support in Barbaria v. Independent Elevator Co., 139 Cal.App.2d 474, 481–482, 293 P.2d 855. Such a theory is not untenable in law. Here, there is nothing to indicate that plaintiff did not urge it in good faith. Moreover, defendants cite a number of instances in which plaintiff's counsel in his opening statement, and later by questions asked during the trial, made reference to the insurance company's inspection of the elevator. In none of those instances did defendants interpose objections at the time.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; PETERS, J., not participating.

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